

January 2020

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Recommended Citation

Louis Fisher, *Correcting Judicial Errors: Lessons from History*, 72 Me. L. Rev. 1 (2020).

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CORRECTING JUDICIAL ERRORS: LESSONS FROM HISTORY

*Louis Fisher**

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ABSTRACT

On June 18, 2018, the Supreme Court in *Trump v. Hawaii* finally acknowledged that its decision in *Korematsu v. United States* (1944) was in error. It took seventy-four years to make that admission, even though it was widely recognized by scholars and a congressional commission that the decision was fundamentally defective. In the 1936 *Curtiss-Wright* decision, the Court completely misinterpreted a speech by John Marshall when he served in the House of Representatives. Although he referred to the President as “the sole organ of the nation in its external relations,” he never argued that the President controlled all of foreign affairs. Such a claim would violate the plain text of the Constitution. Instead, Marshall defended President John Adams for acting on the basis of specific authority in the Jay Treaty. Still, the Court spoke of “very delicate, plenary and exclusive power of the president as the sole organ of the federal government in the field of international relations.” Scholars immediately attacked the Court’s error but it remained in place to promote presidential power until finally jettisoned by the Court in the 2015 *Zivotofsky* decision. It took seventy-nine years to correct an obvious and well publicized judicial error.

The 1953 *Reynolds* case involved a B-29 bomber that exploded over Waycross, Georgia, killing a number of crewmembers and civilian engineers. Three widows of the engineers filed a tort claims lawsuit. Lower courts understood the principle of judicial independence and the need to examine the accident report to determine if the Air Force had been negligent. The Supreme Court, without looking at the report, accepted the government’s assertion that it contained state secrets. The plaintiffs later obtained the declassified report and learned that it contained no state secrets but abundant evidence of Air Force irresponsibility. They returned to court, charging fraud against the judiciary. The Supreme Court chose not to take the case. The erroneous *Reynolds* decision continues to guide the executive branch and federal courts, at great cost to individual rights and constitutional government.

An understanding of U.S. history rejects the doctrine of judicial finality, which asserts that constitutional decisions by the Supreme Court are final unless the Court changes its mind or the Constitution is amended. That theory is regularly undermined by historical precedents, demonstrating that constitutional law is shaped by all three branches and the general public

I. INTRODUCTION

Scholars at times attribute to Chief Justice John Marshall a position he did not promote. According to Joel Richard Paul in a book published in 2018, Marshall “elevated the dignity of the Supreme Court as the final arbiter of the Constitution’s meaning.”¹ In another study published in 2018, David Kaplan states that Chief Justice Marshall in *Marbury v. Madison* “established that it was the Court that had the last word on what the Constitution meant” and it “has been accepted wisdom since.”² As will be explained, Marshall was well aware that his decision in

¹ JOEL RICHARD PAUL, WITHOUT PRECEDENT: JOHN MARSHALL AND HIS TIMES 3 (2018).

² DAVID A. KAPLAN, THE MOST DANGEROUS BRANCH: INSIDE THE SUPREME COURT’S ASSAULT ON THE CONSTITUTION 44 (2018).

McCulloch v. Maryland (1819), upholding the U.S. Bank, did not prevent President Andrew Jackson on July 19, 1832, from using his own constitutional judgment to veto a bill designed to renew the bank.³ President Jackson's veto was not overridden.

This type of constitutional dialogue by all three branches is a fixture of the American system. Constitutional decisions by the Supreme Court lack finality in part because human institutions, including the judiciary, are prone to miscalculation and error. Chief Justice William Rehnquist put the matter bluntly in 1993: "It is an unalterable fact that our judicial system, like the human beings who administer it, is fallible."⁴ The doctrine of judicial finality has been challenged and thrust aside in many broad areas: Washington's Neutrality Proclamation, the Sedition Act of 1798, the U.S. Bank, the commerce power, individual rights, slavery, freedoms of African Americans and women, religious liberty, child-labor legislation, the sole-organ doctrine, the Japanese-American cases, and the state secrets doctrine. In these constitutional disputes, Supreme Court decisions have often been challenged and reversed. The system of self-government requires broad and thoughtful deliberation, not automatic deference to judicial rulings.

Corrections are often needed to take account of changes in public attitudes. These shifts can generate new constitutional values. Alexander Bickel noted in 1962 that the process of developing constitutional principle in a democratic society "is evolved conversationally not perfected unilaterally."⁵ On July 20, 1993, Ruth Bader Ginsburg explained in testimony before the Senate Judiciary Committee after her nomination to the Supreme Court: "Justices do not guard constitutional rights alone. Courts share that profound responsibility with Congress, the president, the states, and the people."⁶

False generalizations about the U.S. government apply to many areas. Frequently it is said that the President represents the "national interest."⁷ It takes little effort in reviewing history to understand how often presidential actions have been flatly against the national interest. In a book published in 2009, Peter Shane pointed out that "time and time again, it has become evident that Presidents, left relatively unchecked by dialogue with and accountability to the other two branches, behave disastrously."⁸ Six years later Harold Bruff underscored the same point: "Even in ordinary times, our system has recently become similar enough to a permanent constitutional dictatorship to give deep pause."⁹ It is a mistake to be

³ *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 437 (1819); 3 A COMPILATION OF THE MESSAGES AND PAPERS OF THE PRESIDENTS 1144 (James D. Richardson, ed., New York: Bureau of National Literature, 1897-1925).

⁴ *Herrera v. Collins*, 506 U.S. 390, 415 (1993).

⁵ ALEXANDER M. BICKEL, *THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS* 244 (1962).

⁶ RUTH BADER GINSBURG, *MY OWN WORDS* 183 (2016).

⁷ WILLIAM G. HOWELL AND TERRY M. MOE, *RELIC: HOW OUR CONSTITUTION UNDERMINES EFFECTIVE GOVERNMENT AND WHY WE NEED A MORE POWERFUL PRESIDENCY* xvi-xvii (2016).

⁸ PETER M. SHANE, *MADISON'S NIGHTMARE: HOW EXECUTIVE POWER THREATENS AMERICAN DEMOCRACY* 5 (2009).

⁹ HAROLD H. BRUFF, *UNTRODDEN GROUND: HOW PRESIDENTS INTERPRET THE CONSTITUTION* 465 (2015).

idealistic about any of the three branches of government.

II. RELYING ON INSTITUTIONAL CHECKS

On May 29, 1789, delegates at the Philadelphia Convention studied a proposal that the President and “a convenient number of the National Judiciary, ought to compose a council of revision” to examine every federal statute and every act of state legislatures.¹⁰ Elbridge Gerry doubted whether the judiciary should be part of this council “as they will have a sufficient check against encroachments on their own department by their exposition of the laws, which involved a power of deciding on their Constitutionality.”¹¹ Rufus King agreed, observing that judges “ought to be able to expound the law as it should come before them, free from the bias of having participated in its formation.”¹²

As the debate continued, delegates considered a proposal to grant the federal government a power to “negative all laws passed by the several States contravening in the opinion of the Nat: Legislature the articles of Union, or any treaties subsisting under the authority of ye Union.”¹³ Gouverneur Morris opposed the provision as “likely to be terrible to the States, and not necessary,” but James Madison considered a negative on state laws “as essential to the efficacy & security of the Genl. Govt.” The need for a general government “proceeds from the propensity of the States to pursue their particular interests in opposition to the general interests.”¹⁴ To Morris, a state law found to be negative “will be set aside in the Judiciary department. And if that security should fail; may be repealed by a National Law.”¹⁵ Efforts to preserve constitutional government would therefore be a duty of all three branches.

Rejection of the joint council left courts with discretion in cases brought before them to judge the merits of legislation. To Madison, a law “violating a constitution established by the people themselves, would be considered by the Judges as null & void.”¹⁶ His statements were directed at judicial review at the state, not the national, level. A year later, writing to Thomas Jefferson, Madison denied that the Constitution empowered the Supreme Court to strike down acts of Congress, for that would have made the judiciary “paramount in fact to the Legislature, which was never intended and can never be proper.”¹⁷

The Supreme Court’s website, “The Court and Constitutional Interpretation,” explains that the Framers “created three independent and coequal branches of government.”¹⁸ The word “coequal” does not imply judicial finality, but the website

¹⁰ 1 THE RECORDS OF THE FEDERAL CONVENTION OF 1787 21 (Max Farrand, ed., 1966) (hereinafter Farrand).

¹¹ *Id.* at 97.

¹² *Id.* at 98.

¹³ 2 Farrand 27.

¹⁴ *Id.* at 28.

¹⁵ *Id.*

¹⁶ *Id.* at 93.

¹⁷ 5 THE WRITINGS OF JAMES MADISON 294 (Hunt ed., 1904).

¹⁸ *The Court and Constitutional Interpretation*, UNITED STATES SUPREME COURT, <https://www.supremecourt.gov/about/constitutional.aspx> [<https://perma.cc/284U-QYP6>] (last visited Aug. 16, 2019).

proceeds to discuss what Alexander Hamilton and James Madison said about judicial review. According to the website, Madison wanted constitutional government left to “the reasoned judgment of independent judges, rather than to the tumult and conflict of the political process.” That implies judicial finality, but when one closely examines what Hamilton and Madison said, they did not endorse judiciary supremacy over the other two branches. Certainly the judicial process has had its share of tumult and conflict.

In this early period, the claim that the Supreme Court announces the last word on the meaning of the Constitution relies in part on Hamilton’s Federalist 78, which described judges “as Guardians of the Constitution.”¹⁹ His language appears to elevate the judiciary to a superior role but the essay proceeds to argue at cross-purposes. It refers to “the natural feebleness of the judiciary” and describes the judiciary as “beyond comparison the weakest of the three departments of power.”²⁰ Hardly evidence of judicial supremacy. Although Hamilton said “the judiciary, from the nature of its functions, will always be the least dangerous to the political rights of the Constitution,”²¹ the record from 1789 to the present time demonstrates that all three branches of the national government have posed dangers to constitutional rights.

Hamilton argued that “liberty can have nothing to fear from the judiciary alone.”²² One might ask: how can the judiciary protect constitutional rights and liberty if it is “naturally feeble?” Another contradiction in Federalist 78 is the claim that the Constitution “ought to be preferred to the statute, the intention of the people to the intention of their agents,” while at the same time denying that this description supposes “a superiority of the judicial to the legislative power.”²³ In wanting to recognize in full measure a form of judicial power, Hamilton chose to identify substantial and natural limits.

In Federalist 81, he analyzed this language in Article III, Section 1: “The judicial Power of the United States shall be vested in one supreme court, and in such inferior Courts as the Congress may from time to time ordain and establish.” He responded to arguments that the authority of the proposed Supreme Court “will be superior to that of the legislature.”²⁴ He noted concern that the power to construe laws could enable the Court “to mould them into whatever shape it may think proper, especially as its decisions will not be in any manner subject to the revision or correction of the legislative body.”²⁵ To Hamilton, that theory of constitutional government “is as unprecedented as it is dangerous.” Such theories, he said, “will be found to be made up altogether of false reasoning upon misconceived fact.”²⁶ A clear rejection of judicial finality.

¹⁹ BENJAMIN F. WRIGHT, THE FEDERALIST 489 (2002).

²⁰ *Id.* at 491.

²¹ *Id.* at 490.

²² *Id.* at 491.

²³ *Id.* at 492.

²⁴ *Id.* at 506.

²⁵ *Id.*

²⁶ *Id.*

In Federalist 78, Hamilton supports judicial review but did not advocate judicial supremacy. If judges rendered unsound decisions they would be subject to impeachment. Moreover, in Federalist 81, Hamilton explains that Congress has adequate checks to control an overactive Court: “There never can be danger that the judges, by a series of deliberate usurpations on the authority of the legislature, would hazard the united resentment of the body intrusted with it, while this body was possessed of the means of punishing their presumption, by degrading them from their stations.”²⁷ As to the Court’s role as “guardian” of the Constitution, it is not the only guardian and at times has failed to safeguard constitutional rights.²⁸

Madison offered conflicting positions about the scope of judicial power. As manager of the Bill of Rights in 1789, he predicted that once various provisions were incorporated into the Constitution, “independent tribunals of justice will consider themselves in a peculiar manner the guardians of those rights; they will be an impenetrable bulwark against every assumption of power in the Legislative or Executive.”²⁹ The phrase “peculiar manner” is revealing. Consider how Federalist judges gave full support to the prosecution of individuals and newspapers for violating the Sedition Act, to be discussed.

During legislative debate on whether the President possesses power to remove executive officials, Madison denied that Congress should defer to the courts on that constitutional issue. He begged to know on what principle it could be contended that “any one department draws from the Constitution greater power than another, in marking out the limits of the power of the several departments.” On questions regarding the boundaries between the branches, he did not see “that any one of these independent departments has more right than another to declare their sentiments on that point.”³⁰

III. FROM GEORGE WASHINGTON TO THOMAS JEFFERSON

Precedents established over the first dozen years help illustrate the competing roles of all three branches in protecting constitutional government. Consider the Neutrality Proclamation issued by President Washington on April 22, 1793. It instructed citizens to remain neutral in the war between England and France. Failure to do so, he warned, would result in prosecution: “I do hereby also make known that whosoever of the citizens of the United States shall render himself liable to punishment or forfeiture under the law of nations by committing, aiding, or abetting hostilities against any of the said powers”³¹ A study by Jean Edward Smith claims that by issuing the proclamation Washington “had placed a distinctive stamp on the office” and “had already established the president’s authority to interpret the Constitution.”³²

²⁷ *Id.* at 509.

²⁸ See Louis Fisher, *One of the Guardians Some of the Time*, in ROBERT A. LICHT, ed., *IS THE SUPREME COURT THE GUARDIAN OF THE CONSTITUTION?* 82-97 (1993).

²⁹ 1 ANNALS OF CONG. 457 (1789) (Joseph Gales ed., 1834).

³⁰ *Id.* at 520.

³¹ HENRY STEELE COMMAGER, *DOCUMENTS OF AMERICAN HISTORY* 163 (7th ed., 1963).

³² JEAN EDWARD SMITH, JOHN MARSHALL: *DEFINER OF A NATION* 283 (1996).

However, when the issue reached the courts, jurors objected to convicting someone for a crime established by an executive proclamation. Criminal law in the United States, they insisted, could be made only by Congress through the regular legislative process, not by unilateral presidential action.³³ Responding to that opposition, the administration dropped plans to prosecute.³⁴ Washington told lawmakers that it rested with “the wisdom of Congress to correct, improve, or enforce” the policy set forth in his proclamation, recommending that the legal code be changed by giving federal courts jurisdiction over issues of neutrality.³⁵

Congress responded by passing the Neutrality Act of 1794, giving the administration statutory authority to prosecute violators.³⁶ On this constitutional issue, the dispute was not resolved by seeking from courts the final word. Jurors had a better understanding of the Constitution than Washington and his circle of legal advisers. The system of checks and balances depended not on the three branches but on private citizens willing to uphold self-government and constitutional principles.

Similarly, the constitutionality of the Sedition Act of 1798 was not analyzed and struck down in the courts. Thomas Jefferson hoped that courts would intercede and declare the legislation unconstitutional: “The laws of the land, administered by upright judges, would protect you from any exercise of power unauthorized by the Constitution of the United States.”³⁷ Some members of Congress regarded the legislation as a blatant violation of press freedoms protected by the First Amendment. To Representative Nathaniel Macon, Congress lacked constitutional authority to pass the legislation and “could only hope that the Judges would exercise the power placed in them of determining the law as unconstitutional”³⁸ There would be no judicial check.

In a book published in 2016, Terri Diane Halperin points out that the Sedition Act “infringed upon the rights of speech, but, as many opponents argued, the law also posed a threat to other rights listed in the First Amendment, including freedom of the press and the right to petition the government for ‘a redress of grievances.’”³⁹ In the national elections of 1800, Democratic-Republicans triumphed over the Federalists. The Sedition Act was a significant factor in that result.⁴⁰ It has been said that the Sedition Act “was in effect declaring war upon the ideas of the French Revolution.”⁴¹ It was also a declaration of war against constitutional rights. The federal judiciary supported prosecutions under the Sedition Act “with such ardor as

³³ See HENFIELD’S CASE, 11 Fed. Cas. 1099 (C.C. Pa. 1793) (No. 6,360); see also FRANCIS WHARTON, STATE TRIALS OF THE UNITED STATES DURING THE ADMINISTRATIONS OF WASHINGTON AND ADAMS 84-85, 88 (1849).

³⁴ ABRAHAM D. SOFAER, WAR, FOREIGN AFFAIRS AND CONSTITUTIONAL POWER: THE ORIGINS 110 (1976).

³⁵ 3 ANNALS OF CONG., 11 (1793) (Joseph Gales ed., 1834).

³⁶ 1 Stat. 369-70 (1794).

³⁷ 10 THE WRITINGS OF THOMAS JEFFERSON (Memorial ed., 1903-04).

