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## THE SECURITY COURT

MATT STEILEN\*

### ABSTRACT

*The Supreme Court is concerned not only with the limits of our government's power to protect us, but also with how it protects us. Government can protect us by passing laws that grant powers to its agencies or by conferring discretion on the officers in those agencies. Security by law is preferable to the extent that it promotes rule of law values—certainty, predictability, uniformity, and so on—but, security by discretion is preferable to the extent that it gives government the room it needs to meet threats in whatever form they present themselves. Drawing a line between security by law and security by discretion is an important and long-standing jurisprudence of the United States Supreme Court, although it is rarely acknowledged as such and entangled with the more general law of separation of powers. In some separation of powers cases, however, where both political branches have a colorable textual and historical claim to exercise authority, it is the Court's concern with preserving the rule of law or making room for necessary discretion that tilts the balance in favor of one branch or another. This Essay begins by examining an important nineteenth-century case, *In re Neagle*, and shows how Justices cleaved around the distinction between security by law and secu-*

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\* University at Buffalo School of Law. Thanks to Jonathan Manes and Jack Schlegel. This Essay is based on remarks given at Chautauqua Institution in July 2017, during a week on the United States Supreme Court. I thank Greg Peterson and Clem Reiss for the invitation.

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*riety by discretion. This Essay then describes a line of cases, beginning in the early republic, in which the Court was concerned with how government secures us. Finally, this Essay identifies cases when the Court shrunk from this role and explains why.*

An unfortunate aspect of today's constitutional law canon is the dearth of late-nineteenth-century cases. We read through the period always en route to somewhere else—to *West Coast Hotel*,<sup>1</sup> to *Jones & Laughlin Steel*,<sup>2</sup> to *Brown*,<sup>3</sup> to a single footnote in a case about filled milk.<sup>4</sup> Events today, however, continue to suggest the relevance of the nineteenth century for our own constitutional self-understanding. We should tell some stories about our fundamental law that begin or end here, or at least pause. There are stories to tell about racial apartheid, empire and individual rights, and, I think, security and government. This Essay tells a story about the role of the Supreme Court in matters of security, and while it does not begin in the *fin de siècle*, or end there, it does more than watch the station flash past from a seat on the train. I begin with an important and thrilling case, which all of us should know, and use the case to frame a narrative about the role of the Supreme Court in matters of security.

The case is *In re Neagle*.<sup>5</sup> It involves two chief justices of the California Supreme Court who served in successive terms. The first was David S. Terry, born in Kentucky in 1823 to a family of Scotch-Irish descent. His parents moved to Texas in 1835 and soon both died, leaving their thirteen-year-old boy, as he later put it, “to my own guardianship.”<sup>6</sup> Terry made use of his freedom the way we imagine a thirteen-year-old might and found his way, later that year, into the Texas War of Independence. He grew tall, standing six-foot-three, with what one contemporary called “Atlantean shoulders and sinews.”<sup>7</sup> At age twenty-seven, Terry traveled to California where he engaged in some “Indian fighting” and mined for gold in Calaveras County. It was a free time in the West and men like him could move between occupations and classes in ways that seem unimaginable to us now. One year later, Terry ran for mayor of Stockton but lost. He opened a law practice, and in late 1855, at age thirty-three, five years after arriving in the state, he was elected to its supreme court. Terry's opinions have been described as “terse, logical and generally sound,” which was surely praise, but

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1. *West Coast Hotel Co. v. Parrish*, 300 U.S. 379 (1937).

2. *Nat'l Labor Relations Bd. v. Jones & Laughlin Steel Corp.*, 301 U.S. 1 (1937).

3. *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954).

4. *United States v. Carolene Prods. Co.*, 304 U.S. 144, 152 n.4 (1938).

5. 135 U.S. 1 (1890).

