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When Structure Fails: Justice Kennedy, Liberty, and Trump v. Hawaii

Frank J. Colucci

Article

When Structure Fails: Justice Kennedy, Liberty, and *Trump v. Hawaii*

FRANK J. COLUCCI[†]

This symposium Article situates Justice Anthony M. Kennedy's final concurring opinion in Trump v. Hawaii *within his larger jurisprudence. Part I traces its separation of powers foundations by examining then-Judge Kennedy's Ninth Circuit opinions in* Chadha v. INS *and* Beller v. Middendorf. *While in* Chadha *Kennedy shows sensitivity to how congressional action can threaten personal liberty, in* Beller *he expresses substantial deference to executive decisions about military necessity and foreign policy at the expense of personal liberties. Part II reviews several early Supreme Court opinions, where Kennedy articulates a judicial duty to police separation of powers as essential to liberty, yet expresses willingness to protect presidential power from both direct and indirect threats from Congress and the courts. Part III reexamines Kennedy's opinions in enemy combatant cases after 2001, culminating in* Boumediene v. Bush*. These opinions, often read as a rebuke of executive power, in fact express his primary concern with both preserving personal liberty and preventing congressional abdication of its powers. Part IV surveys later Kennedy opinions leading to* Trump *that uphold exclusive executive power—especially in areas of immigration and foreign affairs—from the burdens of legislative and judicial intrusion even at the cost to individual liberty. Part V focuses on Kennedy's final opinion in* Trump*, where he characteristically votes to protect presidential power and ensure that neither Congress nor courts should "intrude on the foreign affairs power of the Executive."*[1]

This Article's conclusion explores the tension Kennedy explicitly recognizes in Trump *between two main strands of his jurisprudence: protection of presidential prerogative in foreign affairs and the judicial obligation to define and enforce personal liberty. His "further observation" in* Trump*, recognizes how liberty relies ultimately on politicians exercising statesmanship and public confidence that they act with fidelity to larger constitutional values. Despite promises expressed in his earlier opinions, Kennedy in* Trump *finally concedes that neither constitutional structure nor courts enforcing law are sufficient to secure liberty.*

[†] Associate Professor of Political Science, Purdue University Northwest. I'd like to thank the *HLJ* staff—especially Nina Gliozzo and Alyxandra Vernon—for their fine editorial work. Errors of course remain my own. This Article was profoundly influenced by the example of my advisor Donald P. Kommers, who spent his life teaching and writing about the importance of constitutionalism and the limits of law.

1. Trump v. Hawaii, 138 S. Ct. 2392, 2424 (2018).

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INTRODUCTION

Justice Anthony M. Kennedy's final concurrence in *Trump v. Hawaii*[2] shaped both initial reactions to his retirement from the U.S. Supreme Court and first assessments of his legacy. Commentators called his vote to join the *Trump* majority, which allowed President Trump's order banning entry by nationals of several countries to take effect, a "betrayal,"[3] a "surrender,"[4] and a "coup."[5] Others categorized Kennedy's last opinion as "depressing defeatism,"[6] "at odds" with the "animating principles" of his larger approach to law.[7] Still others read it as an "empty gesture" and "an expression of defeat and a loss of integrity . . . at precisely the moment that it was most needed"[8] or "an elusive conclusion for the career of an elusive justice."[9]

2. *Id.* (overturning lower court preliminary injunction suspending enforcement of Proclamation No. 9645, 82 Fed. Reg. 45,161 (Sept. 24, 2017)).

3. Noah Feldman, Opinion, *Justice Kennedy's Legacy Is the Dignity He Bestowed*, BLOOMBERG NEWS (June 27, 2018, 12:24 PM), https://www.bloomberg.com/opinion/articles/2018-06-27/anthony-kennedy-retirement-his-legacy-is-dignity-he-created.

4. Christian Farias, *Justice Kennedy Surrendered to Donald Trump*, N.Y. MAG. (June 27, 2018), http://nymag.com/intelligencer/2018/06/justice-kennedy-surrendered-to-donald-trump.html.

5. *Id.*

6. Richard L. Hasen, *Did Anthony Kennedy Just Signal His Retirement? (Update: Yes.)*, SLATE (June 26, 2018, 1:38 PM), https://slate.com/news-and-politics/2018/06/did-justice-anthony-kennedy-just-signal-his-retirement.html.