³⁸ 8 ANNALS OF CONG. 2152 (1798) (Joseph Gales ed., 1834).

³⁹ TERRI DIANE HALPERIN, THE ALIEN AND SEDITION ACTS OF 1798: TESTING THE CONSTITUTION 7 (2016).

⁴⁰ *Id.* at 120.

⁴¹ JOHN C. MILLER, CRISIS IN FREEDOM: THE ALIEN AND SEDITION ACTS 74 (1951).

to raise grave doubts concerning its ability to conduct an impartial trial.”⁴² Federalist judges defined “patriotism by their own narrow partisan standards and interpreted seditious libel in such a way as to preclude ordinary political activity.”⁴³ Far from performing as an independent branch determined to protect constitutional principles, these judges chose to promote and defend partisan objectives.

Federal judges were unlikely to strike down a statute passed by a Federalist administration to silence domestic opponents of the executive branch. They regularly upheld prosecutions against Republican newspapers and even a member of Congress, Representative Matthew Lyon.⁴⁴ The constitutionality of the Sedition Act was decided not by the courts but by the elections of 1800, which drove Federalists out of office and ushered in President Jefferson and the Republican Party.

One of Jefferson’s first actions as President was to call the Sedition Act unconstitutional and pardon all individuals punished or prosecuted under it.⁴⁵ He considered the legislation “to be a nullity, as absolute and as palpable as if Congress had ordered us to fall down and worship a golden image.”⁴⁶ He denied that the judiciary possessed a monopoly in deciding constitutional issues. To allow judges to decide what laws are constitutional, not only in their own “sphere of action” but legislative and executive spheres as well, “would make the judiciary a despotic branch.”⁴⁷

Congress passed private bills to reimburse individuals who had been fined under the Sedition Act. In 1840, it appropriated \$1,060.96, with interest from February 9, 1799, to the heirs of Matthew Lyon.⁴⁸ The House Judiciary Committee explained that those funds were provided because the Sedition Act was “unconstitutional, null, void, passed under a mistaken exercise of undelegated power, and the mistake ought to be corrected by returning the fine so obtained, with interest thereon.”⁴⁹ In 1964, the Supreme Court acknowledged that “although the Sedition Act was never tested in this Court, the attack upon its validity has carried the day in the court of history.”⁵⁰

IV. CONSTITUTIONAL PRINCIPLES OF JOHN MARSHALL

Scholars often attribute to John Marshall a position he did not hold or promote. A study by Joel Richard Paul in 2018 claimed that Marshall “elevated the dignity of the Supreme Court as the final arbiter of the Constitution’s meaning.”⁵¹ Similarly, Ronald Rotunda stated that Marshall “created judicial review in *Marbury v.*

⁴² *Id.* at 136.

⁴³ *Id.*

⁴⁴ See GEOFFREY R. STONE, PERILOUS TIMES: FREE SPEECH IN WARTIME 48-68 (2004).

⁴⁵ 11 WRITINGS OF THOMAS JEFFERSON 43 (Bergh. ed 1905). This was a letter to Mrs. John Adams, July 22, 1804.

⁴⁶ *Id.* at 43-44.

⁴⁷ *Id.* at 51.

⁴⁸ AN ACT TO REFUND A FINE IMPOSED ON THE LATE MATTHEW LYON, UNDER THE SEDITION LAW, TO HIS LEGAL HEIRS AND REPRESENTATIVES, ch. 45 (1840).

⁴⁹ U.S. CONGRESS, HOUSE COMMITTEE ON THE JUDICIARY, “MATTHEW LYON-HEIRS OF,” H. Rept. No. 86, 26th Cong., 1st Sess., p. 2 (1840).

⁵⁰ *New York Times Co. v. Sullivan*, 376 U.S. 254, 276 (1964).

⁵¹ JOEL RICHARD PAUL, WITHOUT PRECEDENT: JOHN MARSHALL AND HIS TIMES 3 (2018).

Madison.⁵² However, judicial review had been established before Marshall joined the Court as Chief Justice. In a study published in 2005, William Michael Treanor identified thirty-one cases before *Marbury* where American courts invalidated a statute.⁵³

Throughout the 1790s, federal courts began to review and invalidate a number of state laws.⁵⁴ In 1792, federal judges objected to a congressional statute enacted that year requiring them to serve as commissioners on claims settlement.⁵⁵ Because their decisions could be set aside by the Secretary of War, they were essentially issuing “advisory opinions” and serving in a subordinate capacity to executive officials. Before the Supreme Court could rule on the statute’s constitutionality, Congress repealed the offending sections and removed the Secretary’s authority to veto decisions rendered by federal judges.⁵⁶

In 1796, the Supreme Court upheld a congressional statute that imposed a tax on carriages. If the Court was empowered to uphold federal legislation, it possessed authority to strike one down if defects were found. In this case, Justice Samuel Chase said it was unnecessary “*at this time*, for me to determine, whether this court, *constitutionally* possesses the power to declare an act of Congress *void* . . . but if the court have such power, I am free to declare, that I will never exercise it, *but in a very clear case*.”⁵⁷ Two years later, the Court upheld another congressional statute, this time allowing constitutional amendments to go directly to the states for ratification rather than first submitting them to the President.⁵⁸

Marbury v. Madison (1803) is often described as a decision by which Chief Justice Marshall declared that the Court has ultimate authority on constitutional questions. In fact, the decision is much more modest in scope. The issue was whether William Marbury and those who joined in the lawsuit had the right to their position as justices of the peace. They had been nominated for that post and the Senate confirmed their selections. But in the hectic remaining weeks of the John Adams administration, their commissions were not delivered to them. The person who failed to do that was John Marshall, Secretary of State at the time. Given his personal role in the dispute, how could Marshall as Chief Justice not only participate in the case but also write for the Court? Why not recuse himself? In a case discussed next, *Stuart v. Laird*, Marshall recused himself “in light of his prior involvement.”⁵⁹ As the decision notes: “*The chief justice, having tried the cause in the court below, declined giving an opinion.*”⁶⁰

⁵² RONALD D. ROTUNDA, JOHN MARSHALL AND THE CASES THAT UNITED THE STATES OF AMERICA: BEVERIDGE’S ABRIDGED LIFE OF JOHN MARSHALL 175 (2018).

⁵³ William Michael Treanor, *Judicial Review Before Marbury*, 58 STAN. L. REV. 455, 457-58 (2005).

⁵⁴ See CHARLES WARREN, THE SUPREME COURT IN UNITED STATES HISTORY 65-69 (Little, Brown, and Co. rev. 1st ed. 1937).

⁵⁵ 1 Stat. 143-45 (March 23, 1792).

⁵⁶ *Hayburn’s Case*, 2 U.S. (2 Dall.) 409, 409-10 (1792); Act of Feb. 28, 1793, ch. 17, 1 Stat. 324-25.

⁵⁷ *Hylton v. United States*, 3 U.S. (3 Dall.) 171, 175 (1796) (emphasis in original).

⁵⁸ *Hollingsworth v. Virginia*, 3 U.S. (3 Dall.) 378, 382 (1798).

⁵⁹ CLIFF SLOAN AND DAVID MCKEAN, THE GREAT DECISION: JEFFERSON, ADAMS, MARSHALL, AND THE BATTLE FOR THE SUPREME COURT 169 (2009).

⁶⁰ *Stuart v. Laird*, 5 U.S. (1 Cranch) 299, 308 (1803).

Marbury and three co-plaintiffs were represented by Charles Lee. How could they come directly to the Supreme Court instead of beginning in district court? During oral argument, Lee explored the Court's authority to issue a writ commanding a specific act or duty. The question was basic: "Whether the supreme court can award the writ of mandamus in any case?"⁶¹ For support he turned to language in Section 13 of the Judiciary Act of September 24, 1789:

[T]he supreme court shall also have appellate jurisdiction from the circuit courts, and courts of the several states, in the cases hereinafter specially provided for; and shall have power to issue writs of prohibition in the district courts, when proceeding as courts of admiralty and maritime jurisdiction, and writs of *mandamus*, in cases warranted by the principles and usages of law, to any courts appointed, or *persons holding office*, under the authority of the United States.⁶²

As explained by Edward Corwin, Marshall reversed the "usual order of procedure," choosing to leave the question of jurisdiction "till the very last, and so created for himself an opportunity to lecture the President [Jefferson] on his duty to obey the law and to deliver the commission."⁶³ What the Court should have done, Corwin said, "was to dismiss the case as not falling within the contemplation of section thirteen, and not on the ground of the unconstitutionality of that section."⁶⁴

In *Marbury*, Marshall stated it is "emphatically the province and duty of the judicial department to say what the law is."⁶⁵ Nothing in that sentence says anything about judicial finality. It merely states that courts decide cases, which we know. It is also emphatically the province and duty of the executive and legislative branches to say what the law is. Surely Marshall did not think he was powerful enough in 1803 to order President Jefferson and Secretary of State Madison to deliver commissions to Marbury and the other plaintiffs. Marshall understood that Jefferson and Madison would ignore any order from the Supreme Court to deliver the commissions. As Chief Justice Warren Burger noted in 1985: "The Court could stand hard blows, but not ridicule, and the ale houses would rock with hilarious laughter" had Marshall issued a mandamus that the Jefferson administration ignored.⁶⁶

Marshall ruled Section 13 to be unconstitutional, the first instance of the Supreme Court striking down legislation passed by Congress. That result was not required. Marshall could have told Marbury and his colleagues: "You must start in district court. Section 13 provides you with no authority to bring this issue directly to the Supreme Court." Instead of striking down statutory language, it would have been sufficient for Marshall to simply reject Lee's strained interpretation. Marshall chose to act more in a political than a judicial manner. Many studies explore the

⁶¹ *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 146 (1803).

⁶² *Id.* at 148 (emphasis added in oral argument); 1 Stat. 73, 80-81, sec. 13 (1789). There are minor but inconsequential differences between the language offered by Lee and the statutory language.

⁶³ EDWARD S. CORWIN, *JOHN MARSHALL AND THE CONSTITUTION* 65 (1919).

⁶⁴ *Id.* at 66.

⁶⁵ *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803).

⁶⁶ Warren E. Burger, *The Doctrine of Judicial Review: Mr. Marshall, Mr. Jefferson, and Mr. Marbury*, in *VIEWS FROM THE BENCH* 14 (Mark Cannon and David O'Brien, eds., 1985).

manner in which he decided *Marbury*.⁶⁷

In a case decided one week after *Marbury*, the Court reviewed the action of the Jeffersonian Congress to repeal legislation passed in the waning days of Federalist control under President John Adams. The statute created sixteen new judgeships. They were quickly nominated and confirmed by the Senate. As Chief Justice Rehnquist has noted, the appointees were “dubbed by the Republicans the ‘Midnight Judges’ because of the belief that Adams had stayed up until midnight making the appointments in the waning hours of his presidency.”⁶⁸

Did Jeffersonians have authority to abolish courts with Article III judges entitled to lifetime terms? Would the Supreme Court invoke the power of judicial review and invalidate the repeal law? Such action would greatly intensify congressional efforts under President Jefferson to impeach and remove Federalist judges, including those on the Supreme Court. Facing the risk of confrontation with Congress, the Court held that the issue of circuit judges had been settled by congressional action in 1789 when it created circuit courts and required Supreme Court Justices to “ride circuit.” In short, the Court deferred to the constitutional judgment of Congress. As the Court noted, practice from 1789 forward, “commencing with the organization of the judicial system, affords an irresistible answer, and has indeed fixed the construction” of the Constitution. This “practical exposition is too strong and obstinate to be shaken or controlled.”⁶⁹ On this constitutional issue the elected branches delivered the final word.

The record is clear during this period that Marshall did not believe the Court was supreme on legal or constitutional questions. His behavior during the impeachment hearings of Judge John Pickering and Justice Samuel Chase suggests he was quite willing to share that responsibility with Congress and the President. *Marbury* was decided on February 24, 1803. The House impeached Pickering on March 2, 1803 and the Senate convicted him on March 12, 1804. As soon as the House impeached Pickering, it turned its guns on Chase. Had Chase been impeached and removed, Marshall understood he was likely the next target.

In this context, Marshall wrote to Chase on January 23, 1805, suggesting that members of Congress did not have to impeach judges whenever they disagreed with their legal opinions. Instead, Congress could simply review and reverse objectionable decisions through the regular legislative process. The Court could say “what the law is” but so could Congress. Marshall’s letter is somewhat ambiguous. He could have been referring to congressional reversals of statutory interpretation by the courts, not constitutional interpretation. But Marshall did not make that distinction. Given the temper of the times, Marshall most likely meant constitutional as well as statutory interpretation.

⁶⁷ See generally Susan Low Bloch and Maeva Marcus, *John Marshall’s Selective Use of History in Marbury v. Madison*, 1986 WIS. L. REV. 301 (1986); Akhil Reed Amar, *Marbury, Section 13, and the Original Jurisdiction of the Supreme Court*, 56 U. CHI. L. REV. 443 (1989); Michael Stokes Paulsen, *The Irrepressible Myth of Marbury*, 101 MICH. L. REV. 2706 (2003).

⁶⁸ WILLIAM H. REHNQUIST, GRAND INQUESTS: THE HISTORIC IMPEACHMENTS OF JUSTICE SAMUEL CHASE AND PRESIDENT ANDREW JOHNSON 50 (1992).

⁶⁹ *Stuart v. Laird*, 5 U.S. (1 Cranch) 299, 309 (1803).

Consider his language to Chase:

I think the modern doctrine of impeachment should yield to an appellate jurisdiction in the legislature. A reversal of those legal opinions deemed unsound by the legislature would certainly better comport with the mildness of our character than [would] a removal of the Judge who has rendered them unknowing of his fault.⁷⁰

Nothing in that language smacks of judicial superiority or finality. It is significant that following his decision in *Marbury*, Marshall never struck down another congressional statute. Over the following decades, he consistently upheld the power of Congress to exercise the commerce clause, create a U.S. Bank, and discharge other constitutional responsibilities, whether express or implied. With regard to this exercise of congressional power, the Marshall Court functioned as a yea-saying, not a negative, branch.

In *Cohens v. Virginia* (1821), Marshall berated those who rummaged around *Marbury* looking for “some *dicta*” to support their cause. The “single question” before the Court, he emphasized, was “whether the legislature could give this Court original jurisdiction in a case in which the constitution had clearly not given it”⁷¹ That was the core holding. Everything else, including possible claims of judicial supremacy and finality, amounts to *dicta*.

In their chapter “The Meaning of *Marbury*,” Cliff Sloan and David McKean interpret the decision to assert not merely “the principle of an independent judiciary” but a system that makes the Supreme Court “the ultimate authority on constitutionality.”⁷² Even if there is disagreement at times about Supreme Court decisions, “everybody respects a system in which the Supreme Court fairly resolves these contested constitutional issues.”⁷³ They describe the Court not as “a co-equal branch” but one “that can and does have the last word on the Constitution.”⁷⁴ The record does not support the claim of judicial supremacy.

During Marshall’s own lifetime, he was well aware that his constitutional decisions could be, and actually were, reversed by the other branches. The history of the U.S. Bank illustrates that point. In *McCulloch v. Maryland* (1819), the Supreme Court decided two issues: whether Congress possessed an implied power to create a national bank and whether the State of Maryland could tax the bank. Writing for a unanimous Court, Marshall in his initial paragraph promoted the notion of judicial finality. Of the various questions presented to the Court, he said if the case had to be decided, “by this tribunal alone can the decision be made.” On the Supreme Court, “has the constitution of our country devolved this important duty.”⁷⁵

Marshall turned his attention to language in the Constitution stating that Congress shall make all laws which shall be “necessary and proper” for carrying into

⁷⁰ 3 ALBERT J. BEVERIDGE, *THE LIFE OF JOHN Marshall* 177 (1919). Marshall dated the letter January 23, 1804, but modern scholarship fixes the date a year later. See 6 *THE PAPERS OF JOHN MARSHALL* 348 n.1 (Hobson ed., 1990). Like the rest of us, Marshall forgot to switch to the new year.

⁷¹ *Cohens v. Virginia*, 19 U.S. (6 Wheat.) 264, 400 (1821).

⁷² CLIFF SLOAN & DAVID MCKEAN, *THE GREAT DECISION* 180 (2009).

⁷³ *Id.*

⁷⁴ *Id.* at 180-81.

⁷⁵ *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 401 (1819).

effect the powers expressly stated. Under that analysis, he concluded that the act to create the Bank of the United States “is a law made in pursuance of the constitution, and is a part of the supreme law of the land.”⁷⁶ He also decided that Maryland had no authority to tax the Bank.⁷⁷ The fact that the Court upheld the Bank did not prevent Congress or the President reaching different conclusions at a later date. If Congress decided that the operation of the Bank created unacceptable results, it could decide not to renew it.