6. OSCAR T. SHUCK, BENCH AND BAR IN CALIFORNIA: HISTORY, ANECDOTES, REMINISCENCES 281 (1889).

7. *Id.* at 286.

one senses the law did not leave too deep an impression on the man.<sup>8</sup> During his first year in judicial office, Terry stabbed someone in the neck during an armed standoff. Two years later he became involved in a public dispute with David Broderick, United States Senator from California; Terry resigned his judgeship, challenged the senator to a duel, and shot him dead. Terry promptly left California for Texas to fight with the Confederate Army in the Civil War.<sup>9</sup>

The second of our chief justices is much better known, although not for vividness of biography. This is Stephen J. Field, who became Chief Justice of the California Supreme Court in 1859 upon Terry's resignation and was elevated several years later by President Lincoln to the United States Supreme Court. Field was born in 1816 into a sophisticated New England family. He attended Williams College and practiced law in New York City with his brother, David Dudley Field, Jr. (known to us for his "Field Code of Civil Procedure"). In 1848, Stephen traveled to California to make his fortune in the gold rush. He called in a debt owed to his brother and used the money to speculate in land. For a time, he had success and was soon elected to the state legislature. It is perhaps telling of the difference between Field and Terry that when Field was challenged to a duel, "no shots were exchanged" "[f]or various reasons."<sup>10</sup> The result was fortuitous for Field, who later professed never to carry a firearm. He was appointed to the California Supreme Court in 1857, where he served with Terry for two years.<sup>11</sup>

The *Neagle* case arose out of a bizarre series of events that unfolded when Terry returned to California after the Civil War. He married a woman named Sarah Hill, who claimed rights by an earlier marriage to half the assets of a deceased Nevada silver baron. Oddly enough, Justice Field presided over litigation contesting the validity of the marriage contract, sitting in his capacity as a federal circuit judge. At one point in the proceedings, David Terry became so irate that he punched the Federal Marshal, breaking one of his teeth, and then pulled a nine-inch bowie knife from his jacket as deputy marshals attempted to remove him from the courtroom.<sup>12</sup> Justice Field found him in contempt of court, but it did little to deter Terry, who began to threaten Justice Field as soon as he was released from custody. He would "horsewhip" Field, Terry said, and if the Justice "resent[ed] it," he would kill him.<sup>13</sup> Newspapers covered the story relentlessly.<sup>14</sup>

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8. *David S. Terry*, DAILY EVENING BULL., Aug. 14, 1889, at 3.

9. SHUCK, *supra* note 6, at 283, 284–85.

10. Adrian M. Tocklin, *Pennyroy v. Neff: The Hidden Agenda of Stephen J. Field*, 28 SETON HALL L. REV. 75, 105 (1997).

11. *Id.* at 102–07.

12. Walker Lewis, *The Supreme Court and a Six-Gun: The Extraordinary Story of In re Neagle*, 43 A.B.A. J. 415, 416–17, 477 (1957).

13. *In re Neagle*, 135 U.S. 1, 46 (1890).

14. *Id.* at 46–47.

Back in Washington, the United States Attorney General wrote to the Federal Marshal in San Francisco, expressing concern for Field's safety. To protect Field while he traveled between courthouses in Los Angeles and San Francisco, the Attorney General ordered the Marshal to "employ certain special deputies" as bodyguards.<sup>15</sup> The Marshal appointed David Neagle, a "small and wiry" man who served as Chief of Police in Tombstone, Arizona.<sup>16</sup> During the next session of the circuit court, Deputy Neagle accompanied Justice Field, traveling with him between courthouses by train. Eventually, David Terry found his way onto one of those trains. While Field and Neagle were eating breakfast in a dining car en route to San Francisco, Terry approached them and slapped Justice Field in the face. Neagle stood up and shouted, "Stop!"<sup>17</sup> Terry slapped Field again; Neagle drew his revolver and shot him twice. Terry fell to the ground dead. He had no firearm on him.<sup>18</sup>

Deputy Neagle was arrested and charged with murder by the state of California. He petitioned for a writ of habeas corpus, asserting that the State should discharge him because he acted, as the habeas statute stated, "in pursuance of a law of the United States."<sup>19</sup> But there was no statute authorizing federal marshals to act as bodyguards to federal judges outside of court. There was only a letter from the Attorney General directing the Marshal to appoint "special deputies" to protect Field.<sup>20</sup> Did this letter exempt a man from a state's criminal law? The United States Supreme Court affirmed the discharge of Deputy Neagle,<sup>21</sup> but, remarkably, there was a dissent. Justice Lamar and Chief Justice Fuller would have recommitted the deputy to the custody of the sheriff.<sup>22</sup> Why?