7. Pratheepan Gulasekaram, *An Immigration Legacy at Odds with Justice Kennedy's Animating Principles*, SCOTUSBLOG (July 3, 2018, 7:29 PM), http://www.scotusblog.com/2018/07/an-immigration-legacy-at-odds-with-justice-kennedys-animating-principles/.

8. Leslie Kendrick & Micah Swartzmann, Comment, *The Etiquette of Animus*, 132 HARV. L. REV. 133, 169 (2018) (footnote omitted).

9. Josh Blackmun, *The Travel Bans*, 2017–2018 CATO SUP. CT. REV. 29, 47.

Kennedy's own words in *Trump* contribute to this confusion. He begins by admitting "the substantial deference that is and must be accorded to the Executive in the conduct of foreign affairs."[10] His final paragraphs, however, speak to the "urgent necessity that officials adhere to these constitutional guarantees."[11] "An anxious world," he concludes, requires reassurance "that our Government remains committed always to the liberties the Constitution seeks to preserve and protect, so that freedom extends outward, and lasts."[12]

Read in light of his previous opinions in separation of powers cases, Kennedy's ambiguity in *Trump* merits deeper exploration. Kennedy's record in separation of powers cases is not merely "pragmatic" and "centrist."[13] Even before coming to the U.S. Supreme Court, Kennedy exercised judicial power to enforce his belief that constitutional structure is essential to preserving individual liberty.[14] On the Court, he vigorously enforced separation of powers, including limits on executive power in cases like *Clinton v. City of New York*[15] and *Boumediene v. Bush*.[16] His judicial commitment to enforcing the full and necessary meaning of liberty requires that courts not leave structural issues solely to political resolution, but vigilantly enforce written and functional limits on the powers of each branch. "When structure fails," Kennedy wrote, "liberty is always in peril."[17] For the bulk of his career, Kennedy found failures of constitutional structure arose more often from congressional abdication or judicial intrusion than from executive overreach. His *Trump* opinion suggests a final reconsideration of this presumption.

This Article situates Justice Kennedy's final concurrence in *Trump v. Hawaii* within his larger jurisprudence. Part I traces the foundations by examining his Ninth Circuit opinions in *Chadha v. INS* and *Beller v. Middendorf*. Even in these early cases, then-Judge Kennedy's enforcement of separation of powers is primarily concerned with threats to executive power from Congress. While in *Chadha* Kennedy is sensitive to how legislative actions can threaten personal liberty,[18] in *Beller* he expresses substantial deference to executive decisions about military necessity and foreign policy, even at the cost of personal liberties protected under the Constitution.[19] Part II reviews several

10. Trump v. Hawaii, 138 S. Ct. 2392, 2424 (2018) (Kennedy, J. concurring).

11. *Id.*

12. *Id.*

13. *Contra* Charles D. Kelso & R. Randall Kelso, *The Constitutional Jurisprudence of Justice Kennedy on Separation of Powers and Federalism*, 42 CAP. U. L. REV. 531, 582 (2014).

14. *See infra* Part I.

15. 524 U.S. 417, 450, 452–53 (1998) (Kennedy, J., concurring) (writing separately to discuss separation of powers and noting even if separation of powers proves insufficient this "cannot validate an otherwise unconstitutional device").

16. 553 U.S. 723, 764–66 (2008) (majority opinion by Kennedy, J.) ("The Government's formal sovereignty-based test raises troubling separation-of-powers concerns as well.").

17. Pub. Citizen v. U.S. Dep't of Justice, 491 U.S. 440, 468 (1989) (Kennedy, J., concurring).

18. 634 F.2d 408, 422 (9th Cir. 1980).

19. 632 F.2d 788, 810–11 (9th Cir. 1980).

opinions from early in Justice Kennedy's tenure on the Court, which describe his judicial duty to police separation of powers as essential to liberty while acting to protect executive power from both direct and indirect threats from Congress and courts. Part III surveys Justice Kennedy's opinions in enemy combatant cases after 2001, culminating in *Boumediene*. These opinions, often read as rebukes of executive power, in fact express his primary concern with both liberty and preventing congressional abdication of its power to suspend habeas corpus.