Moreover, if Congress decided at a later date to support the bank, the President could exercise independent judgment and veto the bill. That is what happened on July 10, 1832, when President Andrew Jackson vetoed a bill to incorporate the bank. He admitted that a bank of the United States “is in many respects convenient for the Government and useful to the people.”⁷⁸ However, various features of the bill convinced him to exercise a veto. He noted that advocates of the bank maintained that “its constitutionality in all its features ought to be considered as settled by precedent and by the decision of the Supreme Court.”⁷⁹ With that conclusion he did not agree: “Mere precedent is a dangerous source of authority, and should not be regarded as deciding questions of constitutional power except where the acquiescence of the people and the States can be considered as well settled.”⁸⁰ He reviewed the legislative history of the bank: Congress favoring it in 1791, voting against it in 1811 and 1815, but in favor again in 1816.⁸¹

As to the Court’s decision in *McCulloch*, Jackson in a single paragraph set forth his main principles. Even if the decision “covered the whole ground of this act, it ought not to control the coordinate authorities of this government.” Congress, the President, and the Supreme Court “must each for itself be guided by its own opinion of the Constitution.” Each public officer who takes an oath to support the Constitution “swears that he will support it as he understands it, and not as it is understood by others.” The opinion of judges “has no more authority over Congress than the opinion of Congress has over the judges, and on that point the President is independent of both.”⁸²

Jackson interpreted *McCulloch* to mean that:

[I]t is the exclusive province of Congress and the President to decide whether the particular features of this act are *necessary* and *proper* in order to enable the bank to perform conveniently and efficiently the public duties assigned to it as a fiscal agent, and therefore constitutional, or *unnecessary* and *improper*, and therefore unconstitutional.⁸³

Congress did not override his veto. Aware of Jackson’s action, Marshall had full

⁷⁶ *Id.* at 424.

⁷⁷ *Id.* at 432.

⁷⁸ 2 JAMES D. RICHARDSON A COMPILATION OF THE MESSAGES AND PAPERS OF THE PRESIDENTS 1139 (1832).

⁷⁹ *Id.* at 1144.

⁸⁰ *Id.* at 1144-45.

⁸¹ *Id.* at 1145.

⁸² *Id.*

⁸³ *Id.* at 1146.

appreciation of the degree to which the elected branches could reverse constitutional decisions by the Supreme Court. Marshall passed away on July 6, 1835.

V. CONSTITUTIONAL DIALOGUES ON COMMERCE POWER

Supreme Court Justices continue to cite *Marbury* in an effort to shore up their decisions. In *Cooper v. Aaron*, the Court claimed that *Marbury* “declared the basic principle that the federal judiciary is supreme in the exposition of the law of the Constitution, and that principle has ever since been respected by this Court and the Country as a permanent and indispensable feature of our constitutional system.”⁸⁴ The historical record flatly rejects that understanding of *Marbury*.

Consider litigation over a bridge that Virginia built over the Ohio River. On August 16, 1849, in a federal appellate court in Philadelphia, Justice Robert C. Grier received an injunction from the Attorney General of Pennsylvania directed against the Wheeling and Belmont Bridge Company.⁸⁵ The complaint stated that the bridge “will hinder and prevent the passage of citizens along said river under such bridge.”⁸⁶ To provide assistance in analyzing this issue of the commerce power, a commissioner was appointed. He directed an engineer to take measurements of the bridge and report back his findings.⁸⁷

After receiving the height of the bridge, the water level, and the height of chimneys of approaching boats, the commissioner concluded that the bridge represented an obstruction over a navigable stream.⁸⁸ Accepting the commissioner’s judgment, the Supreme Court held that “said suspension-bridge is an obstruction and nuisance” and that the state of Pennsylvania “has a just and legal right to have the navigation of the said river made free.”⁸⁹ The Court released its decision on February 6, 1852, and in amended form in May. Did its position on this constitutional issue amount to judicial finality? Not at all. It merely represented a single chapter in judicial-congressional relations, with more to come.

On August 12, 1852, the House of Representatives began debate on a bill to make the Wheeling Bridge “a lawful structure.”⁹⁰ In sponsoring this legislation, Rep. Joseph Addison Woodward insisted that the “ultimate right” to decide the issue was in Congress pursuant to its power to regulate interstate commerce and preserve intercourse among the states.⁹¹ On the issue of the bridge obstructing commerce, why was the Supreme Court the better judge? The fact-finding capacity of the legislative branch was certainly equal to if not superior to the judiciary. The Court had shifted the investigation to a commissioner. Why should his judgment control Congress? Senator George W. Badger denied that Congress was seeking “some

⁸⁴ *Cooper v. Aaron*, 358 U.S. 1, 18 (1958).

⁸⁵ *Pennsylvania v. Wheeling & Belmont Bridge Co.*, 50 U.S. (9 How.) 647, 647 (1850).

⁸⁶ *Id.* at 648.

⁸⁷ *Id.* at 658.

⁸⁸ *Pennsylvania v. Wheeling & Belmont Bridge Co.*, 54 U.S. 518, 568-71 (1852).

⁸⁹ *Id.* at 626.

⁹⁰ CONG. GLOBE, 32d Cong., 1st Sess. 2195 (1852).

⁹¹ *Id.* at 2195-96.

revising power over the adjudications of the Supreme Court.”⁹² Instead, Congress was exercising “our legislative functions, as the court discharged its judicial functions.”⁹³ He pointed out that boats should not be allowed to deliberately construct artificially high chimneys that could not clear the Wheeling Bridge. On that issue, the legislative branch proved to be more informed, perceptive, and insightful than the judiciary. Rather than altering the bridge to accommodate vessels, ships should adjust their height to the bridge. The Supreme Court and its commissioner did not consider that elementary issue.

Legislative language enacted on August 31, 1852, stated that bridges across the Ohio River “are hereby declared to be lawful structures in their present position and elevation.”⁹⁴ The statute required vessels navigating the Ohio River to ensure that any pipes or chimneys shall not “interfere with the elevation and construction of said bridges.”⁹⁵ When the dispute returned to the Supreme Court, Pennsylvania insisted that the statute was “unconstitutional and void.”⁹⁶ Writing for the majority, Justice Samuel Nelson explained that when the Court acted in 1852 it did so without guidance from Congress. It now had clear statutory direction.

Nelson wrote “it is urged, that the act of Congress cannot have the effect and operation to annul the judgment of the court already rendered, or the rights determined thereby in favor of the plaintiff.”⁹⁷ Yet he concluded that the legislation passed by Congress “is not inconsistent with the clause of the constitution referred to.”⁹⁸ After Congress passed that legislation, Nelson noted that the bridge had collapsed in a gale of wind and Pennsylvania had taken legal steps to prevent the company from reconstructing the bridge. The company ignored that effort and proceeded to rebuild the bridge. To the Court, the congressional statute “afforded full authority to the defendants to reconstruct the bridge.”⁹⁹ The four dissenting Justices each wrote separately to express dismay with the majority’s holding that a decision by the Supreme Court on a constitutional question could be reversed by Congress.¹⁰⁰

Another judicial-congressional dialogue on constitutional matters concerning the commerce power occurred in 1890 when the Supreme Court in *Leisy v. Hardin* ruled that Iowa’s prohibition on intoxicating liquors from outside its borders could not be applied to original packages or kegs.¹⁰¹ Justices Gray, Harlan, and Brewer filed a thirty-five page dissent, insisting that states had available to them the “police power” to protect inhabitants “against disorder, disease, poverty, and crime.”¹⁰²

The Court issued its opinion on April 28, 1890. Less than a month later, on May

⁹² *Id.* at 2310.

⁹³ *Id.*

⁹⁴ 10 Stat. 112, § 6 (1852).

⁹⁵ *Id.* § 7.

⁹⁶ *Pennsylvania v. Wheeling & Belmont Bridge Co.*, 59 U.S. (18 How.) 421, 429 (1855).

⁹⁷ *Id.* at 431.

⁹⁸ *Id.* at 433.

⁹⁹ *Id.* at 436.

¹⁰⁰ *Id.* at 439-58.

¹⁰¹ *Leisy v. Hardin*, 135 U.S. 100, 125 (1890).

¹⁰² *Id.* at 127.

14, the Senate reported a bill granting states authority to regulate incoming intoxicating liquors.¹⁰³ As congressional debate proceeded, lawmakers offered irreverent remarks about the Court's capacity to understand constitutional issues. Senator George Edmunds described the Court as "an independent and co-ordinate branch of the Government" empowered to decide cases, but "as it regards the Congress of the United States, its opinions are of no more value to us than ours are to it. We are just as independent of the Supreme Court of the United States as it is of us, and every judge will admit it."¹⁰⁴

Congress enacted remedial legislation on August 6, 1890, slightly more than three months after the Court's decision.¹⁰⁵ The statute made intoxicating liquors, upon their arrival in a state or territory, subject to the police power of a state "to the same extent and in the same manner as though such liquids or liquors had been produced in such State or Territory, and shall not be exempt therefrom by reason of being introduced in original packages or otherwise."¹⁰⁶ When the constitutionality of this statute returned to the Supreme Court a year later, it was upheld unanimously.¹⁰⁷

In subsequent years, the Supreme Court has spoken clearly about this constitutional dialogue between Congress and the states concerning the commerce power. A 1946 decision acknowledged that in conflicts between Congress and the Supreme Court over the commerce clause, the Court has accepted the judgment of Congress.¹⁰⁸ In 1985, the Court wrote that "[w]hen Congress so chooses, state actions which it plainly authorizes are invulnerable to constitutional attack under the Commerce Clause."¹⁰⁹ In a concurrence in 1995, Justices Kennedy and O'Connor conceded that judicial finality does not exist in this type of constitutional dispute, noting that "if we invalidate a state law, Congress can in effect overturn our judgment."¹¹⁰

VI. PROTECTING INDIVIDUAL RIGHTS

It is frequently argued that the Supreme Court is especially qualified in protecting individual rights. During his service as governor of New York, Charles Evans Hughes spoke strongly in defense of Supreme Court finality. In a speech on May 3, 1907, he rebuked those as "the worst enemies of the community who will talk lightly of the dignity of the bench," stating that "[w]e are under a Constitution, but the Constitution is what judges say it is." The judiciary is "the safeguard of our liberty and of our property under the Constitution."¹¹¹

¹⁰³ 21 CONG. REC. 5, 4642 (1890).

¹⁰⁴ *Id.* at 4964.

¹⁰⁵ Act of Aug. 8, 1890, ch. 728, 26 Stat. 313 (1890).

¹⁰⁶ *Id.*

¹⁰⁷ *In re Rahrer*, 140 U.S. 545, 565 (1891).

¹⁰⁸ *Prudential Ins. v. Benjamin*, 328 U.S. 408, 425 (1946).

¹⁰⁹ *Northeast Bancorp, Inc. v. Bd. of Governors, Fed. Reserve Sys.*, 472 U.S. 159, 174 (1985).

¹¹⁰ *United States v. Lopez*, 514 U.S. 549, 580 (1995).

¹¹¹ DEXTER PERKINS, CHARLES EVANS HUGHES AND AMERICAN DEMOCRATIC STATESMANSHIP 16 (Oscar Handlin, ed.) (Preager 1978).

Yet when Hughes many decades later spoke about judicial power, he recognized that the Supreme Court “has the inevitable failings of any human institution.”¹¹² He said that in “three noticeable instances” the Court “suffered severely from self-inflicted wounds” by deciding *Dred Scott*, the Legal Tender Cases, and the Income Tax Cases.¹¹³ With regard to *Dred Scott*, the Supreme Court faced two principal issues: whether a black man could sue in federal court and whether Congress had authority to prohibit slavery in the western territories. James Buchanan, newly elected President, decided not to provide any leadership or guidance on those issues. He chose to defer entirely to the Supreme Court. To him, the constitutional issue of slavery presented

a judicial question, which legitimately belongs to the Supreme Court of the United States, before whom it is now pending, and will, it is understood, be speedily and finally settled. To their decision, in common with all good citizens, I shall cheerfully submit, whatever this may be¹¹⁴

Buchanan was correct that Supreme Court action on the *Dred Scott* case would be speedy. The decision was released two days later. Writing for the Court, Chief Justice Roger Taney decided that “a negro, whose ancestors were imported into this country, and sold as slaves,” had no right to sue in a federal court in cases specified by the Constitution.¹¹⁵ On the issue of whether Congress possessed constitutional authority to prohibit slavery in the territories, Taney concluded that Congress had no authority to prohibit a citizen from holding and owning slaves north of the dividing line in the western territories.¹¹⁶ Throughout his opinion, Taney relied heavily on British precedents regarding slavery, suggesting that those principles were well established and fixed. He made no mention that England in 1833 had prohibited slavery.

Taney’s fifty-five page opinion for the Court has been praised by some scholars for imparting unity to the Court. In a study published in 2006, Austin Allen states that the decision brought “judicial harmony” and settled “the internal divisions that had plagued the justices.” *Dred Scott* “resolved the issues that had so bitterly divided the justices between the 1852 and 1855 terms.”¹¹⁷ Yet Taney’s decision prompted six separate concurrences by Justices James Wayne, Samuel Nelson, Robert Grier, Peter Daniel, John Campbell, and John Catron (totaling seventy-six pages). Justices John McLean and Benjamin Curtis wrote separate dissenting opinions, covering 105 pages.

In his inaugural address in 1861, Abraham Lincoln said he did “not forget the position assumed by some that constitutional questions are to be decided by the Supreme Court.” Nor did he deny “that such decisions must be binding in any case

¹¹² CHARLES EVANS HUGHES, *THE SUPREME COURT OF THE UNITED STATES* 45 (1936).

¹¹³ *Id.* at 50.

¹¹⁴ ARTHUR M. SCHLESINGER, JR. & FRED L. ISRAEL, ED., *MY FELLOW CITIZENS: THE INAUGURAL ADDRESSES OF THE PRESIDENTS OF THE UNITED STATES* 132 (Infobase Publishing 2010).

¹¹⁵ *Dred Scott v. Sandford*, 60 U.S. 393, 403 (1857).

¹¹⁶ *Id.* at 452.

¹¹⁷ AUSTIN ALLEN, *ORIGINS OF THE DRED SCOTT CASE: JACKSONIAN JURISPRUDENCE AND THE SUPREME COURT* 203 (2006).

upon the parties to a suit as to the object of that suit” while also being “entitled to very high respect and consideration in all parallel cases by all other departments of the Government.”¹¹⁸ Having addressed *Dred Scott* obliquely in that manner, Lincoln came directly to the doctrine of judicial finality, stating

[T]he candid citizen must confess that if the policy of the Government upon vital questions affecting the whole people is to be irrevocably fixed by decisions of the Supreme Court, the instant they are made in ordinary litigation between parties in personal actions the people will have ceased to be their own rulers, having to that extent practically resigned their Government into the hands of that eminent tribunal.¹¹⁹

In legislation enacted in 1862, Congress asserted its independent constitutional authority by prohibiting slavery in the territories.¹²⁰ What the Supreme Court in *Dred Scott* said that Congress could not do, it did. Also in 1862, Attorney General Edward Bates released an opinion to the Secretary of the Treasury concerning the issue of “whether or not *colored men* can be citizens of the United States.”¹²¹ If so, are they “therefore competent to command American vessels?”¹²² He offered the following judgment:

In the United States it is too late now to deny the political rights and obligations conferred and imposed by nativity; for our laws do not pretend to create or enact them, but do assume and recognize them as things known to all men, because pre-existent and natural; and therefore things of which the laws must take cognizance.¹²³

Contrary to the principles announced in *Dred Scott*, Bates concluded:

I give it as my opinion that the *free man of color*, mentioned in your letter, if born in the United States, is a citizen of the United States; and, if otherwise qualified, is competent, according to the acts of Congress, to be master of a vessel engaged in the coasting trade.¹²⁴

In 1875, members of Congress passed legislation to further implement the Civil War Amendments. The preamble of the statute began: “Whereas, it is essential to just government we recognize the equality of all men before the law”¹²⁵ Although the Civil War Amendments officially elevated blacks to the status of citizen, in some states they were denied access to public facilities. Under the 1875 legislation, all persons in the United States were entitled to the “full and equal enjoyment of the accommodations, advantages, facilities, and privileges of inns, public conveyances [transportation] on land and water, and other places of public

¹¹⁸ See SCHLESINGER AND ISRAEL *supra* note 114, 145-46.

¹¹⁹ *Id.* at 146.

¹²⁰ An Act to Secure Freedom to all Persons Within the Territories of the United States, June 19, 1862, ch. 111, 12 Stat. 432.

¹²¹ 10 Op. Att’y Gen. 382 (1862).

¹²² *Id.* at 383.

¹²³ *Id.* at 395.

¹²⁴ *Id.* at 413.