At its core, the dispute between the majority and the dissent was about how the government protects itself and us. It was a dispute about the proper form of acts to protect and secure. One form is law. We are a government of laws, Justice Marshall reminded us in *Marbury v. Madison*,<sup>23</sup> and a government of laws protects itself and its citizens by passing laws.<sup>24</sup> To that end, many of the legislative powers vested in Congress by the Constitution

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15. *Id.* at 51.

16. Lewis, *supra* note 12, at 478.

17. *Justice Field's Story*, *supra* note 8, at 3. An eyewitness also reported that Neagle shouted to Terry that he should "[s]top that." *Accounts of Eyewitnesses*, *supra* note 8, at 3.

18. *Result of the Investigation by the Coroner*, DAILY EVENING BULL., Aug 15, 1889, at 1.

19. *In re Neagle*, 135 U.S. at 40.

20. *Id.* at 51.

21. *Id.* at 76.

22. *Id.* at 80 (Lamar, J., dissenting).

23. 5 U.S. (1 Cranch) 137 (1803).

24. *Id.* at 163 ("The government of the United States has been emphatically termed a government of laws, and not of men. It will certainly cease to deserve this high appellation, if the laws furnish no remedy for the violation of a vested legal right.")

are relevant to security. Yet law never covers every contingency. There are always gaps, unaccounted for cases, and rapid developments—eventualities that require the exercise of “discretion” in the sense of open choice. Discretion is the second form of security, and the Constitution, along with ordinary federal law, provides for the election and appointment of officers to exercise such discretion. We are a government of laws, but we are also, necessarily, a government of discretion.

The majority and dissent in *Neagle* cleaved around the distinction between law and discretion. Writing for the majority, Justice Miller pointed to the Take Care Clause of Article II,<sup>25</sup> which states that the President “shall take Care that the Laws be faithfully executed.”<sup>26</sup> Justice Miller reasoned that the clause obligated the President to protect the judges of the federal courts, which Congress established by law.<sup>27</sup> As Professor Henry Monaghan described it, the Take Care Clause implied a “protective power” in the President.<sup>28</sup> The President discharged this obligation, through the Attorney General, by directing the appointment of a judicial bodyguard. Deputy Neagle, the man appointed, acted in pursuance of “a law of the United States”—that is, the Constitution—and habeas law required that he be discharged from custody.<sup>29</sup>

Writing in dissent, Justice Lamar pointed to the Necessary and Proper Clause of Article I,<sup>30</sup> which vested in Congress the power to make laws necessary and proper not only for the exercise of its enumerated powers, but for the exercise of the President’s powers as well, including his take-care duties.<sup>31</sup> Thus, even if the President was obligated to keep the peace, the means by which he did so “must proceed . . . primarily from Congress.”<sup>32</sup> Congress had to provide for judicial bodyguards by passing a statute. If, instead, it let its power lie dormant, the President had no discretion to act. The authority to create such an office, to specify its powers and immunities, had to come from law—probably because of the effect it had on state authority.<sup>33</sup>

Marking a boundary between law and discretion in matters of security is the work of what I will call the “Security Court.” The Security Court is a vision of the institutional structure of federal courts that puts the United

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25. U.S. CONST. art. II, § 3.

26. *Id.*

27. *In re Neagle*, 135 U.S. at 64–68 (majority opinion).

28. Henry P. Monaghan, *The Protective Power of the Presidency*, 93 COLUM. L. REV. 1, 61–63 (1993).

29. *In re Neagle*, 135 U.S. at 75.

30. U.S. CONST. art. 1, § 8, cl. 18.

31. *In re Neagle*, 135 U.S. at 82–83 (Lamar, J., dissenting) (citing U.S. CONST. art. 1, § 8, cl. 18).

32. *Id.* at 83.

33. *Id.*

States Supreme Court at the center of a collective deliberation about the form of domestic and national security. The questions guiding the work of the Security Court are these: When must security be attained by law? When may it be accomplished by discretion, and how (if at all) should that discretion be bounded? In short, how much “leeway” does government enjoy in ensuring our security?