Part IV surveys several later Justice Kennedy opinions leading up to *Trump* which uphold exclusive executive power—especially in areas of immigration and foreign affairs—from the burdens of legislative and judicial intrusion. Justice Kennedy sustains executive power even when conceding the cost to individual liberty. Part V focuses on Justice Kennedy's final opinion in *Trump*, assessing its consistencies with, and departures from, his larger approach to separation of powers. In *Trump*, he characteristically votes to protect presidential power and to ensure that neither Congress nor courts should "intrude on the foreign affairs power of the Executive," but adds a "further observation" which recognizes consequences for the preservation of liberty in the Court's ruling.[20]

This Article concludes by exploring the tension Kennedy recognizes in *Trump* between two main strands of his broader jurisprudence: protection of presidential power in foreign affairs and the judicial obligation to protect personal liberty. It then reconsiders the consequences of his "further observation" that true security for liberty relies ultimately on politicians exercising statesmanship and public confidence in their fidelity to constitutional values.[21] Despite promises inherent and explicit in his earlier opinions, in *Trump*, Justice Kennedy finally admits that neither constitutional structure nor courts suffice to guarantee liberty.[22]

I. JUDGE KENNEDY AND SEPARATION OF POWERS ON THE NINTH CIRCUIT: *CHADHA* AND *BELLER*

Kennedy's commitments to judicial enforcement of separation of powers and to preserving executive prerogatives date from his two major Ninth Circuit opinions concerning constitutional structure: *Chadha v. INS*[23] and *Beller v. Middendorf*.[24] His opinions in *Chadha*—later affirmed on different grounds by the Supreme Court—and *Beller* offer previews to how he would eventually approach separation of powers issues on the Court, and provide some premises underlying his last *Trump v. Hawaii* opinion. In these Ninth Circuit opinions, then-Judge Kennedy eschews textualism and originalism for a more functional

20. Trump v. Hawaii, 138 S. Ct. 2392, 2424 (2018) (Kennedy, J. concurring).

21. *Id.*

22. *See id.*

23. 634 F.2d. 408, *aff'd on other grounds*, 462 U.S. 919 (1983).

24. 632 F.2d. 788, *cert. denied sub nom.*, Beller v. Lehman, 452 U.S. 905 (1981), *overruled by* Witt v. Dep't of the Air Force, 527 F.3d 806 (9th Cir. 2008).

analysis sensitive to threats to the effective exercise of executive power.[25] These opinions arise from an overriding concern with congressional attempts both to assume the powers of other branches—especially the executive—and to abdicate its own authority. At the same time, Kennedy articulated his willingness to defer to executive power in military and foreign affairs, even in a case where a plaintiff raises a strong claim based on constitutional liberty.[26]

Kennedy's Ninth Circuit opinion in *Chadha* invalidated the one-house legislative veto traditionally used to overturn orders preventing deportation as provided under the Immigration and Nationality Act.[27] While his ruling was affirmed and broadened by the Supreme Court,[28] Justice Kennedy's opinion for the Ninth Circuit was based not on original history or the text of the presentment clause (as was Chief Justice Burger's opinion for the Court), but on a broader functional analysis of separation of powers and the proper role of judiciary.[29]

Kennedy explicitly rejects claims—such as those presented in Justice White's Supreme Court dissent—that the distribution of power among branches is a "history of accommodation and practicality" and "a necessary check on the unavoidably expanding power of the agencies, both Executive and independent, as they engage in exercising authority delegated by Congress."[30] "It would stand the political question doctrine on its head," Justice Kennedy writes, "to require the Judiciary to defer to another branch's determination that its acts do not violate the separation of powers principle."[31] As Justice Kennedy elaborates, "it is the Judiciary's prerogative . . . to adjudicate a claimed excess by a coordinate branch of its constitutional powers."[32]

Kennedy concludes the legislative veto, as exercised in this particular case, "violates the constitutional doctrine of separation because it is a prohibited legislative intrusion upon the Executive and Judicial branches" that is "usurping a necessary power of another branch."[33] To conduct this analysis, he writes, "we must examine the purpose and function of the constitutional doctrine, particularly as it pertains to the boundaries of legislative authority."[34]

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25. *See infra* note 69.