¹²⁵ An Act to Protect All Citizens in their Civil and Legal Rights, March 1, 1875, ch. 114, 18 Stat. 335 (1875).

amusement.”¹²⁶

During House debate, Benjamin Butler of Massachusetts explained how Congress could protect constitutional rights violated by the states. As chairman of the Judiciary Committee and Republican floor leader, he explained it was not the intent of Congress to bring “social equality” among blacks and whites. Instead, the legislative purpose was to underscore a fundamental legal principle:

The colored men are either American citizens or they are not. The Constitution, for good or evil, for right or wrong, has made them American citizens; and the moment they were clothed with that attribute of citizenship, they stood on a political and legal equality with every other citizen, be he whom he may.¹²⁷

Butler explained that the legislative purpose was not social equality.¹²⁸ Individuals had full freedom to pick their friends and associates, but those choices had nothing to do with the right of access to public facilities. From Butler’s own experience, the men and women riding in the cars “[were] not [his] associates.”¹²⁹ He preferred not to sit next to many white men and white women, but they had a legal right to ride in the cars. The same principle applied to attending a theater, inn, or tavern. Butler felt no obligation to speak to anyone at a public accommodation. As he explained, the bill did not force whites to associate with blacks or vice versa.¹³⁰ After the bill passed the House 161 to 79 and the Senate 38 to 26, President Grant signed it into law.¹³¹

The statute, after challenges in five states (California, Kansas, Missouri, New York, and Tennessee), did not reach the Supreme Court until 1882. A year later, the Court declared the public accommodations statute an encroachment on the states and an interference with private relationships. The Court insisted that Congress, under the Fourteenth Amendment, could regulate only “state action,” not discrimination by private parties, stating that “[i]ndividual invasion of individual rights is not the subject-matter of the amendment.”¹³² The statute had nothing to do with discrimination by private parties. It focused exclusively on state policy requiring access to public accommodations.

In his dissent, Justice John Marshall Harlan explained why the statute did not invade state or individual rights. The public accommodations at issue were activities that had been promoted, subsidized, and licensed by the state. Even if controlled and owned by private corporations, railroads were able to extend their operations only after the state seized land through the power of eminent domain.¹³³ Places of public amusement did not receive state assistance, as with railroads, but they were

¹²⁶ *Id.* at 336.

¹²⁷ 3 CONG. REC. 939-40 (1875).

¹²⁸ *Id.* at 940.

¹²⁹ *Id.*

¹³⁰ *Id.*

¹³¹ *Id.* at 991; 18 Stat. 335 (1875); Bertram Wyatt-Brown, *The Civil Rights Act of 1875*, 18 W. POL. QUARTERLY. 763, 774 (1965).

¹³² Civil Rights Cases, 109 U.S. 3, 11 (1883).

¹³³ *Id.* at 39.

established and licensed under the law.¹³⁴ Authority to create and maintain them comes from the public. “A license from the public . . . imports, in law, equality of right, at such places, among all the members of the public.”¹³⁵

In the 1960s, Congress once again passed legislation providing for equal access to public accommodations. The bill attracted strong bipartisan support. Private groups lobbied for the bill, creating a political base that helped educate citizens and build public support. The rights of blacks were supported far better through this political process than through judicial action. In two unanimous opinions, the Supreme Court relied on the commerce power to uphold the public accommodations title.¹³⁶ What could have been accomplished in 1875 had to wait nearly a century because of judicial obstruction.

Decisions by the Supreme Court after the Civil War repeatedly underscore its failure to uphold individual rights. As with blacks, women learned that their interests were better protected by legislative bodies, at both the state and national level. A good example is the experience of Myra Bradwell. After studying law, she applied for admission to the Illinois bar in 1869.¹³⁷ To take that step, she needed the approval of a panel of all-male judges to practice law in the state. They denied her application solely on the grounds that she was a woman.¹³⁸ The Supreme Court of Illinois rejected her appeal.¹³⁹ Of her qualifications, the court said, “we have no doubt,”¹⁴⁰ but British law and custom weighed heavily on the court’s analysis. Female attorneys “were unknown in England” and the suggestion that a woman could enter the courts as a barrister would have created “hardly less astonishment” than if she were placed on the bench of bishops or was elected to the House of Commons.¹⁴¹

The Illinois court did not limit its analysis to the U.S. Constitution and British precedents. It also found guidance from higher authority: “That God designed the sexes to occupy different spheres of action, and that it belonged to men to make, apply and execute the laws, was regarded as an almost axiomatic truth.”¹⁴² *Axiomatic*. Additional thinking or analysis was not required. Of further interest, the court advised that if change was needed to recognize greater rights for women, “let it be made by that department of the government to which the constitution has entrusted the power of changing the laws.”¹⁴³ The state legislature could decide if allowing women to “engage in the hot strifes of the bar, in the presence of the public, and with momentous verdicts the prizes of the struggle, would not tend to destroy

¹³⁴ *Id.* at 41.

¹³⁵ *Id.*

¹³⁶ *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241, 250 (1964); *Katzenbach v. McClung*, 379 U.S. 294, 303-05 (1964).

¹³⁷ Jane M. Friedman, *Myra Bradwell: On Defying the Creator and Becoming a Lawyer*, 28 VAL. U. L. REV. 1287, 1288 (1994).

¹³⁸ LOUIS FISHER, RECONSIDERING JUDICIAL FINALITY: WHY THE SUPREME COURT IS NOT THE LAST WORD ON THE CONSTITUTION 62 (2019).

¹³⁹ *In re Bradwell*, 55 Ill. 535, 552-53 (1869).

¹⁴⁰ *Id.* at 536.

¹⁴¹ *Id.* at 539.

¹⁴² *Id.*

¹⁴³ *Id.* at 540.

the deference and delicacy with which it is the pride of our ruder sex to treat her”¹⁴⁴ In so many words: if the legislature wanted to corrupt and damage women, go ahead.

After this experience with the Illinois court, Bradwell followed its advice and sought help from the state legislature.¹⁴⁵ It passed a bill in 1872 stating that “no person shall be precluded or debarred from any occupation, profession or employment (except military) on account of sex.”¹⁴⁶ The statute included some qualifications. Nothing in it was to be “construed as requiring any female to work on streets or roads, or serve on juries.”¹⁴⁷ Bradwell and other women now had the right to practice law within the state.

Bradwell decided to take the issue to the U.S. Supreme Court to establish a national right of women to practice law. She had the legal assistance of Matthew H. Carpenter.¹⁴⁸ In a brief opinion, the Court examined the claim that the Privileges and Immunities Clause of the Fourteenth Amendment included the right of women to serve as attorneys. The Court agreed that certain privileges and immunities belong to citizens of the United States, “[b]ut the right to admission to practice in the courts of a State is not one of them.”¹⁴⁹ A concurrence by Justice Joseph P. Bradley offered additional reasons why women should not be permitted to practice law. He insisted that the civil law, “as well as nature herself, has always recognized a wide difference in the respective spheres and destinies of man and woman.”¹⁵⁰ He insisted that man “is, or should be, woman’s protector and defender.”¹⁵¹ The “natural and proper timidity and delicacy” of women made them “unfit” for many occupations, including law.¹⁵² Reaching to a higher plane, he argued that a “divine ordinance” commanded that a woman’s primary mission in life is centered in the home.¹⁵³ While some women do not marry, he nonetheless decided that a general rule imposed upon women the “paramount destiny and mission” to fulfill the roles of wife and mother.¹⁵⁴ For Bradley: “This is the law of the Creator.”¹⁵⁵ Years later, conditions changed for Myra Bradwell. In 1892, on the motion of U.S. Attorney General William Henry Harrison Miller, the Supreme Court admitted her to practice before it.¹⁵⁶

During this period, Belva Lockwood was also successful in turning to lawmakers to expand the right of women to practice law. In the 1870s, the Supreme Court adopted a rule denying women the right to practice before it. Admitted to the

¹⁴⁴ *Id.* at 542.

¹⁴⁵ FISHER, RECONSIDERING JUDICIAL FINALITY, *supra* note 138, at 63.

¹⁴⁶ 1871-1872 Ill. Laws 234.

¹⁴⁷ *Id.*

¹⁴⁸ FISHER, RECONSIDERING JUDICIAL FINALITY, *supra* note 138, at 63.

¹⁴⁹ *Bradwell v. Illinois*, 83 U.S. (16 Wall.) 130, 139 (1872).

¹⁵⁰ *Id.* at 141.

¹⁵¹ *Id.*

¹⁵² *Id.*

¹⁵³ *Id.*

¹⁵⁴ *Id.*

¹⁵⁵ *Id.*

¹⁵⁶ Friedman, *supra* note 137, at 1303.

District of Columbia bar in 1873, she drafted legislation in 1876 to overturn that rule. Her bill provided that any woman admitted to the bar of the highest court of a state, or of the D.C. Supreme Court, and otherwise qualified as set forth in the bill (three years of practice and a person of good moral character, as with male attorneys), may be admitted to practice before the U.S. Supreme Court. She took her draft to members of Congress to seek their support.

Would the all-male legislative body of Congress conclude, as did the courts, that the “natural delicacy” of women made them unfit for law? Her bill became law within one year, underscoring the striking difference between lawmakers and judges on how they interpreted constitutional rights. The bill reached the House floor on February 21, 1878, and passed 169 to 87. Benjamin Butler, chairman of the Judiciary Committee, said the committee unanimously supported the bill.¹⁵⁷ On March 18, the Senate Judiciary Committee voted against the bill, reasoning that ever since the founding of the national government the Supreme Court and every other federal court had declined to admit women to practice law. Instead of acting and thinking independently, the committee chose to defer to judicial precedents.¹⁵⁸

Senator Aaron Sargent of California pushed hard for passage. Under his pressure, the committee promised to report the bill for floor deliberation.¹⁵⁹ With the committee continuing to oppose the bill, Sargent reviewed progress that women had made in various professions, including medicine and surgery. He argued that in America no man “has a right to put a limit to the exertions or the sphere of woman. That is a right which only can be possessed by that sex itself.” The “enjoyment of liberty, the pursuit of happiness in her own way, is as much the birthright of woman as of man.”¹⁶⁰ The bill now passed the Senate 39 to 20. The statute provided that any woman who had been a member of the bar of the highest court of any state or territory, or of the D.C. Supreme Court, for at least three years, had maintained a good standing before such court, and was a person of good moral character, “shall, on motion, and the production of such record, be admitted to practice before the Supreme Court of the United States.”¹⁶¹

Not until 1971 did the Supreme Court issue an opinion striking down sex discrimination. A unanimous Court declared invalid an Idaho law that preferred men over women in administering estates.¹⁶² A study by John Johnson and Charles Knapp that year denounced the failure of courts to defend the rights of women. They concluded that “by and large the performance of American judges in the area of sex discrimination can be succinctly described as ranging from poor to abominable.”¹⁶³

Advances in women’s rights continue to come from the elected branches, not the courts. Consider the case of Lilly Ledbetter. In 2007, the Supreme Court split

¹⁵⁷ 7 CONG. REC. 1077, 1235 (1878).

¹⁵⁸ *Id.* at 1821.

¹⁵⁹ *Id.* at 2704-05.

¹⁶⁰ 8 CONG. REC. 1077, 1084 (1879).

¹⁶¹ Act of Feb. 15, 1879, ch. 81, 20 Stat. 292 (1879) (providing relief of certain legal disabilities of women).

¹⁶² *Reed v. Reed*, 404 U.S. 71, 77 (1971).

¹⁶³ John D. Johnson, Jr. & Charles L. Knapp, *Sex Discrimination by Law: A Study in Judicial Perspective*, 46 N.Y.U. L. REV. 675, 676 (1971).

5-4 in deciding that she had filed an untimely claim against Goodyear Tire for pay discrimination. She had worked there from 1979 to 1998. For most of that time, she was unaware that she was paid less than men doing the same work. Writing for the majority, Justice Alito claimed that anyone filing a charge of unequal pay to the Equal Employment Opportunity Commission had to file within a specified period, either 180 or 300 days (depending on the state) after the alleged unlawful employment practice occurred. The shorter period, he said, applied to Ledbetter.¹⁶⁴ According to Alito, she should have filed within 180 days “after each allegedly discriminatory pay decision was made and communicated to her.”¹⁶⁵

However, Goodyear never communicated to Ledbetter discriminatory pay decisions. Only years later did she discover she had been paid less than men for performing the same work. In a dissent joined by Justices Stevens, Souter, and Breyer, Justice Ginsburg noted the disparity between Ledbetter’s monthly salary as area manager and those of her male counterparts for the end of 1997. The latter group ranged from a high of \$5,236 to a low of \$4,286. Her monthly salary for that time period was \$3,727. Recalling the Civil Rights Act of 1991 that overturned in whole or in part nine decisions of the Supreme Court, Justice Ginsburg remarked: “Once again, the ball is in Congress’s court. As in 1991, the Legislature may act to correct this Court’s parsimonious reading of Title VII.”¹⁶⁶

In late July 2007, the House of Representatives debated the Lilly Ledbetter Fair Pay Act to reverse the Court’s decision. Voting 225 to 199, the House passed the bill.¹⁶⁷ The legislation, amending Title VII and several other statutes, clarified that a discriminatory pay action can occur each time a worker is paid. With that understanding, a company could not discriminate, withhold that information from the employee, and be at liberty to continue discriminatory pay actions in the future without fear of litigation.

Senate action was delayed until early 2009, when it voted 61 to 36 to support the legislation.¹⁶⁸ Voting 250 to 177, the House agreed with the Senate bill.¹⁶⁹ As enacted, the bill provides that an unlawful employment practice occurs when a discriminatory compensation decision is adopted. Nothing in the statute limits an employee’s right to challenge an unlawful employment practice.¹⁷⁰ Discriminatory actions carry forth in each paycheck, allowing women to file a complaint in a timely manner for relief.

VII. RELIGIOUS LIBERTY

We are generally taught that courts, not the elected branches, are best suited to protect individual rights. Legislative bodies, operating by majority vote, are supposedly insensitive and unresponsive to minority interests, including those of

¹⁶⁴ Ledbetter v. Goodyear Tire & Rubber Co., 550 U.S. 618, 623-24 (2007).

¹⁶⁵ *Id.* at 628.

¹⁶⁶ *Id.* at 661.

¹⁶⁷ 153 CONG. REC. 929 (2007).

¹⁶⁸ 155 CONG. REC. 1400-01 (2009).

¹⁶⁹ *Id.* at 1671.

¹⁷⁰ Public Law 111-2, 123 Stat. 5 (2009).

religious beliefs. However, on a regular basis individuals and religious groups found support not from the judiciary but from the legislative and executive branches. It might seem logical that a majoritarian institution like Congress cannot be trusted to protect minorities, but history does not follow logic. At the Philadelphia Convention, John Dickinson offered valuable advice: "Experience must be our only guide. Reason may mislead us."¹⁷¹

James Madison predicted that by adding a Bill of Rights to the Constitution, "independent tribunals of justice will consider themselves in a peculiar manner the guardians of those rights."¹⁷² His forecast fell quite short unless we want to speculate on what he meant by "peculiar manner." For the first century and a half, individual rights were promoted and protected almost exclusively through the majoritarian process. The Supreme Court did little to define the jurisprudence of religious freedom until 1940.¹⁷³ That case involved a Jehovah's Witness who went house to house to solicit money, sell books, and play records on a portable phonograph.¹⁷⁴ Some of the records included attacks on Roman Catholics. A unanimous Court struck down a state law that prohibited any person from soliciting money for an alleged religious cause without approval from a designated official.¹⁷⁵

Two weeks later, the Supreme Court decided another case involving Jehovah's Witnesses, this time ruling against them.¹⁷⁶ By a vote of 8 to 1, it upheld a compulsory flag salute for schoolchildren.¹⁷⁷ Jehovah's Witnesses, relying on their interpretation of the Bible, insisted that saluting a secular symbol violated their religious beliefs and the express language in Exodus 20: 4-5: "Thou shalt not make unto thee any graven image, or any likeness of anything that is in heaven above, or that is in the earth beneath, or that is in the water under the earth. Thou shalt not bow down thyself to them, nor serve them."¹⁷⁸

The case involved the refusal of two children, Lillian Gobitis (12 years old) and her brother William (10), to salute the U.S. flag because of their religious beliefs as Jehovah's Witnesses.¹⁷⁹ The family name would be spelled incorrectly as "Gobitis" throughout the litigation.¹⁸⁰ The school regarded their refusal to salute the flag as an act of insubordination, expelling them from school. Their father lacked the funds needed to pay for their education at a private school.¹⁸¹

Writing for the Court, Justice Frankfurter relied heavily on two principles: liberty requires unifying sentiments and national unity promotes national security.¹⁸² His decision was excoriated by law journals, the press, and religious

¹⁷¹ 2 Farrand 278.

¹⁷² 1 Annals of Cong. 439 (1789).

¹⁷³ *Cantwell v. Connecticut*, 310 U.S. 296 (1940).

¹⁷⁴ *Id.* at 301.