These concerns are siblings to a number of familiar procedural doctrines. They include procedural due process and the arbitrary and capricious standard from administrative law, which requires that an agency examine relevant data and explain its action by reference to that data.<sup>34</sup> In each case, courts are vindicating rule-of-law values, such as liberty, certainty, predictability, and autonomy. The aim of the Security Court is to preserve these values, while ensuring government remains capable of answering threats. The value placed on law explains why the Court generally requires the President to conform his discretion to statutory constraints, even in emergencies and when those constraints are implied rather than explicit.<sup>35</sup> On the other hand, the Court recognizes the President’s discretion to act when he judges it necessary to fulfill a duty attached to his office, sometimes even contrary to law. The case for this power rests on the benefits of discretionary decision-making. As I will show below, these considerations drive many cases about the Constitution’s separation of powers, especially in what Justice Jackson called its “zone of twilight,” where the text’s distribution of authority is uncertain.<sup>36</sup>

The remainder of this Essay has two parts. First, I provide several other examples of the Security Court in action. Second, I describe instances in which the Court shrunk from such a role and the reasons why.

## I. THE SECURITY COURT IN ACTION

Consider the following two structural features of the United States Supreme Court. First, it is a “constitutional” court, in the sense that is created by the Constitution itself, as one of the three great departments of the national government. In contrast, inferior federal courts and executive agencies are created by congressional legislation. At the time the Framers drafted the Constitution, state courts, too, were largely legislative in origin. Second, the Supreme Court is “supreme” in the sense that it stands atop a

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34. See *Mathews v. Eldridge*, 424 U.S. 319, 332–35 (1976) (procedural due process); *Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402, 415–17 (1971) (arbitrary and capricious standard).

35. Professors David J. Barron and Martin S. Lederman noted the Court’s penchant for resolving national security cases by expansive statutory interpretation. David J. Barron & Martin S. Lederman, *The Commander in Chief at the Lowest Ebb—Framing the Problem, Doctrine, and Original Understanding*, 121 HARV. L. REV. 689, 702 (2008).

36. *Youngstown Sheet & Tube Co. v. Sawyer (Steel Seizure)*, 343 U.S. 579, 637 (1952) (Jackson, J., concurring).

jurisdictional pyramid vested with the judicial power of the national government in cases at law, equity, and admiralty.<sup>37</sup> Most states at the time invested these jurisdictions in separate bodies, sometimes even including the legislature or executive, giving their court systems the form of a web, or parallel lines, rather than a pyramid.<sup>38</sup> Thus, although not all cases were appealable to the federal Supreme Court, none could be appealed to a different high court. As best we can tell, there was consensus among delegates at the Philadelphia Convention on the need to establish a single, national, supreme appellate court.<sup>39</sup>

Why was there broad agreement on the need for a single, national, supreme appellate court? For one thing, it was vital for security. It is a familiar point that under the Articles of Confederation Congress could raise money only by requisitioning a portion of state tax receipts. Since the states were largely broke and Congress lacked the means to enforce its requisitions, states rarely paid those requisitions. Congress was forced to finance the Revolutionary War by what we call “currency finance”—that is, by printing money. At one point, disgruntled officers who had been promised a pension gathered in Newburgh, New York, and there was talk they might march on Philadelphia and stage a coup.<sup>40</sup> Obtaining revenue sufficient to finance the military was thus a vital security issue, and a supreme court with appellate jurisdiction over cases arising under the national revenue laws could ensure that taxes were duly paid and collected.<sup>41</sup>

A single, national, appellate court would also provide important benefits in matters of foreign policy. Scholars of international law continue to debate the extent to which federal courts possess a power to apply customary principles of international law, thereby making foreign policy in the cases before them.<sup>42</sup> But it is undisputed that the Court was understood to have a role in the *enforcement* of foreign policy.<sup>43</sup> If treaties made by the President with the approval of the Senate were to be effective, the Supreme Court had to possess jurisdiction to enforce them. It should come as no sur-

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37. U.S. CONST. art. III, § 2.

38. See LAWRENCE M. FRIEDMAN, *A HISTORY OF AMERICAN LAW* 138–43 (2d ed. 1985); see, e.g., SCOTT DOUGLAS GERBER, *A DISTINCT JUDICIAL POWER: THE ORIGINS OF AN INDEPENDENT JUDICIARY, 1606–1787*, at 60, 261–63 (2011) (describing the initial constitutional organization of state court systems in Virginia and New York).