26. *See* Beller, 632 F.2d at 810–11.

27. *Chadha*, 634 F.2d. at 411, 420 (holding that the statutory provision for one-house veto violates the doctrine of separation of powers).

28. INS v. Chadha, 462 U.S. 919, 928 (1983).

29. *See Chadha*, 634 F.2d at 420–21. In a 1984 speech explaining his process and reasoning while deciding *Chadha*, Kennedy said, "I had mentioned the presentment clause, but struck it from the last draft as superfluous to our holding." Anthony M. Kennedy, Judge, Ninth Cir., Hoover Lecture at Stanford Law School 1 (May 17, 1984) (on file with *Journal*) [hereinafter Kennedy, Hoover Lecture].

30. *Chadha*, 462 U.S. at 999, 1002 (White, J., dissenting).

31. *Chada*, 634 F.2d at 419.

32. *Id.*

33. *Id.* at 420–421.

34. *Id.* at 421.

For Kennedy, separation of powers "is neither doctrinaire nor rigid" but "a cautious balance of antimonies."[35] It "is at once pervasive and fluid" and "there will be instances where the proper means for its enforcement rest with the mutual respect that each branch of the Government must extend to the others."[36] Yet, when "transgressions are more patent. . . . it is the duty of the Judicial Branch to resolve disputes with or among the other component parts of the Government."[37] In Chadha's case, "a private litigant is, in part, a surrogate for a branch whose powers have been usurped" and who "asserts a separate and personal legal interest, namely, that the exercise of government power exceeds constitutional bounds and is therefore an unlawful invasion of individual rights."[38]

Kennedy finds two purposes in enforcement of separation of powers. The first is "to prevent an unnecessary and therefore dangerous concentration of power in one branch."[39] Justice Kennedy fears "the natural tendency of each center of power to compete to enlarge or maintain its own influence."[40] He thus seeks "to deter any one branch from attaining hegemony," as "[a]n undue concentration of authority in one branch inevitably causes structural decomposition of the other branches, along with a dispersal of their original powers."[41]

Kennedy notes that a second purpose of separation of powers is "a practical measure to facilitate administration of large nation by the assignment of numerous labors to designated authorities."[42] Unlike Justice White, he concludes that constitutional limits to delegations apply to this legislative veto.[43] "Just as the separation of powers prohibits the accumulation of too much power in one branch, the nondelegation doctrine prevents one branch from abrogating its authority in a wholesale and standardless manner."[44]

From these two principles, Kennedy defines a

> constitutional violation of the separation of powers as an assumption by one branch of powers that are central or essential to the operation of a coordinate branch, provided also that the assumption disrupts the coordinate branch in the performance of its duties and is unnecessary to implement a legitimate policy of the Government.[45]

35. *Id.*
36. *Id.* at 421–422.
37. *Id.* at 422.
38. *Id.*
39. *Id.*
40. *Id.* at 422–423.
41. *Id.* at 423.
42. *Id.*
43. *Id.* at 423–24.
44. *Id.* at 424.
45. *Id.* at 425.

He goes further: "[i]f an exercise of functions which lie at the center of another branch is attempted on a long-term and routine basis, a violation of the constitutional rule requiring separation of powers is more easily established."[46]

Kennedy conducts an extensive analysis of the one-house veto and finds "a constitutional violation" and usurpation of both executive and judicial power.[47] First, he finds the one-house veto "an interference with a central function of the Judiciary, . . . [one] both disruptive and unnecessary."[48] Courts review "whether the Executive branch has corrected applied the statute that establishes its authority."[49] The ability of Congress to overturn such a decision "implies a radical alteration of the role of federal courts in the field of administrative law," making judicial rulings, "in effect, impermissible advisory opinions."[50] With the threat of this veto, "the Legislative branch has disrupted or severed the Judiciary's relation to the alien in a substantial way" and "potential nullification of judicial attempts to require uniform application of the statute by the Executive."[51] This legislative veto "diminishes the strength of the Judiciary's structural check on the Executive, which is one of the twin purposes behind the separation of powers principle."[52]