¹⁷⁵ *Id.* at 303.

¹⁷⁶ *See Minersville Sch. Dist. v. Gobitis*, 310 U.S. 586, 600-01 (1940).

¹⁷⁷ *Id.*

¹⁷⁸ *Id.* at 592. n.1.

¹⁷⁹ *Id.* at 591-92.

¹⁸⁰ FISHER, RECONSIDERING JUDICIAL FINALITY, *supra* note 138, at 150.

¹⁸¹ *Id.*

¹⁸² *Minersville School District v. Gobitis*, 310 U.S. 586, 597-98 (1940).

organizations.¹⁸³ Of the thirty-nine law reviews that analyzed the decision, thirty-one did so critically, and newspapers accused the Court of violating constitutional liberties and yielding to popular hysteria.¹⁸⁴ Editorials in 171 newspapers ripped Frankfurter's opinion.¹⁸⁵

Justices Black, Douglas, and Murphy, part of Frankfurter's 8-1 majority, began to regret their votes.¹⁸⁶ Two years later, they offered a public apology, stating that the Court's decision in the flag-salute case was "wrongly decided."¹⁸⁷ The Court's lineup now stood at 5-4. That margin was shaky because two members of the 1940 opinion retired from the Court and were replaced by Wiley Rutledge and Robert H. Jackson.¹⁸⁸ Opinions by Rutledge while serving on the D.C. Circuit suggested that he would likely join Stone, Black, Douglas and Murphy in overturning *Gobitis*.¹⁸⁹

The flag-salute issue returned to the Supreme Court in 1943, this time involving a West Virginia case. With a 6-3 majority, the Court overruled its 1940 decision.¹⁹⁰ Only Justices Roberts and Reed agreed with Frankfurter that *Gobitis* was properly decided.¹⁹¹ Writing for the majority, Justice Jackson wrote a powerful and moving defense for religious liberty. However, credit for the reversal belongs to those who refused to accept the Court's 1940 decision and the constitutional reasoning that accompanied it. Citizens and organizations around the country told the Court it did not understand the Constitution, minority rights, or religious freedom.¹⁹²

Consider other judicial reversals. In 1916, Congress passed legislation to regulate child labor in interstate commerce.¹⁹³ Two years later, a 5-4 Supreme Court struck down the statute as unconstitutional.¹⁹⁴ Congress did not accept judicial finality. Lawmakers passed legislation to regulate child labor through the taxing power. In 1922, the Court assembled an 8-1 majority to strike down that legislative effort.¹⁹⁵ Congress responded by passing a constitutional amendment in 1924 to support its authority to regulate child labor but by 1937 only twenty-eight of the necessary thirty-six states had ratified it.¹⁹⁶

Congress remained intent on passing child-labor legislation. In 1938 it passed

¹⁸³ "Frankfurter v. Stone," *The New Republic*, vol. 102, pp. 843-44 (June 24, 1940); Walton Hamilton and George Braden, "The Supreme Court Today," *The New Republic*, vol. 103, p. 180, Aug. 5, 1940; MARK DEWOLFE HOWE, *THE GARDEN AND THE WILDERNESS: RELIGION AND GOVERNMENT IN AMERICAN CONSTITUTIONAL HISTORY* 111 (1965).

¹⁸⁴ DAVID R. MANWARING, *RENDER UNTO CAESAR: THE FLAG-SALUTE CONTROVERSY* 158-60 (1962); Francis H. Heller, *A Turning Point for Religious History*, 29 *VA. L. REV.* 440, 452-53 (1942-1943).

¹⁸⁵ ALPHEUS THOMAS MASON, *HARLAN FISKE STONE: PILLAR OF THE LAW* 532 (1956).

¹⁸⁶ FISHER, *RECONSIDERING JUDICIAL FINALITY*, *supra* note 138, at 152-53.

¹⁸⁷ *Jones v. City of Opelika*, 316 U.S. 584, 624 (1942).

¹⁸⁸ FISHER, *RECONSIDERING JUDICIAL FINALITY*, *supra* note 138, at 153.

¹⁸⁹ *See Busey v. District of Columbia*, 129 F.2d 24, 37-38 (D.C. Cir. 1942).

¹⁹⁰ *West Virginia State Bd. of Educ. v. Barnett*, 319 U.S. 624, 642 (1943).

¹⁹¹ *Id.* at 642-43.

¹⁹² FISHER, *RECONSIDERING JUDICIAL FINALITY*, *supra* note 138, at 153-54.

¹⁹³ Keating-Owen Child Labor Act of 1916, Pub. L. No. 64-249, 39 Stat. 675.

¹⁹⁴ *Hammer v. Dagenhart*, 247 U.S. 251, 277 (1918).

¹⁹⁵ *Bailey v. Drexel Furniture Co.*, 259 U.S. 20, 44 (1922).

¹⁹⁶ JOHN R. VILE, *ENCYCLOPEDIA OF CONSTITUTIONAL AMENDMENTS, PROPOSED AMENDMENTS, AND AMENDING ISSUES, 1789-2002*, 62 (2d ed. 2003).

a bill that relied once again on the commerce power.¹⁹⁷ In 1941, a unanimous Supreme Court upheld the statute.¹⁹⁸ As to its decision in 1918, the Court now remarked that it “was novel when made and unsupported by any provision of the Constitution”¹⁹⁹ Not a shred of constitutional support! The Court in 1941 repudiated both the doctrine of judicial finality and the assertion of judicial infallibility. The Court held that judgments on which goods to exclude from interstate commerce considered injurious to the public health, morals, or welfare were reserved to the elected branches, not to the judiciary.²⁰⁰ The motive and purpose of a regulation of interstate commerce “are matters for the legislative judgment upon the exercise of which the Constitution places no restriction and over which the courts are given no control.”²⁰¹

VIII. THE SOLE-ORGAN DOCTRINE

In *United States v. Curtiss-Wright* (1936), Justice George Sutherland departed from the core issue before the Supreme Court: could Congress delegate to the President certain powers in the field of international relations?²⁰² Legislation enacted in 1934 authorized the President to prohibit the sale of arms in the Chaco region in South America whenever he found that “it may contribute to the reestablishment of peace” between belligerents.²⁰³ When President Roosevelt imposed the embargo he relied exclusively on statutory authority. The proclamation prohibiting the sale of arms and munitions began: “NOW, THEREFORE, I, FRANKLIN D. ROOSEVELT, President of the United States, acting and by virtue of the authority conferred in me by the said joint resolution of Congress.”²⁰⁴

In upholding the delegation, the Court proceeded to add dicta about the President possessing “plenary and exclusive” power for foreign affairs and serving as the “sole organ” in external affairs.²⁰⁵ Anyone reading the text of the Constitution would understand that the Framers did not place all power of external affairs in the President. For the phrase “sole organ,” the Court relied on a speech given by John Marshall in 1800 when he served in Congress.²⁰⁶ The year marked an election contest between President John Adams and Thomas Jefferson. In the House, Jefferson’s supporters urged that Adams be either impeached or censured for turning over to England an individual charged with murder.²⁰⁷ Because the case was already pending in an American court, some lawmakers wanted to sanction Adams for

¹⁹⁷ Fair Labor Standards Act of 1938, Pub. L. No. 75-718, 52 Stat. 1060 (codified as 29 U.S.C. § 203 (2019)). For further details on this legislation see FISHER, RECONSIDERING JUDICIAL FINALITY, *supra* note 138, at 98-99.

¹⁹⁸ *United States v. Darby*, 312 U.S. 100, 115 (1941).

¹⁹⁹ *Id.* at 116.

²⁰⁰ *Id.* at 114.

²⁰¹ *Id.* at 115.

²⁰² See *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304, 319-20 (1936).

²⁰³ Joint Resolution, ch. 365, § 1, 48 Stat. 811 (1934).

²⁰⁴ *Id.*, 1745.

²⁰⁵ *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304, 319-20 (1936).

²⁰⁶ FISHER, RECONSIDERING JUDICIAL FINALITY, *supra* note 138, at 107-08.

²⁰⁷ *Id.*

encroaching on the judiciary and violating the principle of separation of powers.²⁰⁸

Lawmakers and executive officials disagreed about the nationality of the person released to the British. The House resolution began: “it appears to this House that a person, calling himself Jonathan Robbins, and claiming to be a citizen of the United States,” was held on a British ship and committed to trial in the United States “for the alleged crime of privacy and murder, committed on the high seas, on board the British frigate *Hermione*.”²⁰⁹ This claim relied on “it appears,” “calling himself,” and “claiming to be.” What were the facts? Robbins said he was from Danbury, Connecticut, but citizens living there certified they had never known an inhabitant of the town “by the name of Jonathan or Nathan Robbins, and that there has not been nor now is any family known by the name of Robbins within the limits of said town.”²¹⁰ To Secretary of State Timothy Pickering, Robbins was using an assumed name and was actually Thomas Nash, a native Irishman.²¹¹ U.S. District Judge Thomas Bee, asked to turn the prisoner over to the British, agreed that the individual was Thomas Nash.²¹²

Marshall, in a lengthy floor address, explained why there was no basis for impeachment or censure. The Jay Treaty with England contained an extradition provision in Article 27, providing that each country deliver up to each other “all persons” charged with murder or forgery.²¹³ Therefore, President Adams was not making foreign policy unilaterally. Instead, he was implementing a treaty. He fulfilled his Article II, Section 3, authority to take care that the laws, including treaties, be faithfully executed. Under Article VI of the Constitution, all treaties “shall be the supreme Law of the Land.”

During his speech defending Adams, Marshall added this sentence: “The President is the sole organ of the nation in its external relations, and its sole representative with foreign nations.”²¹⁴ The phrase “sole organ” is ambiguous. “Sole” means exclusive but what is “organ?” Simply the President’s duty to communicate to other nations U.S. policy decided jointly by the elected branches? Anyone reading the entire speech would understand that Marshall was not investing the President with plenary and exclusive authority over external affairs. He merely defended Adams for carrying out the extradition provision in the Jay Treaty. By the time Marshall completed his presentation, Jeffersonians considered his argument so tightly reasoned that they dropped plans to impeach or censure Adams.²¹⁵

²⁰⁸ 10 ANNALS OF CONG. 533 (1800).

²⁰⁹ *Id.* at 532.

²¹⁰ *Id.* at 517.

²¹¹ *Id.* at 515.

²¹² See *id.* at 516-17; Ruth Wedgwood, *The Revolutionary Martyrdom of Jonathan Robbins*, 100 YALE L.J. 229 (1990). On page 310 of her article, Wedgwood states that the defendant was not “Jonathan Robbins,” an American, but Thomas Nash, an Irishman.

²¹³ Treaty of Amity, Commerce and Navigation, Great Britain-U.S., art. XXVII, Nov. 19, 1794.

²¹⁴ 10 ANNALS OF CONG. 613 (1800).

²¹⁵ For background on Marshall’s speech, see Louis Fisher, *Presidential Inherent Power: The ‘Sole Organ’ Doctrine*, 37 PRES. STUD. Q. 139, 140-43, 151 (2007); LOUIS FISHER, *THE LAW, STUDIES ON PRESIDENTIAL POWER IN FOREIGN RELATIONS: THE ‘SOLE ORGAN’ DOCTRINE*,

Beginning in 1938 and carrying forward, decade-by-decade, scholars thoroughly discredited Justice Sutherland's opinion for his erroneous use of Marshall's sole-organ speech.²¹⁶ Throughout that period, executive agencies and federal courts relied extensively on the sole-organ doctrine to promote independent presidential power in external affairs.²¹⁷ In 1941, Attorney General Robert Jackson described *Curtiss-Wright* as "a Christmas present to the President."²¹⁸ Executive branch attorneys have turned to the decision with great frequency. As noted by Harold Koh, Justice Sutherland's "lavish description of the president's powers is so often quoted that it has come to be known as the '*Curtiss-Wright*, so I'm right cite'—a statement of deference to the president so sweeping as to be worthy of frequent citation in any government foreign-affairs brief."²¹⁹

In another error in *Curtiss-Wright*, Justice Sutherland claimed that the Constitution commits treaty negotiation exclusively to the President. That is incorrect, as the record plainly shows. Presidents frequently invite not only Senators but also members of the House of Representatives to participate in treaty negotiation. They do that to build political support in the Senate for treaties and support in the House for authorization and appropriation bills needed to implement treaties.²²⁰ Ironically, a book published by Sutherland in 1919 acknowledged that Senators do in fact participate in treaty negotiation and Presidents often accede to this "practical construction."²²¹ How could Sutherland, drawing on his twelve years in the U.S. Senate and personal knowledge about Senators being involved in treaty negotiation, place such an obvious error in the *Curtiss-Wright* decision?

The apparent rule in the Justice Department: if something appears in a Supreme Court decision that promotes presidential power, no matter how egregiously in error, then cite it as fully adequate authority. On a regular basis the Justice Department exploits judicial misconceptions to advance presidential power. In 2009, the Office of Legal Counsel cited "clear dicta" in *Curtiss-Wright* that "[i]nto the field of negotiation the Senate cannot intrude; and Congress itself is powerless to invade it."²²² Clear dicta? No doubt about that. But also erroneous dicta.

<http://www.loufisher.org/docs/pip/441.pdf> [<https://perma.cc/W462-FTD3>]. Marshall's speech is available at <http://loufisher.org/docs/pip/444.pdf> [<https://perma.cc/2S72-ZTHV>].

²¹⁶ See Louis Fisher, *The Staying Power of Erroneous Dicta: From Curtiss-Wright to Zivotofsky*, 31 CONST. COMMENT. 149, 186-99 (2016).

²¹⁷ See *id.* at 175-85, 201-06.

²¹⁸ ROBERT H. JACKSON, *THE STRUGGLE FOR JUDICIAL SUPREMACY: A STUDY OF A CRISIS IN AMERICAN POWER POLITICS* 201 (1941).

²¹⁹ HAROLD HONGJU KOH, *THE NATIONAL SECURITY CONSTITUTION: SHARING POWER AFTER THE IRAN-CONTRA AFFAIR* 94 (1990).

²²⁰ Fisher, *The Staying Power of Erroneous Dicta*, *supra* note 216, at 160; Louis Fisher, *Congressional Participation in the Treaty Process*, 137 U. PA. L. REV. 1511 (1989).

²²¹ GEORGE SUTHERLAND, *CONSTITUTIONAL POWER AND WORLD AFFAIRS* 122-24 (1919).

²²² OFFICE OF LEGAL COUNSEL, *Memorandum Opinion for the Acting Legal Adviser, Department of State* (June 1, 2009), at 9,

<http://www.justice.gov/sites/default/files/olc/opinions/2009/06/31/section7054.pdf> [<https://perma.cc/ZLY6-YBBY>].

IX. FIXING THE SOLE-ORGAN ERROR

Litigation starting in the George W. Bush administration led the Supreme Court to review some *Curtiss-Wright* dicta. Congress passed legislation in 2002 stating that for purposes of the registration of birth, certification of nationality, or issuance of a passport of a U.S. citizen born in the city of Jerusalem, the Secretary of State “shall, upon the request of the citizen or the citizen’s legal guardian, record the place of birth as Israel.”²²³ In signing the bill, President Bush objected that several provisions “impermissibly interfere with the constitutional functions of the presidency in foreign affairs, including provisions that purport to establish foreign policy that are of significant concern.” He expressed particular constitutional concern about Section 214.²²⁴ By referring to the President’s constitutional authority to “speak for the Nation in international affairs” he implicitly, if not explicitly, relied on *Curtiss-Wright* dicta.

As a first principle, we treat as law what appears in a statute, not what is said in a signing statement.²²⁵ Moreover, the remarks by Bush highlight a number of widespread misconceptions. He said that Section 214 would “impermissibly interfere with the President’s constitutional authority to formulate the position of the United States.” The process of creating public policy in external affairs is a constitutional duty assigned to both elected branches, as the Justice Department acknowledged in its brief to the Supreme Court in February 2014. It correctly stated that Congress “also possesses the power to regulate passports pursuant to its enumerated powers.”²²⁶ The Justice Department agreed that the Constitution “provides that the two Branches exercise some foreign-affairs powers jointly.”²²⁷ To that extent, the administration rejected an interpretation of the sole-organ doctrine that placed all of external affairs with the President.

In his signing statement, President Bush asserted that Section 214 interfered with the President’s authority to “determine the terms on which recognition is given to foreign states,” suggesting that the recognition power is vested solely in the President under Article II of the Constitution. There is no evidence that the Framers placed the recognition power solely in the President and it is “certainly not a power that is plenary in nature.”²²⁸ Executive recognition decisions “are not exclusive but are subject to laws enacted by Congress.”²²⁹

Following the Bush signing statement in 2002, a federal district court two years later granted the administration’s motion to dismiss a challenge by private parties,

²²³ Foreign Relations Authorization Act, Fiscal Year 2003, Pub. L. No. 107-228 § 214(d), 116 Stat. 1366 § 214(d) (2002).