39. WILLIAM R. CASTO, *THE SUPREME COURT IN THE EARLY REPUBLIC: THE CHIEF JUSTICESHIPS OF JOHN JAY AND OLIVER ELLSWORTH* 6 (1995); RICHARD H. FALLON, JR. ET AL., *HART AND WECHSLER’S THE FEDERAL COURTS AND THE FEDERAL SYSTEM* 6–7 (7th ed. 2015).

40. ALAN TAYLOR, *AMERICAN REVOLUTIONS: A CONTINENTAL HISTORY, 1750–1804*, at 317–18 (2016).

41. CASTO, *supra* note 39, at 44, 48–49.

42. See, e.g., Curtis A. Bradley & Jack L. Goldsmith, *Customary International Law as Federal Common Law: A Critique of the Modern Position*, 110 HARV. L. REV. 815, 822–26 (1997).

43. See, e.g., CURTIS A. BRADLEY & JACK L. GOLDSMITH, *FOREIGN RELATIONS LAW: CASES AND MATERIALS* 6–12, 579 (3d ed. 2009).

prise, then, that the Judiciary Act of 1789<sup>44</sup> granted the Supreme Court jurisdiction over cases arising under treaties and suits brought by foreign nationals.<sup>45</sup> The Court's early docket reflected this design. One in four cases heard in the Supreme Court under Chief Justices John Jay and John Marshall concerned foreign affairs. A significant portion of these cases involved enforcement of trade embargoes and peace treaties.<sup>46</sup> In these areas, noted a student commentator, "most recognized that the Court would help Congress and the President hold states to their federal commitments."<sup>47</sup> Since peace with other nations depended on upholding our treaty obligations, the Court's ability to enforce those responsibilities was essential to national security.

But what was the Court to do when the different branches of government could not agree on a foreign policy? Early presidents sought to play a large role in the determination of foreign policy and, on occasion, exceeded or contradicted federal law. The Court did not shy from such cases. As Professor Harold Koh observed, "perhaps [the] most striking feature" of this early period "is the extent to which courts actively participated in the delineation and delimitation of the executive's authority in foreign affairs."<sup>48</sup> In the case of *Little v. Barreme*,<sup>49</sup> the Supreme Court held that written instructions from the Secretary of the Navy to a ship's captain to seize certain vessels on suspicion of violating a federal trade embargo did not insulate the captain from liability for exceeding the actual terms of the embargo.<sup>50</sup> Congress had forbidden ships to travel to French ports, but the Secretary of the Navy instructed Captain Little to seize ships coming from French ports. The Court was careful not to conclude that the President, John Adams, lacked the authority to order such seizures during war. The President's "high duty," observed Chief Justice Marshall, "is to 'take care that the laws be faithfully executed,'" and to that end, as Commander in Chief of the Navy, he might employ American naval vessels to seize ships violating the embargo "without any special authority for that purpose."<sup>51</sup> Yet here Congress had not only enacted an embargo, but "prescribed . . . the manner in which this law shall be carried into execution," thereby limiting the discretion the President normally enjoyed to decide how best to execute

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44. Judiciary Act of 1789, ch. 20, 1 Stat. 73 (1789).

45. *Id.* at 77, 80–81.

46. Ariel N. Lavinbuk, Note, *Rethinking Early Judicial Involvement in Foreign Affairs: An Empirical Study of the Supreme Court's Docket*, 114 YALE L.J. 855, 872–74, 883–84 (2005).

47. *Id.* at 874.

48. HAROLD HONGJU KOH, THE NATIONAL SECURITY CONSTITUTION 81 (1990).

49. 6 U.S. (2 Cranch) 170 (1804).

50. *Id.* at 179.

51. *Id.* at 177.

the law.<sup>52</sup> Congress supplanted discretion with law, and the Supreme Court vindicated its authority to do so.<sup>53</sup>