Kennedy emphasizes the subordination of judiciary to the legislature under the one-house veto, "thus undermining the integrity of the third branch."[53] In his view, by doing this, Congress "disrupts the judicial system by retaining a selective power to override individual adjudications, in lieu of changing standards prospectively by the usual, corrective device of a statutory amendment."[54] He finds "virtually no procedural constraints on the ultimate congressional decision."[55]

Justice Kennedy also finds the very existence of the legislative veto disruptive to the executive and the judiciary. He criticizes "legislative interference, constant in its potentiality, can be exercised in any given case without a change in the general standards the legislature has initially decreed."[56] The possibility of "[s]ummary reversal" of "an action that carried all of the weight and dignity that necessarily attends deliberative decisions by one of the highest officers in the Executive branch" by one house of Congress "detracts from the authority of the second branch, and to that extent undermines its

46. *Id.*
47. *Id.* at 429.
48. *Id.* at 430.
49. *Id.*
50. *Id.*
51. *Id.* at 431.
52. *Id.*
53. *Id.*
54. *Id.*
55. *Id.*
56. *Id.* at 432.

powers."[57] He finds this interference "with a relation between the second branch and the persons governed by its decisions" to be "egregious."[58]

Even while, "Congress holds all legislative powers"[59] and "[t]he statute was enacted for the most humanitarian of considerations,"[60] Kennedy writes:

> We cannot accept that definite, uniform, and sensible criteria . . . should be replaced by a species of nonlegislation, wherein the Executive branch becomes a sort of referee in making an initial determination which has no independent force or validity, even after review by the Judiciary, save and except for the exercise of final control by the unfettered discretion of Congress as to each case.[61]

For Justice Kennedy, "[s]uch flexibility is but the structural twin of lawless rule."[62]

In a 1984 lecture delivered after the Supreme Court's decision in *Chadha*, Kennedy admitted his differences from Chief Justice Burger's majority decision based solely on the presentment clause.[63] He conceded that the "more sweeping approach" adopted by the Supreme Court "emphasized the specific language of the Constitution."[64] While "[p]art of my approach was that of an interpretivist with a focus on the intent of the framers . . . . In reviewing the opinion, it does not seem to me to be entirely successful in this regard."[65]

For Kennedy, the challenge was neither textual nor historical, but practical. "[T]he ultimate question *Chadha* poses is how to bring a sense of order and responsibility to the shambles that is now the congressional process."[66] He questioned the consequences of Justice Burger's broader ruling. "If you strike down the legislative veto, you trim the powers of the legislative branch, but you may be doing it at the expense of allowing a sprawling federal bureaucracy to go uncontrolled."[67] Yet he also noted, "[i]f we say that agencies constitute a fourth branch of the government, and it is necessary to control them, is it not a problem of modern political science to design the remedy, rather than to rely on interpretation of the writings of 1788?"[68] In contrast, the Ninth Circuit "tried to follow a functionalist analysis in the balance of the opinion and thus relied on something more than history."[69]

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57. *Id.*
58. *Id.*
59. *Id.* at 435.
60. *Id.* at 436.
61. *Id.* at 435–36.
62. *Id.* at 436.
63. Kennedy, Hoover Lecture, *supra* note 29, at 1.
64. *Id.* at 4. Kennedy also spoke in August 1987 at a Ninth Circuit judicial conference panel titled "A Bicentennial Review of Separation of Powers: What Is the Role of Courts in Constitutional Interpretation?" While on a panel along with fellow federal judges William A. Norris and Frank Easterbrook, as well as Stanford Law School Dean Paul Brest, Kennedy made no specific comments about his decision in *Chadha*.
65. *Id.* at 4.
66. *Id.* at 2.
67. *Id.* at 4.
68. *Id.* at 4.
69. *Id.* at 5.