²²⁴ 2 PUBLIC PAPERS OF THE PRESIDENTS OF THE UNITED STATES, GEORGE W. BUSH 1697-99 2002.

²²⁵ *Da Costa v. Nixon*, 55 F.R.D. 145, 146 (E.D.N.Y. 1972); LOUIS FISHER, *THE LAW OF THE EXECUTIVE BRANCH: PRESIDENTIAL POWER* 191-96 (2015).

²²⁶ Brief for the Respondent in Opposition at 10, *Zivotovsky v. Kerry*, 566 U.S. 189 (2012) (No. 13-628).

²²⁷ *Id.* at 13.

²²⁸ Robert J. Reinstein, *Recognition: A Case Study on the Original Understanding of Executive Power*, 45 U. RICH. L. REV. 801, 862 (2011).

²²⁹ Robert J. Reinstein, *Is the President’s Recognition Power Exclusive?*, 86 TEMP. L. REV. 1, 60 (2013).

finding that the plaintiffs lacked standing and that the issue was a nonjusticiable political question.²³⁰ In 2006, the D.C. Circuit held that one of the plaintiffs, a three-year old child, suffered injury and remanded the case to the district court. The constitutional question posed several issues, including which should prevail: a statute passed by Congress pursuant to its legislative authority over passport policy, or the administration's policy included in the State Department's Foreign Affairs Manual? Which would have greater weight: a statute or an agency manual? On remand, the district court once again held that the case presented a nonjusticiable political question.²³¹ The D.C. Circuit affirmed.²³² On a request to rehear the case en banc, the D.C. Circuit denied the petition.²³³

On March 26, 2012, the Supreme Court vacated the D.C. Circuit's ruling and remanded the case for further proceedings. Divided 8-1, the Court specifically rejected the position of the D.C. Circuit that the political question doctrine prohibited judicial review of Zivotofsky's claim. It concluded that federal courts "are fully capable of determining whether this statute may be given effect, or instead must be struck down in light of authority conferred on the Executive by the Constitution."²³⁴

The D.C. Circuit issued a decision on July 23, 2013, concluding that the President "exclusively holds" the constitutional power to determine whether to recognize a foreign government and that Section 214(d) of the 2002 statute "impermissibly intrudes on the President's recognition power and is therefore unconstitutional."²³⁵ Halfway into its analysis of legal and historical precedents it turned to Supreme Court decisions, relying heavily on the sole-organ doctrine in *Curtiss-Wright*. It said the Court "echoed" the words of then-Congressman John Marshall by describing the President as the "sole organ of the nation in its external relations, and its sole representative with foreign nations."²³⁶ The Court echoed Marshall's words but not his meaning. The D.C. Circuit demonstrated no understanding that the sole-organ doctrine was not merely dicta but erroneous dicta.

On four other occasions, the D.C. Circuit cited *Curtiss-Wright's* sole-organ theory.²³⁷ As a lower court, it said that "carefully considered" language of the Supreme Court, "even if technically dictum, generally must be treated as authoritative."²³⁸ First, the language in *Curtiss-Wright* regarding the sole-organ doctrine is not carefully considered. It wholly distorts what Marshall said. Second, quite a bit of discretion exists with the word "generally." For further guidance, the D.C. Circuit depended on Supreme Court dicta as especially authoritative if "reiterated."²³⁹ The D.C. Circuit seemed unaware that dicta could be repeated many times and still be false, as with the sole-organ doctrine.

²³⁰ Zivotofsky v. Sec'y of State, 2004 WL 5835212 (D.D.C. 2004).

²³¹ Zivotofsky v. Sec'y of State, 444 F.3d 614, 617 (D.C. Cir. 2006).

²³² Zivotofsky v. Sec'y of State, 571 F.3d 1227 (D.C. Cir. 2009).

²³³ Zivotofsky v. Sec'y of State, 610 F.3d 84 (D.C. Cir. 2010).

²³⁴ Zivotofsky v. Clinton, 566 U.S. 189, 191 (2012).

²³⁵ Zivotofsky v. Sec'y of State, 725 F.3d 197, 214, 220 (D.C. Cir. 2013).

²³⁶ *Id.* at 211 (quoting *United States v. Curtiss-Wright Exp. Corp.*, 299 U.S. 304, 319 (1936)).

²³⁷ *Id.* at 211, 213, 215, 219.

²³⁸ *Id.* at 212 (citing *United States v. Dorcelly*, 454 F.2d 366, 375 (D.C. Cir. 2006)).

²³⁹ *Id.* (citing *Overby v. Nat'l Ass'n of Letter Carriers*, 595 F.3d 1290, 1295 (D.C. Cir. 2010)).

The D.C. Circuit's reliance on the erroneous sole-organ doctrine prompted this author to file an amicus brief with the Supreme Court on July 17, 2014. The summary to the brief explained that the purpose of John Marshall's speech in 1800 was to defend President Adams for carrying out a treaty provision and that nothing in the speech promoted independent presidential authority in external affairs.²⁴⁰ The brief noted that scholars regularly identified defects in the dicta that Justice Sutherland added to *Curtiss-Wright*, "but the Supreme Court has yet to correct his errors. It is time to do so."²⁴¹

The brief identifies three erroneous dicta in *Curtiss-Wright*: the sole-organ doctrine, the belief that Presidents are the sole negotiator of treaties, and the claim that sovereign powers came directly to the national government and bypassed the states.²⁴² As for the third error, the Court said that states "severally never possessed international powers."²⁴³ That is false. The Court claimed that after the Declaration of Independence "the powers of external sovereignty passed from the Crown not to the colonies severally, but to the colonies in their collective and corporate capacity as the United States of America."²⁴⁴

External sovereignty did not circumvent the colonies and the independent states, passing directly to the national government. When Great Britain entered into a peace treaty with America it was not with a national government because one did not yet exist. The agreement of November 30, 1782 states: "His Britannic Majesty acknowledges the said United States, vis. New-Hampshire, Massachusetts Bay, Rhode-Island and Providence Plantations, Connecticut, New-York, New-Jersey, Pennsylvania, Delaware, Maryland, Virginia, North-Carolina, South-Carolina, and Georgia," referring to them as "free, sovereign and independent States."²⁴⁵ During that time, "states operated as sovereign entities" and entered into treaties.²⁴⁶

On June 8, 2015, the Supreme Court rejected the sole-organ doctrine that had magnified presidential power in external affairs for seventy-nine years. Writing for the Court, Justice Anthony Kennedy reviewed the position of Secretary of State John Kerry, who urged the Court to define executive power over foreign affairs in broad terms, relying on language in *Curtiss-Wright* that described the President as "the sole organ of the federal government in the field of international relations."²⁴⁷ In response, the Court said it "declines to acknowledge the unbounded power," stating that *Curtiss-Wright* "does not extend so far as the Secretary suggests."²⁴⁸

There are several deficiencies with the Court's opinion. First, it never clarified

²⁴⁰ Brief *Amicus Curiae* of Louis Fisher in Support of Petitioner at 2, *Zivotofsky v. Kerry*, 135 S. Ct. 2076 (2015) (No. 13-628); available at <http://www.loufisher.org/docs/pip/Zivotofsky.pdf> [<https://perma.cc/HD2Y-UTVQ>].

²⁴¹ *Id.* at 2-3.

²⁴² *See id.* at 8-23.

²⁴³ *United States v. Curtiss-Wright Exp. Corp.*, 299 U.S. 304, 316 (1936).

²⁴⁴ *Id.*

²⁴⁵ 8 Stat. 55 (1782).

²⁴⁶ Brief *Amicus Curiae* of Louis Fisher in Support of Petitioner at 19, *Zivotofsky*, 135 S. Ct. 2076 (No. 13-628).

²⁴⁷ *Zivotofsky v. Kerry*, 135 S. Ct. 2076, 2089 (2015).

²⁴⁸ *Id.*

how the statutory issue in question had anything to do with the President's recognition power. Second, it did not acknowledge that when the D.C. Circuit upheld the administration's policy it relied five times on the erroneous sole-organ dicta in *Curtiss-Wright*. Readers would not understand the legal significance of the sole-organ doctrine in this case. Third, the Court did not explain how Justice Sutherland misrepresented John Marshall's speech.

Why omit such basic and relevant information? Was it considered inappropriate to point an accusing finger at a particular Justice in 1936 and underscore the failure of his colleagues to double-check Marshall's speech to make sure it was being properly cited? Would such an explanation discredit the Supreme Court as an institution capable of constitutional analysis? A straightforward analysis of Sutherland's error in 2015 would have served the important purpose of alerting the D.C. Circuit and other courts to take special care when citing dicta, particularly after the sole-organ dicta had been repudiated by scholars for more than seven decades.

The Court left in place Sutherland's erroneous dicta about the President possessing sole power to negotiate treaties. It even offered fresh support for that misconception, stating that the President "has the sole power to negotiate treaties."²⁴⁹ In that same paragraph, the Court stated that the Constitution "thus assigns the President means to effect recognition on his own initiative. Congress, by contrast, has no constitutional power that would enable it to initiate diplomatic relations with a foreign nation." In fact, members of Congress travel abroad on a regular basis to meet with foreign leaders and see those leaders when they visit Washington, D.C.

Not only may the Justice Department, reporters, and others continue to cite this erroneous dicta from *Curtiss-Wright*, but they can refer to the Court's fresh endorsement that the error remains a valid and binding source of constitutional authority. How many other professions, including medicine and engineering, would make an error seventy-nine years ago, allow it to effect policy over that time with regrettable results, and then give it fresh support no matter how often studies had highlighted the error?

The Court did not discuss scholarly studies that from 1938 to the present time regularly attacked *Curtiss-Wright* for its errors about presidential power.²⁵⁰ The Court did cite an article by Michael Glennon but it failed to mention what he said about *Curtiss-Wright*, calling the decision an "extravagant scheme concocted by Justice George Sutherland."²⁵¹ He explained that Sutherland introduced the "sole organ" quote from Marshall "with no reference to its limiting context," leading Sutherland to claim for the President "plenary and exclusive power" over international relations, a step Glennon called a "breathtaking exegesis" and the "sheerest of dicta."²⁵² He proceeded to describe Sutherland's opinion as "a muddled law review article wedged with considerable difficulty between the pages of United

²⁴⁹ *Id.* at 2086 (citing *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304, 319 (1936)).

²⁵⁰ For a summary of scholarly critiques of *Curtiss-Wright* dicta from 1938 to the present time, see Fisher, *supra* note 216, at 186-99.

²⁵¹ Michael J. Glennon, *Two Views of Presidential Foreign Affairs Power: Little v. Barre or Curtiss-Wright?*, 13 YALE J. INT'L L. 5, 11 (1988).

²⁵² *Id.* at 12.

States Reports.”²⁵³

Having rejected the sole-organ doctrine, the Court proceeded to create a substitute that promotes independent presidential power in external affairs. It began by stating that the recognition of foreign nations is a topic on which the federal government must “speak . . . with one voice” and that voice “must be the President’s.”²⁵⁴ According to the Court, between the two elected branches “only the Executive has the characteristic of unity at all times.”²⁵⁵ Far from revealing unity at all times, various administrations regularly display inconsistency, conflict, disorder, and confusion. That is evident not only by studying particular Presidents but by reading memoirs of top officials who upon retirement chronicle the infighting and disagreements within an administration.

To the quality of unity the Court then added four more characteristics for the President: decision, activity, secrecy, and dispatch. It borrowed those four qualities from Alexander Hamilton’s *Federalist No. 70*.²⁵⁶ Why would the Court assume that unity plus those four qualities are inherently positive in nature, meriting support for broad presidential power in external affairs? Unity, decision, activity, secrecy, and dispatch can certainly have negative consequences. One need only recall presidential initiatives from 1950 to the present time: Truman allowing U.S. troops in Korea to travel northward, provoking the Chinese to introduce their military forces in large numbers and resulting in heavy casualties for both sides; Johnson’s decision to escalate the war in Vietnam; Reagan’s involvement in Iran-Contra, leading to prosecution of those involved and nearly to his impeachment; Bush in 2003 using military force against Iraq on the basis of six claims that Saddam Hussein possessed weapons of mass destruction—six claims found to be entirely empty; and Obama ordering military force against Libya in 2011, leaving behind a country broken legally, economically, and politically, providing a breeding-ground for terrorism.²⁵⁷

In an article published in 2015, Jack Goldsmith evaluated the Court’s decision in *Zivotofsky*. He noted that until the Court released its opinion on Section 214(d) executive branch lawyers “had to rely on shards of judicial dicta, in addition to executive branch precedents and practices, in assessing the validity of foreign relations statutes thought to intrude on executive power.” But now these lawyers “have a Supreme Court precedent with broad arguments for presidential exclusivity in a case that holds that the President can ignore a foreign relations statute.”²⁵⁸ It is wrong, he said, to conclude that *Zivotofsky* repudiates *Curtiss-Wright* dicta. Instead, the Court “affirm[ed] *Curtiss-Wright*’s functional approach to exclusive presidential power.”²⁵⁹ Those who favor independent presidential power in external affairs will seek to exploit the Court’s “untidy reasoning.”²⁶⁰

²⁵³ *Id.* at 13.

²⁵⁴ *Zivotofsky*, 135 S. Ct. at 2086.

²⁵⁵ *Id.*

²⁵⁶ *Id.*

²⁵⁷ See LOUIS FISHER, *PRESIDENTIAL WAR POWER* 100-03, 132-37, 209-32, 238-47 (3d ed. 2013).

²⁵⁸ Jack Goldsmith, *Zivotofsky II as Precedent in the Executive Branch*, 129 HARV. L. REV. 112, 114 (2015).

²⁵⁹ *Id.* at 130.

²⁶⁰ *Id.* at 146.

In a separate analysis, Esam Ibrahim expressed concern about the “danger” of providing “a blueprint for the executive branch to establish an exclusive power” and gives “a determined executive branch the justification it needs to push more deeply into territory traditionally considered legislative.”²⁶¹ As with others, he points out that Section 214(d) “does not expressly involve recognition.”²⁶² In his judgment, *Zivotofsky* “may be even stronger precedent than *Curtiss-Wright* ever was” and is “probably going to replace *Curtiss-Wright* as support for broad inherent executive power in [Office of Legal Counsel] opinions.”²⁶³

X. JAPANESE-AMERICAN CASES

In *Korematsu v. United States* (1944), the Supreme Court upheld the relocation of Japanese Americans (two-thirds of them U.S. citizens) to detention camps.²⁶⁴ With no evidence of disloyalty or subversive activity and without benefit of any procedural safeguards, the United States imprisoned Japanese Americans solely on account of race.²⁶⁵ The previous year, in *Hirabayashi v. United States*, the Court upheld a curfew placed on Japanese Americans on the west coast.²⁶⁶

On February 19, 1942, President Franklin D. Roosevelt issued Executive Order 9066, leading to a military curfew covering all persons of Japanese descent within a designated military area, requiring them to “be within their place of residence between the hours of 8 P.M. and 6 A.M.”²⁶⁷ A month later, Congress passed legislation to ratify the executive order.²⁶⁸ Gordon Hirabayashi, a U.S. citizen of Japanese descent, was prosecuted in federal district court for violating the curfew order.

In a unanimous decision, the Supreme Court upheld the government’s actions. Hirabayashi, born in Seattle, had never been to Japan nor did he have any association with Japanese living there.²⁶⁹ He said it “had at all times been his belief that he would be waiving his rights as an American citizen” if he complied with the curfew order.²⁷⁰ A jury found him guilty on two counts: not remaining in his place of residence during the curfew period, and failing to report to the Civil Control Station to register for evacuation from the military areas. He was sentenced to imprisonment for a term of three months on each count, the sentences to run concurrently.²⁷¹

Writing for the Court, Chief Justice Stone concluded “it was within the constitutional power of Congress and the executive arm of the Government to prescribe this curfew order for the period under consideration and that its

²⁶¹ Esam Ibrahim, *The Dangers of Zivotofsky II: A Blueprint for Category III Action in National Security and War Powers*, 11 HARV. L. & POL’Y REV. 585, 587 (2017).

²⁶² *Id.* at 590.

²⁶³ *Id.* at 592, 593.

²⁶⁴ *Korematsu v. United States*, 323 U.S. 214, 23-24 (1944).

²⁶⁵ *See id.* at 218-19.

²⁶⁶ *Hirabayashi v. United States*, 320 U.S. 81, 104-05 (1943).

²⁶⁷ 7 Fed. Reg. 1407 (1942).

²⁶⁸ *See* The Act of March 21, 1942, 18 U.S.C. § 97(a).

²⁶⁹ *Hirabayashi*, 320 U.S. at 84.