Acting as a Security Court did not mean the Court would uniformly side with Congress. Even in domestic matters, it might vindicate presidential discretion, just as it did in the *Neagle* case. Several decades before *Neagle*, Justice Miller (the author of *Neagle*) joined the Court's opinion in *The Prize Cases*,<sup>54</sup> which recognized the need for presidential discretion in addressing the southern "insurrection" that became the Civil War.<sup>55</sup> The question before the Court was the legality of a blockade at the Port of Richmond, Virginia ordered by President Lincoln, which netted a perky haul of 5,100 bags of coffee beans and some outgoing tobacco.<sup>56</sup> Blockade was a military measure lawful under the customary laws of war, but Congress had not declared war. Nevertheless, reasoned Justice Grier, the Constitution obligated the President to see federal law executed, which implied the discretion to decide appropriate measures when an insurrection interfered with the execution of the law.<sup>57</sup> Only the President could decide if war measures were necessary to meet the military objective; as Justice Grier quipped, "He must determine what degree of force the crisis demands."<sup>58</sup> In Justice Grier's vision, then, the President's authority to employ a blockade arose from his obligation to enforce the law and military command of armed forces. It was a matter, in short, of a military necessity, and judgments of military necessity were committed to the President's discretion.

As the risks of foreign policy grew in the twentieth century, so did a concern about the Court's proper institutional role in foreign affairs. Stakes seemed much higher in the eras of World War and Total War. The danger and complexity of the post-WWII period triggered structural changes across government, as the foreign policy apparatus was reconfigured to contain communism by stationing military assets abroad.<sup>59</sup> Starting in the mid-1930s, the Supreme Court noticeably retreated from its jurisdiction in foreign policy cases and, on occasion, even from its role of Security Court. Yet it is at the opening of the Cold War that we encounter the Court's most important articulation of its role in national security.

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52. *Id.* at 170, 177–78.

53. John C. Dehn, *The Commander-in-Chief and the Necessities of War: A Conceptual Framework*, 83 TEMP. L. REV. 599, 620 (2011).

54. 67 U.S. (2 Black) 635 (1863).

55. *Id.* at 636.

56. *Id.* at 637.

57. *Id.* at 668.

58. *Id.* at 635, 670.

59. See STEPHEN M. GRIFFIN, *LONG WARS AND THE CONSTITUTION* 52–99 (2013); KOH, *supra* note 48, at 93–113.

*Youngstown Sheet & Tube Co. v. Sawyer (Steel Seizure)*<sup>60</sup> arose out of President Truman's seizure of many of the nation's steel mills in an effort to prevent a disruption in steel production by a labor strike.<sup>61</sup> Five years earlier, though, Congress had passed the Taft-Hartley Act,<sup>62</sup> which provided for mediation in such cases, preserving the unions' right to strike and rejecting a presidential power to seize and operate industrial plants.<sup>63</sup> In light of the statute, and the fact that the steel mills were domestic and not in the conventional theater of battle, the Court held that the President lacked constitutional authority to seize the steel mills.<sup>64</sup> Writing for the Court, Justice Black described the President's order as "law making."<sup>65</sup> It was not law making merely because it was policymaking; Black would not have denied that the President could make policy in exercising his power to carry out the law. President Truman's order was law making because it effectively repealed a law, the Taft-Hartley Act, and replaced it with a policy of the President's own making. There was no inherent, discretionary, emergency power in the President to repeal law. Only law could undo law.<sup>66</sup> This was a clear rejection of the Government's view that the President had inherent power to "take such action as is necessary to meet the emergency"<sup>67</sup>—a power the Government traced to Article II of the Constitution, though the Government's attorney declined "to get into a discussion of semantics."<sup>68</sup>

Justice Jackson's concurrence, which has proven to be the most influential opinion in the *Steel Seizure* case, makes a similar point. Jackson famously identified three categories of presidential power: (1) when the President's act is consistent with the will of Congress, (2) when Congress is silent, and (3) when the President's act is inconsistent with the will of Congress.<sup>69</sup> President Truman's order fell in category three, to which, reasoned Justice Jackson, the Court should apply the greatest scrutiny.<sup>70</sup> The rubric is helpful, but its real significance is often missed. It is important not simply because it checks executive unilateralism and preserves an equilibrium be-

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60. 343 U.S. 579 (1952).

61. *Id.* at 582.

62. Labor Management Relations Act of 1947, ch. 120, 61 Stat. 136 (codified as amended in 29 U.S.C.).

63. *Steel Seizure*, 343 U.S. at 586.

64. *Id.* at 587–89.

65. *Id.* at 588.

66. *See id.* ("The power of Congress to adopt such public policies as those proclaimed by the order is beyond question . . . . The Constitution does not subject this lawmaking power of Congress to presidential or military supervision or control.")

67. PAUL BREST ET AL., PROCESSES OF CONSTITUTIONAL DECISIONMAKING 1009 (6th ed. 2015).

68. THE STEEL SEIZURE CASE: PART I—PROCEEDINGS IN DISTRICT COURT AND COURT OF APPEALS, H.R. DOC. NO. 534, pt. 1, at 371 (2d Sess. 1952).

69. *Steel Seizure*, 343 U.S. at 635–38 (Jackson, J., concurring).

70. *Id.* at 640.

tween the branches. Rather, as Jeff Powell put it, formerly a senior attorney in the Department of Justice Office of Legal Counsel, which advises the executive branch, the key idea is “*legislative powers have legal priority*, so that the existence of executive authority is regularly . . . dependent on what Congress could do and has done.”<sup>71</sup> In other words, in the effort to mark a boundary between law and discretion, discretion generally retreats when law advances. Executive power, therefore, does not imply a discretion to ignore law; it is shaped and limited by law. The dynamic is characteristic of what Justice Jackson called “free [g]overnment,” or government “by those impersonal forces which we call law.”<sup>72</sup> “[M]en have discovered no technique for long preserving free government,” he wrote in conclusion, “except that the Executive be under the law, and that the law be made by parliamentary deliberations.”<sup>73</sup>

## II. INSECURITY ABOUT THE SECURITY COURT

The Supreme Court has not always acted as a Security Court. At times, it has tried to be something more, at times something less. Earlier I described the concern that by applying rules of customary international law to the cases before it, the Court would be in effect *formulating* our foreign policy, rather than enforcing a policy settled on by the other branches. There are reasons to doubt that an institution like the Supreme Court should have a hand in formulating foreign policy, given its limited expertise and lack of accountability. Yet, in a basic way, when the Court limits, or refuses to limit, the scope of the President’s discretion in security matters, it is also making policy. Suppose the President announces he is withdrawing our nation from a treaty, but in litigation arising under the treaty, the Supreme Court enforces it despite the President’s announcement. Is the Court making foreign policy? Isn’t it, at least in the case before it, electing the policy of the treaty? Now imagine a slightly less extreme example: the Court simply disagrees with the President about the scope of the treaty and enforces it in cases the President concluded it should not apply. Again, isn’t the Court making foreign policy by deciding the scope of the treaty?

At times, the presence of complex, high-stakes policy questions has led Justices to express discomfort with exercising jurisdiction at all. Consider the case of *Korematsu v. United States*,<sup>74</sup> where the Court upheld “exclusion orders” issued by Army General John DeWitt, acting on the authority of President Franklin D. Roosevelt (“FDR”), resulting in the forced removal of over 100,000 men, women, and children of Japanese descent

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71. H. JEFFERSON POWELL, *THE PRESIDENT AS COMMANDER IN CHIEF* 102 (2014) (emphasis added).

72. *Steel Seizure*, 343 U.S. at 654.

73. *Id.* at 655.

74. 323 U.S. 214 (1944).

from their homes on the West Coast.<sup>75</sup> The orders rested on FDR's authority as Commander in Chief, though Congress later invoked its own authority to criminalize disobeying the orders.<sup>76</sup> Notably, Justice Jackson dissented from the Court's decision upholding the removal on grounds that military orders were not subject to constitutional stricture at all. The aim of military measures, he wrote, was to "be successful, rather than legal."<sup>77</sup> A constitutional test requiring that military orders be reasonable (as the majority articulated) was impossible to apply because judges had no capacity to determine whether military orders were reasonable.<sup>78</sup> By upholding the General's exercise of discretion as reasonable, the Court gave his removal policy constitutional sanction. According to Justice Jackson, the Court should do no such thing, and he would dismiss the case.<sup>79</sup>