²⁷⁰ *Id.*

²⁷¹ *Id.*

promulgation by the military commander involved no unlawful delegation of legislative power.”²⁷² Because of conditions present in the case, Stone said it “is not for any court to sit in review of the wisdom” of what President Roosevelt and Congress decided and “substitute its judgment for theirs.”²⁷³ That sounds like a political question not suitable for judicial consideration. He claimed that the decision by General John L. DeWitt, who established the curfew, “involved the exercise of his informed judgment.”²⁷⁴ DeWitt’s action was not informed. He believed that all Japanese Americans, by race alone, are disloyal.²⁷⁵ Deferring to certain military judgments might be justified; deferring to racism is not.

In one of three concurrences, Justice Douglas offered this opinion: “If the military were right in their belief that among citizens of Japanese ancestry there was an actual or incipient fifth column, we were indeed faced with the imminent threat of a dire emergency.”²⁷⁶ If? Belief? Courts are expected to operate on the basis of independent judgment and reliable evidence, not suppositions and claims. His decision to forgo judicial independence was clear: “The point is that we cannot sit in judgment on the military requirements of that hour.”²⁷⁷

In another concurrence, Justice Murphy could not locate an earlier ruling where the Court had “sustained a substantial restriction of the personal liberty of citizens of the United States based upon the accident of race or ancestry.”²⁷⁸ To him, the curfew order bore “a melancholy resemblance to the treatment accorded to members of the Jewish race in Germany and in other parts of Europe.”²⁷⁹ His concurrence reads more like a dissent. In fact, he wrote a dissent initially, but under pressure from colleagues, decided to convert his opinion into a concurrence.²⁸⁰

A third concurrence by Justice Rutledge denied that courts have no power or authority to review an action by a military officer. While agreeing that a military officer “must have wide discretion and room for its operation,” it did not follow for him that “there may not be bounds beyond which he cannot go.”²⁸¹ Justice Jackson wrote a draft concurrence but withheld it. Some views in that draft would later appear in his dissent in *Korematsu*.²⁸²

President Roosevelt’s executive order led to the transfer of Americans of Japanese descent to what were euphemistically called “relocation centers.” They were imprisoned solely on account of their race. Divided 6-3, the Court in *Korematsu* supported detention camps in various parts of the country. Writing for the majority, Justice Black offered this analysis: “In the light of the principles we

²⁷² *Id.* at 92.

²⁷³ *Id.* at 93.

²⁷⁴ *Id.* at 103.

²⁷⁵ *Hirabayashi v. United States*, 627 F. Supp. 1445, 1452 (W.D. Wash. 1986).

²⁷⁶ *Hirabayashi v. United States*, 320 U.S. 81, 106 (1943).

²⁷⁷ *Id.*

²⁷⁸ *Id.* at 111.

²⁷⁹ *Id.*

²⁸⁰ PETER IRONS, *JUSTICE AT WAR* 242-46 (1983).

²⁸¹ *Hirabayashi*, 320 U.S. at 114.

²⁸² Dennis J. Hutchinson, “*The Achilles Heel*” of the Constitution: *Justice Jackson and the Japanese Exclusion Cases*, 2002 SUP. CT. REV. 455, 456 (2003).

announced in the *Hirabayashi* case, we are unable to conclude that it was beyond the war power of Congress and the Executive to exclude those of Japanese ancestry from the West Coast war area at the time they did.”²⁸³ What principles were announced in *Hirabayashi*? Basically: Supreme Court Justices should defer to whatever the elected branches wanted to do. The Court followed political judgments, not constitutional principles. In one of the dissents, Justice Murphy protested that the exclusion order resulted from an “erroneous assumption of racial guilt” found in General DeWitt’s report, which referred to all individuals of Japanese descent as “subversives” belonging to “an enemy race” whose “racial strains are undiluted.”²⁸⁴ Murphy chose to dissent from this “legalization of racism.”²⁸⁵ In his dissent, Justice Jackson remarked that “here is an attempt to make an otherwise innocent act a crime merely because this prisoner is the son of parents to which he had no choice, and belongs to a race from which there is no way to resign.”²⁸⁶

Although Jackson chose to dissent, he offered reasoning that supported the majority position. He claimed that the Court, “having no real evidence before it, has no choice but to accept General DeWitt’s own unsworn, self-serving statement, untested by any cross-examination, that what he did was reasonable. And thus it will always be when courts try to look into the reasonableness of a military order.”²⁸⁷ With that reasoning, Jackson could have joined the majority. No real evidence? No choice? Thus it will always be? As a member of an independent branch, Jackson had a duty to probe the basis for the exclusion order and insist on credible and persuasive evidence.

In *Hirabayashi* and *Korematsu*, the Supreme Court decided not to challenge and analyze various executive claims and assertions, many of which were later found to be erroneous. In 1945, Eugene Rostow issued a critique of the Japanese-American cases. The wartime treatment of Japanese aliens and citizens of Japanese descent on the West Coast “has been hasty, unnecessary, and mistaken. The course of action which we undertook was in no way required or justified by the circumstances of the war. It was calculated to produce both individual injustice and deep-seated social maladjustments of a cumulative and sinister kind.”²⁸⁸ The administration was not required to produce evidence nor was it subjected to cross-examination.²⁸⁹ At the time of the exclusion orders, Japanese Americans “had lived in California without committing sabotage for five months after Pearl Harbor.”²⁹⁰ DeWitt’s recommendation to the Secretary of War on February 14, 1942, referred to the Japanese as “an enemy race” whose “racial strains are undiluted.”²⁹¹

In an article published in 1962, Chief Justice Warren reflected on the Japanese-American cases. To him, the decisions “demonstrate dramatically that there are

²⁸³ *Korematsu v. United States*, 323 U.S. 214, 217-18 (1944).

²⁸⁴ *Id.* at 235-36.

²⁸⁵ *Id.* at 242.

²⁸⁶ *Id.* at 243.

²⁸⁷ *Id.* at 245.

²⁸⁸ Eugene V. Rostow, *The Japanese American Cases—A Disaster*, 54 *YALE L. J.* 489, 489 (1945).

²⁸⁹ *Id.* at 507.

²⁹⁰ *Id.*

²⁹¹ *Id.* at 520-21.

some circumstances in which the Court will, in effect, conclude that it is simply not in a position to reject descriptions by the Executive of the degree of military necessity.”²⁹² He added this thought: “To put it another way, the fact that the Court rules in a case like *Hirabayashi* that a given program is constitutional, does not necessarily answer the question whether, in a broader sense, it actually is.”²⁹³

On February 20, 1976, President Gerald Ford issued a proclamation apologizing for the treatment of Japanese Americans during World War II, resulting in “the uprooting of loyal Americans.”²⁹⁴ In 1980, Congress established a commission to gather facts and determine the wrong done by Roosevelt’s order.²⁹⁵ Released in December 1982, the report stated that the order “was not justified by military necessity.” The principal factors shaping those decisions were “race prejudice, war hysteria, and a failure of political leadership.”²⁹⁶ To the commission, the decision in *Korematsu* “lies overruled in the court of history.”²⁹⁷ In 1988, Congress passed legislation to implement the recommendations of the commission. The statute acknowledges “the fundamental injustice of the evacuation, relocation, and internment” of Japanese Americans, apologized for this treatment, and made restitution to individuals of Japanese ancestry.²⁹⁸

In the 1980s, *Hirabayashi* and *Korematsu* returned to court after newly discovered documents revealed the extent to which executive officials had deceived federal courts and the general public. At the time of *Korematsu*’s case in 1944, Justice Department attorneys were aware that a 618-page document called “Final Report,” prepared by the War Department for General DeWitt, contained erroneous claims about alleged espionage efforts by Japanese Americans. The FBI and the Federal Communications Commission rejected War Department assertions that some Japanese Americans had sent signals from shore to assist Japanese submarine attacks along the Pacific coast.²⁹⁹ With abundant evidence of executive branch efforts to deceive the judiciary, *Hirabayashi* and *Korematsu* filed a writ of *coram nobis*, charging the government with committing fraud against the court. Through those actions their convictions were reversed.³⁰⁰

On May 20, 2011, Acting Solicitor General Neal Katyal publicly acknowledged that Solicitor General Charles Fahy had failed to inform the Supreme Court of evidence that undermined the rationale for internment. Katyal underscored the duty of the Solicitor General to be candid and truthful in making representations to the Court: “Only then can we fulfill our responsibility to defend the United States and

²⁹² Earl Warren, *The Bill of Rights and the Military*, 37 N.Y.U. L. REV. 181, 192 (1962).

²⁹³ *Id.* at 192-93.

²⁹⁴ Proclamation No. 4417, 41 Fed. Reg. 7741 (Feb. 20, 1976).

²⁹⁵ See Act of July 31, 1980, Pub. L. No. 96-317 (94 Stat. 964).

²⁹⁶ COMM’N ON WARTIME RELOCATION AND INTERNMENT OF CIVILIANS, PERSONAL JUSTICE DENIED 18 (1982).

²⁹⁷ *Id.* at 238.

²⁹⁸ Act of Aug. 10, 1988, Pub. L. No. 100-383 (102 Stat. 903).

²⁹⁹ See IRONS, *supra* note 280, at 278-84.

³⁰⁰ See generally *Hirabayashi v. United States*, 828 F.2d 591 (9th Cir. 1987); *Hirabayashi v. United States*, 627 F. Supp. 1445 (W.D. Wash. 1986); *Korematsu v. United States*, 584 F. Supp. 1406 (N.D. Cal. 1984).

its Constitution, and to protect the rights of all Americans.”³⁰¹

Consider these responses to the Japanese-American cases: President Ford’s apology in 1976, the commission’s report in 1982, the successful *coram nobis* actions by Hirabayashi and Korematsu in the mid-1980s, congressional legislation in 1988, and Katyal’s announcement in 2011. The Supreme Court had abundant evidence that its decisions in the Japanese-American cases were in error and needed to be corrected. Yet nothing happened until June 26, 2018, when the Court in *Trump v. Hawaii* acknowledged that *Korematsu* was defective as a constitutional ruling.

In upholding a travel ban issued by President Trump in September 2017, Chief Justice Roberts noted that the dissent by Justice Sotomayor, joined by Justice Ginsburg, repudiated *Korematsu*. To Roberts, whatever “rhetorical advantage the dissent may see in doing so, *Korematsu* has nothing to do with this case.”³⁰² He said that the “forcible relocation of U.S. citizens to concentration camps, solely and explicitly on the basis of race” had no application to the travel ban.³⁰³ Yet he then added: “The dissent’s reference to *Korematsu*, however, affords this Court the opportunity to make express what is already obvious: *Korematsu* was gravely wrong the day it was decided, has been overruled by the court of history, and—to be clear—‘has no place in law under the Constitution.’”³⁰⁴

The Court’s action raises several questions. If *Korematsu* was wrong the day it was decided, why did it take the Court seventy-four years to admit it? Why was the decision overruled by a non-judicial body: “the court of history”? Given the Court’s acknowledgment in 2018 that *Korematsu* was defective, what about *Hirabayashi*? Is it still good law? Couldn’t the Court on the same day repudiate both? After the announcement in *Trump v. Hawaii*, Charlie Savage for the *New York Times* referred to *Korematsu* as a “notorious precedent” that remained law “because no case gave justices a good opportunity to overrule it.”³⁰⁵ Does the Court have to wait for a case to correct one of its rulings? Nothing prevents the Court from announcing that an earlier opinion was so utterly defective that it should no longer be cited as having constitutional value.

XI. STATE SECRETS PRIVILEGE

Curtiss-Wright and the Japanese-American cases highlight the capacity of the Supreme Court to make errors and leave them uncorrected for more than seven decades. *Curtiss-Wright* was discredited by the Court’s failure to understand John Marshall’s sole-organ speech. *Hirabayashi* and *Korematsu* were undermined in large part because the executive branch had committed fraud on the courts. Those

³⁰¹ Neal Katyal, *Confession of Error: The Solicitor General’s Mistakes During the Japanese-American Internment Cases*, U.S. DEP’T OF JUST. (May 20, 2011), <https://www.justice.gov/opa/blog/confession-error-solicitor-generals-mistakes-during-japanese-american-internment-cases> [https://perma.cc/8PHL-Y2JC].

³⁰² *Trump v. Hawaii*, No. 17-965, slip op. at 38 (U.S. June 26, 2018).

³⁰³ *Id.*

³⁰⁴ *Id.*

³⁰⁵ Charlie Savage, *Korematsu, Long a Stain on the Supreme Court, Is Tossed Out*, N.Y. TIMES, June 27, 2018, at A17.

same issues apply to *United States v. Reynolds*, involving a midair explosion of a B-29 bomber.³⁰⁶ Six of nine crewmembers perished, along with three of the four civilian engineers on board.³⁰⁷

Three widows of the engineers filed a tort claims action to determine if the Air Force had been negligent.³⁰⁸ As with the sole-organ doctrine and the Japanese-American cases, the Supreme Court in *Reynolds* relied on false information about presidential power. For example, in its brief submitted to the Court in 1952, the Justice Department cited the Aaron Burr trial of 1807 as a precedent for the executive branch to withhold sensitive documents from the courts.³⁰⁹ The department produced a list of what it called successful assertions of the state secrets privilege. Among the examples: “[c]onfidential information and letters relating to Burr’s conspiracy.”³¹⁰ Guided by the Justice Department, courts have cited the Burr trial as a legitimate precedent for the state secrets privilege. A district court in 1977 claimed that the privilege “can be traced as far back as Aaron Burr’s trial in 1807.”³¹¹ In 1989, the D.C. Circuit located the “initial roots” of the privilege to Burr’s trial.³¹² A district court in 2004 explained that the origin of the privilege “can be traced back to the treason trial of Aaron Burr.”³¹³

Those claims are false. As will be explained, Burr insisted on certain documents to defend himself and was fully supported by the judiciary. Burr’s trial in Richmond, Virginia, was handled by Chief Justice Marshall, who understood that he needed to issue a subpoena to President Jefferson for certain documents. If it be a duty to issue a subpoena to the President, “the court can have no choice in the case.”³¹⁴ Marshall’s primary concern was that the judiciary would lose respect by failing to give an accused access to information needed for his defense. He said that if he were a party to withholding documents needed by a defendant to clear his name, he would “deplore” any action on his part to deny Burr documents needed to clear his name.³¹⁵ Jefferson assured the court of his “readiness” to furnish on “all occasions whatever the purposes of justice may require,” expressing “a perfect willingness to do what is right.”³¹⁶ The jury found Burr not guilty of treason and a misdemeanor charge.³¹⁷ Despite claims by the Justice Department and several federal courts, the Burr trial is not a precedent for the state secrets privilege.

³⁰⁶ *United States v. Reynolds*, 345 U.S. 1, 2-3 (1953).

³⁰⁷ *Id.* at 3.

³⁰⁸ *Id.* For a detailed history and analysis of the B-29 case, see LOUIS FISHER, *IN THE NAME OF NATIONAL SECURITY: UNCHECKED PRESIDENTIAL POWER AND THE REYNOLDS CASE* (2006).

³⁰⁹ Brief for Petitioner at 10, *United States v. Reynolds*, 345 U.S. 1 (1953) (No. 21), 1952 WL 82378, at *10-11.

³¹⁰ *Id.* at 24.

³¹¹ *Jababa v. Kelley*, 75 F.R.D. 475, 483 (D. Mich. 1977).

³¹² *In re United States*, 872 F.2d 472, 474-75 (D.C. Cir. 1989).

³¹³ *Edmonds v. U.S. Dep’t of Justice*, 323 F. Supp. 2d 65, 70 (D.D.C. 2004).

³¹⁴ *United States v. Burr*, 25 F. Cas. 30, 34 (C.C.D. Va. 1807) (No. 14,692d).

³¹⁵ *Id.* at 37.

³¹⁶ *United States v. Burr*, 25 F. Cas. 55, 65 (C.C.D. Va. 1807) (No. 14,693).

³¹⁷ *Id.* at 181; *United States v. Burr*, 25 F. Cas. 201, 202 (C.C.D. Va. 1807) (No. 14,694). For further details on Burr’s trial, see Louis Fisher, *Jefferson and the Burr Conspiracy: Executive Power Against the Law*, 45 *PRESIDENTIAL STUD. Q.* 157 (2015).

In *Reynolds*, the Court considered the state secrets doctrine as a privilege “well established in the law of evidence.”³¹⁸ Among the cases the Court cited for that proposition, and standing first in line, is a Civil War government spy case, *Totten v. United States*.³¹⁹ The case involved a contract between President Lincoln and William A. Lloyd, in which Lloyd agreed to collect data on Confederate troops. Lloyd was to be paid \$200 a month but received funds only to cover his expenses. After he died, his family sought to recover compensation for his services. The Supreme Court concluded that the case was not justiciable because it involved a confidential agreement between a President and someone he hired as a spy.³²⁰ However, a state secrets case *is* justiciable. The widows in the B-29 case had every right to file their case. Nothing in *Totten* had any bearing on the *Reynolds* case even if the Supreme Court mistakenly thought otherwise.