Pushed to its limit, these concerns have led the Supreme Court not only to carve out a large sphere for the exercise of presidential discretion, but to swear off any involvement in foreign policy. This is how I read the famous case of *United States v. Curtiss-Wright Export Corp.*,<sup>80</sup> in which the Court upheld the presidential power, based on federal law, to criminalize the sale of weapons to Bolivia.<sup>81</sup> Congress authorized the President to ban such sales by proclamation if he concluded that an influx of weapons would inflame the armed conflict in the region.<sup>82</sup> Justice Sutherland, writing for the Court, stated that foreign affairs power was an aspect of the inherent sovereignty of the national government.<sup>83</sup> It did not flow from a specific grant in the Constitution. Among the branches of the national government, Justice Sutherland reasoned, the President alone was capable of handling the complex, sensitive issues that arose in representing the nation abroad. His office necessarily enjoyed a "very delicate, plenary and exclusive power . . . as the sole organ of the federal government in the field of international relations."<sup>84</sup> The nature of foreign affairs further implied that the Court "should not be in haste to apply" constitutional rules that originated in the context of domestic affairs, where the Court had a more substantial role to play.<sup>85</sup> Justice Sutherland, the leading architect of this vision, pushed fed-

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75. GREG ROBINSON, *BY ORDER OF THE PRESIDENT: FDR AND THE INTERNMENT OF JAPANESE AMERICANS* 4, 128 (2001).

76. See Act of March 21, 1942, Pub. L. No. 77-503, ch. 191, 56 Stat. 173.

77. *Korematsu*, 323 U.S. at 244 (Jackson, J., dissenting).

78. *Id.* at 245.

79. *Id.* at 248.

80. 299 U.S. 304 (1936).

81. *Id.* at 312-13, 319-22, 333.

82. See H.R.J. Res. 347, 73d Cong. (1934).

83. *Curtiss-Wright Export Corp.*, 299 U.S. at 318.

84. *Id.* at 304, 319-20.

85. *Id.* at 322.

eral courts to accept what one leading historian called a “sharply reduced role . . . as significant overseers of executive foreign policy decisions.”<sup>86</sup>

While the Court later characterized Justice Sutherland’s more extreme statements in *Curtiss-Wright* as dicta,<sup>87</sup> there remains considerable sympathy for the concern about judicial policymaking in foreign affairs.<sup>88</sup> A related worry is whether there are proper judicial methods for marking a boundary between law and discretion, given the policy implications of these decisions. Usually the Court looks to familiar sources of lawyerly constitutional interpretation with a special focus on history, precedent, and the Constitution’s internal structure.<sup>89</sup> Yet the pressure to craft a solution that is both workable and legally limited can draw the Court into the spheres of the other branches.<sup>90</sup>

### III. CONCLUSION

The Supreme Court is at a point of transition. It has just gained a new member, Justice Gorsuch, and, with Justice Kennedy’s retirement, will soon gain another. Will the new Supreme Court be a Security Court? This is not to ask whether the new Court will seek to preserve a place for executive discretion in matters of national security, whose value the Court has long acknowledged, but whether the Court will continue to delimit that discretion in order to preserve the priority of law. Thus, moving forward, we should ask two kinds of questions: First, does this Court understand its previous efforts to mark a boundary between discretion and law as properly judicial? And second, does law retain the priority that Justice Jackson asserted in the *Steel Seizure* case? In areas of overlapping authority over national security, does this Court acknowledge that Congress may displace, shape, and confine presidential discretion by passing law? As the branch least affected by party politics, this principle may depend on judicial enforcement if it is to be realized.

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86. G. EDWARD WHITE, *THE CONSTITUTION AND THE NEW DEAL* 47 (2000).

87. See *Zivotofsky v. Kerry*, 135 S. Ct. 2076, 2089–90 (2015) (“This description of the President’s exclusive power was not necessary to the holding of *Curtiss-Wright* . . .”).

88. See, e.g., *Hamdi v. Rumsfeld*, 542 U.S. 507, 579, 583, 585–86 (2004) (Thomas, J., dissenting) (“[A]lthough it is appropriate for the Court to determine the judicial question whether the President has the asserted authority . . . , we lack the information and expertise to question whether Hamdi is actually an enemy combatant, a question the resolution of which is committed to other branches.”).

89. See PHILIP BOBBITT, *CONSTITUTIONAL FATE: THEORY OF THE CONSTITUTION* 7 (1982); Jack Balkin, *Arguing About the Constitution: The Topics in Constitutional Interpretation*, 33 *CONST. COMMENT.* 145, 181–83 (2018).

90. *Hamdi*, 542 U.S. at 576 (Scalia, J., dissenting) (describing the majority’s “Mr. Fix-It Mentality” in crafting a procedure for a detainee to challenge his status designation).