Litigation in *Reynolds* began when the three widows brought action under the Federal Tort Claims Act. They asked for the accident report and depositions of the three surviving crewmembers. Under the tort claims statute, federal agencies settle claims against the United States caused by negligent or wrongful acts by federal employees acting within the scope of their official duties.³²¹ Congress empowered courts to exercise individual judgment. There were no grounds for judges to accept at face value a government’s claim that an agency document sought by plaintiffs was somehow privileged. Courts must examine documents to verify assertions by the government. Permitting executive officials to withhold documents that reveal government negligence would make a nullity of the statute.

The lawsuit was assigned to Judge William H. Kirkpatrick in the Eastern District of Pennsylvania. Guided by various precedents, he decided on June 30, 1950, that the accident report and findings of the Air Force’s investigation were “not privileged.”³²² Rather than share all documents with the plaintiffs, he directed the government to produce for his examination certain documents, including the accident report. He would read the material in his chamber (*in camera* review). When the government failed to produce the documents he requested, he ruled in favor of the three widows.³²³

The case moved to the Third Circuit, where the government insisted that “disclosure by the head of an executive department cannot be coerced.”³²⁴ The appellate court insisted on judicial independence and the right of plaintiffs to pursue their claim. It upheld Judge Kirkpatrick’s decision that good cause had been shown to produce the accident report and statement of survivors for his reading *in camera*. Considerations of justice required access to facts.³²⁵ To grant the government the

³¹⁸ *United States v. Reynolds*, 345 U.S. 1, 6-7 (1953).

³¹⁹ *Id.* at 7 n.11.

³²⁰ *Totten v. United States*, 92 U.S. 105, 106-07 (1875).

³²¹ Federal Tort Claims Act, ch. 753, sec. 403, 60 Stat. 843 (1946).

³²² *Brauner v. United States*, 10 F.R.D. 468, 472 (E.D. Pa. 1950).

³²³ *Sur Pleadings and Proof, Brauner v. United States*, Civil Action No. 9793, and *Reynolds v. United States*, Civil Action No. 10142 (E.D. Pa. February 20, 1951).

³²⁴ Brief for Petitioner-Appellant, *Reynolds v. United States*, No. 10483 (3d Cir. 1951), 1.

³²⁵ *Reynolds v. United States*, 192 F.2d 987, 992 (3d Cir. 1951), *rev’d*, 345 U.S. 1 (1953).

“sweeping privilege” it claimed would be contrary to “a sound public policy.”³²⁶ It would be “a small step to assert a privilege against any disclosure of records merely because they might prove embarrassing to government officers.”³²⁷

The government then took the case to the Supreme Court, insisting that “there are well settled privileges for state secrets and for communications of informers, both of which are applicable here.”³²⁸ On March 9, 1953, Chief Justice Vinson ruled that the government had presented a valid claim of privilege.³²⁹ The Court divided 6-3, with Justices Black, Frankfurter, and Jackson dissenting “substantially for the reasons set forth in the opinion of Judge Maris” for the Third Circuit.³³⁰ Those words consisted of their entire dissent. They did not indicate what parts of Maris’s decision they accepted or rejected. The three dissenters flatly refused to say a single word about potential weaknesses and deficiencies in the majority opinion.

As to the duty of the Supreme Court to exercise judicial supervision over executive actions, Vinson offered this view: “The court itself must determine whether the circumstances are appropriate for the claim of privilege, and yet do so without forcing a disclosure of the very thing the privilege is designed to protect.”³³¹ His point was misleading. If the government can keep a document from a judge, even for *in camera* review, a judge could not possibly “determine whether the circumstances are appropriate for the claim of privilege.” To Vinson: “Judicial control over the evidence of a case cannot be abdicated to the caprice of executive officers.”³³² Yet if an executive officer did act capriciously and arbitrarily, a judge following Vinson’s procedure would not be aware of those actions. Without access to evidence, federal courts necessarily rely on assertions and allusions by the government. The Supreme Court chose not to look at the accident report *in camera*, preferring to trust in statements by the government.

The accident report was declassified in 1995.³³³ It contains no state secrets but abundant evidence that the Air Force was negligent in allowing the B-29 to fly.³³⁴ The three families sued the government under a writ of *coram nobis*, charging that the government had misled the Supreme Court and committed fraud against it.³³⁵ Tolerating fraud in a particular case lowers respect for judges, reduces confidence in the courts, and leads to future injuries to individual rights. The government argued that the issue of *coram nobis* relief should be sent back to district court, but plaintiffs

³²⁶ *Id.* at 995.

³²⁷ *Id.*

³²⁸ Brief for Petitioner at 11, *United States v. Reynolds*, 345 U.S. 1 (1953) (No. 21), 1952 WL 82378, at *11.

³²⁹ *See* *United States v. Reynolds*, 345 U.S. 1, 6-7 (1953).

³³⁰ *Id.* at 12.

³³¹ *Id.* at 8.

³³² *Id.* at 9-10.

³³³ FISHER, RECONSIDERING JUDICIAL FINALITY, *supra* note 138, at 194.

³³⁴ Brief for Petitioner, app. at 22a, 27a, 66a-67a, *United States v. Reynolds*, 345 U.S. 1, 12 (1953).

³³⁵ For more details on *coram nobis* see FISHER, RECONSIDERING JUDICIAL FINALITY, *supra* note 138, at 173-76, 178, 181, 194-98.

insisted that the Supreme Court “should now act in this case to set things right.”³³⁶ Without explanation, the Court on June 12, 2003 issued a statement reading “[m]otion for leave to file a petition for writ of error *coram nobis* denied.”³³⁷ The Court had an opportunity to confront erroneous claims by the government regarding the contents of the accident report. It failed to do that. It also neglected to acknowledge that it failed to read the report *in camera*.

The plaintiffs returned to lower courts in pursuit of justice. They lost in district court³³⁸ and the Third Circuit.³³⁹ On May 1, 2006, the Supreme Court denied certiorari.³⁴⁰ At every level of this litigation, the judiciary signaled to the executive branch that it is at liberty to present false claims and arguments to courts at no cost to itself. The constitutional value ignored is the need to protect the integrity, independence, and reputation of the federal judiciary and the right of private citizens to pursue their interests in courts. When courts operate in that manner, citizens lose faith in the judiciary, the rule of law, the adversary legal process, and the constitutional principle of checks and balances.

Following the 9/11 terrorist attacks, the Bush administration invoked the state secrets privilege to prevent litigants from challenging the practice of the executive branch to conduct electronic surveillance and to transfer individuals to other countries for interrogation and torture. Consider the case of Khaled El-Masri, who traveled to Macedonia at the end of 2003 for vacation. Border guards detained him in part because of confusion about his name.³⁴¹ They thought he was Khalid al-Masri, a suspect from an Al Qaeda cell in Hamburg, Germany.³⁴² Moreover, there was concern that his passport was a forgery.³⁴³ CIA agents flew him to a prison in Afghanistan where he was subjected to abuse and violence.³⁴⁴ Eventually the CIA determined that his passport was genuine and they had imprisoned the wrong person. On May 28, 2004, he was flown to Albania and allowed to return to Germany.

El-Masri sued CIA Director George Tenet, the airlines used by the CIA, and current and former employees of the agency.³⁴⁵ The Bush administration invoked the state secrets privilege to prevent the case from moving toward discovery of government documents.³⁴⁶ A federal district court began its decision by stating that “courts must not blindly accept the Executive Branch’s assertion” of the state secrets privilege.³⁴⁷ It then abandoned any pretense of judicial independence by stating it

³³⁶ Petitioners’ Reply in Support of Their Motion to File Petition for a Writ of Error Coram Nobis, *United States v. Reynolds*, 345 U.S. 1, 12 (1953).

³³⁷ *In re Herring*, 539 U.S. 940, 940 (2003).

³³⁸ *Herring v. United States*, No. 03-CV-5500-LDD, 2004 WL 2040272, at *11 (E.D. Pa. Sept. 10, 2004).

³³⁹ *Herring v. United States*, 424 F.3d 384, 392 (3d Cir. 2005).

³⁴⁰ *Herring v. United States*, 547 U.S. 1123, 1123 (2006).

³⁴¹ FISHER, RECONSIDERING JUDICIAL FINALITY, *supra* note 138, at 199.

³⁴² *Id.*

³⁴³ *Id.*

³⁴⁴ JANE MAYER, THE DARK SIDE: THE INSIDE STORY OF HOW THE WAR ON TERROR TURNED INTO A WAR ON AMERICAN IDEALS 282-87 (2008).

³⁴⁵ FISHER, RECONSIDERING JUDICIAL FINALITY, *supra* note 138 at 199.

³⁴⁶ *Id.*

³⁴⁷ *El-Masri v. Tenet*, 437 F. Supp. 2d 530, 536 (E.D. Va. 2006).

“must bear in mind the Executive Branch’s preeminent authority over military and diplomatic matters,” requiring the court to accept executive branch assertions without attempting “a judicial balancing of the various interests at stake.”³⁴⁸ It held that the state secrets privilege had been validly asserted in this case.³⁴⁹ The Fourth Circuit affirmed, pointing out that a case of this nature “pits the judiciary’s search for truth against the Executive’s duty to maintain the nation’s security.”³⁵⁰

Although relief for El-Masri would not be available from American courts, on December 13, 2012, the European Court of Human Rights unanimously ruled that he was an innocent victim of torture and abuse.³⁵¹ The Court held Macedonia responsible for his mistreatment and transfer to U.S. authorities and ordered Macedonia to pay \$78,000 in damages to El-Masri.³⁵² Macedonia’s Ministry of Justice said it would comply.³⁵³ This process brought a measure of justice and accountability, but the United States offered no admission of error.

The Bush administration inflicted great harm on Maher Arar, a Canadian citizen. Upon returning home to Ottawa in September of 2002, he was pulled aside for questioning at JFK airport by New York police and FBI agents. Within a short time, the administration sent him to Syria where for nearly a year he was subjected to beatings and threatened with other physical abuse. Unable to link him to terrorism, he was eventually released by Syria. Arar then filed a civil suit seeking money damages and declaratory relief from a number of U.S. officials. As with El-Masri, the Bush administration invoked the state secrets privilege.³⁵⁴ A federal district court dismissed Arar’s claim for declaratory relief, holding that Arar lacked standing to bring the claim.³⁵⁵

In a 7-4 opinion, the Second Circuit decided not to offer Arar any declaratory relief.³⁵⁶ In deferring to the executive branch, the majority relied in part on the erroneous dicta in the *Curtiss-Wright* case about the “plenary and exclusive power of the President as the sole organ of the federal government in the field of international relations.”³⁵⁷ In a dissent, Judge Barringer Daniels Parker pointed to “an enormous difference between being deferential and being supine in the face of governmental misconduct.”³⁵⁸ It is not the role of the judiciary “to serve as a help-mate to the executive branch” and avoid “difficult decisions for fear of complicating life for federal officials.”³⁵⁹ Judge Guido Calibresi, in another dissent, objected to

³⁴⁸ *Id.* at 536-37.

³⁴⁹ *Id.* at 539.

³⁵⁰ *El-Masri v. United States*, 479 F.3d 296, 304 (4th Cir. 2007).

³⁵¹ Nicolas Kulich, *Court Finds Rights Violation in C.I.A. Rendition Case*, N.Y. TIMES (Dec. 14, 2012), <https://www.nytimes.com/2012/12/14/world/europe/european-court-backs-cia-rendition-victim-khaled-el-masri.html> [<https://perma.cc/X3L8-69TL>].

³⁵² *Id.*

³⁵³ *Id.*

³⁵⁴ FISHER, RECONSIDERING JUDICIAL FINALITY, *supra* note 138, at 200.

³⁵⁵ *Arar v. Ashcroft*, 414 F. Supp. 2d 250, 287 (E.D.N.Y. 2006).

³⁵⁶ *Arar v. Ashcroft*, 585 F.3d 559, 563 (2d Cir. 2009).

³⁵⁷ *Id.* at 575.

³⁵⁸ *Id.* at 611. (Parker, J., dissenting).

³⁵⁹ *Id.*

the majority's "utter subservience to the executive branch."³⁶⁰

To its credit, Canada conducted an independent investigation to determine the facts and produced a three-volume, 822-page report concluding that Canadian intelligence officials had shared with the United States false warnings and unreliable information about Arar. Following this study, on January 26, 2007, Prime Minister Stephen Harper released a public apology.³⁶¹ Arar and his family received \$10.5 million in compensation.³⁶² Canada found fault and took steps to bring justice. The United States, responsible for Arar's suffering, offered no apology.

When the Obama administration issued a report to Congress on April 29, 2011, regarding the state secrets privilege, it concluded that no change was warranted with respect to assertions of the privilege by the Bush administration, including actions taken against Khaled El-Masri and Maher Arar.³⁶³ Moreover, in a number of other cases the Obama administration invoked the privilege to abuse individual rights, including placing them on the no-fly list without making public the reasons for doing so. Often the government can rely on arbitrary and erroneous reasons to deny individuals the right to fly.³⁶⁴

The pattern of judicial deference to executive claims of the state secrets privilege largely continued.³⁶⁵ The unwillingness of federal judges to independently analyze charges of executive illegality in cases of state secrets is evident in the Ninth Circuit's decision in *Mohamed v. Jeppesen Dataplan, Inc.*³⁶⁶ Litigation began under President Bush after 9/11 and carried forward into the Obama administration. The case involved a private contractor who provided assistance to what were called CIA torture flights.³⁶⁷ Initially, the Ninth Circuit claimed it had an obligation to "make an independent determination whether the information is privileged."³⁶⁸

Yet it soon chose to acquiesce entirely to executive claims, relying on an earlier case for this guidance: "In evaluating the need for secrecy, 'we acknowledge the need to defer to the Executive on matters of foreign policy and national security and surely cannot legitimately find ourselves second guessing the Executive in this arena.'"³⁶⁹ A dissent by Judge Hawkins underscored the fundamental defect of this judicial attitude: "Permitting the executive to police its own errors and determine the remedy dispensed would not only deprive the judiciary of its role, but also deprive

³⁶⁰ *Id.* at 630. (Calibresi, J., dissenting).

³⁶¹ *Harper's Apology 'Means the World': Arar*, CBC NEWS (January 26, 2007, 12:40 PM), <http://www.cbc.ca/news.canada/harper-s-apology-means-the-world-arar-1.646481> [<https://perma.cc/9YLK-78VV>].

³⁶² *Id.*

³⁶³ FISHER, RECONSIDERING JUDICIAL FINALITY, *supra* note 138, at 200-01.

³⁶⁴ LOUIS FISHER, PRESIDENT OBAMA: CONSTITUTIONAL ASPIRATIONS AND EXECUTIVE ACTIONS 183-85 (2018).

³⁶⁵ *Id.* at 180-85, 197-201.

³⁶⁶ *Mohamed v. Jeppesen Dataplan, Inc.*, 614 F.3d 1070 (9th Cir. 2010).

³⁶⁷ FISHER, *supra* note 364, at 182-83.

³⁶⁸ *Mohamed v. Jeppesen Dataplan, Inc.*, 614 F.3d 1070, 1080 (9th Cir. 2010) (quoting *Al-Haramain Islamic Foundation, Inc. v. Bush*, 507 F.3d 1190, 1202 (9th Cir. 2007)).

³⁶⁹ *Id.* at 1081-82.

Plaintiffs of a fair assessment of their claims by a neutral arbiter.”³⁷⁰

XII. CONCLUSIONS

From 2015 to 2018, the Supreme Court corrected errors in *Curtiss-Wright* and *Korematsu*. In *Reynolds*, the Supreme Court had an opportunity to respect the constitutional principles that guided the district court and the Third Circuit: judicial independence, checks and balances, the rights of litigants to seek justice, and an insistence on reading the accident report *in camera*. The Court ignored all four principles, choosing to simply defer to executive power and assertions. Five decades later, when the three families returned to seek justice, the Court was fully aware of its errors. It was time to correct them. Yet the court let them survive.

As a consequence, the executive branch continues to assert the state secrets privilege and federal judges routinely defer to presidential authority. The result: private litigants are regularly denied access to fundamental constitutional protections. Justice would be served if the Supreme Court announced, without any litigation, that its decision in *Reynolds* was defective because it failed to look at the accident report and wrongly acquiesced to executive claims, with those claims later found to be false. If the Supreme Court took that initiative, the executive branch and federal courts could no longer rely on *Reynolds* for support and guidance. Private citizens could begin to build trust in a judiciary capable of reaching independent and informed decisions.

³⁷⁰ *Id.* at 1101 (Hawkins, J., dissenting). For a detailed analysis of this case, see CHRIS EDELSON, EMERGENCY PRESIDENTIAL POWER: FROM THE DRAFTING OF THE CONSTITUTION TO THE WAR ON TERROR 251-55 (2013).