Kennedy's functionalism focuses on the propensity of Congress to disrupt the executive and legislative branches. He noted in his speech "we might have been somewhat harsh to Congress" in the *Chadha* opinion.[70] But he was no less harsh to Congress later in the 1984 address: "The ultimate question then is whether the *Chadha* decision will be the catalyst for some basic congressional changes."[71] He admitted "[m]y view of this is not a sanguine one"[72] and reflected that he was "not sure what it will take for Congress to confront its own lack of self-discipline, its own lack of a principled course of action besides the ethic of securing its reelection."[73] Kennedy's criticism extends beyond those he attributes to the Framers: "Madison distrusted Congress because it would aggrandize the other branches; but I think the more real concern is its competence within its own legitimate sphere."[74]

Kennedy expressed such criticism of Congress in other off-the-bench statements. In a 1982 speech he stated, "Congress must acknowledge its constitutional responsibility and begin to articulate its legislative judgments in constitutional terms."[75] If Congress fails to provide such an articulation, he continued, "I would contend that courts should rescind the rule that a legislative act is presumed to be constitutional. A presumption should not exist if it does not mirror a reality."[76]

Kennedy's opinion in *Beller*, upholding the Navy's policy to discharge those who engage in homosexual activity, expressed sensitivity to claims of individual rights, but ultimately upheld executive authority based on judicial deference to military necessity.[77] *Beller* thus differs from a later opinion issued by the District of Columbia Court of Appeals—written by Robert Bork and joined by Antonin Scalia—that rejected the challenge as having no right "solidly based in constitutional text and history" and simply applied a rational basis test.[78]

Kennedy's *Beller* opinion explicitly recognizes the plaintiffs' claims that the policy violates their rights to substantive due process. Even before the Supreme Court's decision in *Bowers v. Hardwick*,[79] Kennedy notes "there is substantial academic comment which argues that the choice to engage in homosexual action is a personal decision entitled, at least in some instances, to recognition as a fundamental right and to full protection as an aspect of the

70. *Id.* at 5.

71. *Id.* at 8.

72. *Id.* at 8.

73. *Id.* at 8.

74. *Id.* at 8.

75. Anthony M. Kennedy, Judge, Ninth Cir., Address at the Los Angeles Patent Lawyers Association 9 (Feb. 1982) (on file with the *Journal*) [hereinafter Kennedy, L.A. Patent Lawyer's Assoc.].

76. *Id.*

77. *See* Beller v. Middendorf, 632 F.2d 788, 810–11 (9th Cir. 1980), *overruled by* Witt v. Dep't of the Air Force, 527 F.3d 806, 819 (9th Cir. 2008).

78. Dronenburg v. Zech, 741 F.2d. 1388, 1397–98 (D.C. Cir. 1984).

79. 478 U.S. 186 (1986).

individual's right to privacy."[80] He does admit "substantial authority to the contrary."[81] Nevertheless, he writes, "we can concede arguendo that the reasons which led the Court to protect certain private decisions intimately linked with one's personality suggest that some kinds of government regulation of private consensual homosexual behavior may face substantial constitutional challenge" and "might be constitutionally protected activity in some other contexts."[82]

Using language that would appear in his Supreme Court opinion in *Lawrence v. Texas*,[83] Kennedy states, "[t]he instant cases, however, are not ones in which the state seeks to use its criminal processes to coerce persons to comply with a moral precept even if they are consenting adults acting in private without injury to each other."[84] Focusing on the specific military policies challenged, he writes, "these appeals require an assessment of a military regulation which prohibits personnel from engaging in homosexual conduct while they are in the service."[85] Writing for the court, he held "that the importance of the government interests furthered, and to some extent the relative impracticality at this time of achieving the Government's goals by regulations which turn more precisely on the facts of an individual case, outweigh whatever heightened solicitude is appropriate for consensual private homosexual conduct."[86]

Kennedy ruled such "heightened solicitude" is outweighed by the need for judicial deference to the considerations of military and foreign policy necessity advanced by the executive.[87] "The nature of the employer—the Navy—is crucial to our decision."[88]

His opinion displays substantial judicial deference to the determinations of military necessity made by executive officials. "While it is clear that one does not surrender his or her constitutional rights upon entering the military," such rights "must be viewed in light of the special circumstances and needs of the armed forces."[89] Kennedy cites, among these special needs, the effect on internal discipline and external foreign policy with other nations and finds "multiple grounds for the Navy to deem this regulation appropriate for the full and efficient accomplishment of its mission."[90] These include acting "to protect the fabric of military life, to preserve the integrity of the recruiting process, to maintain the discipline of personnel in active service, and to insure the acceptance of men and women in the military, who are sometimes stationed in foreign countries with

80. *Beller*, 632 F.2d at 809.

81. *Id.*

82. *Id.* at 810, 812.

83. Kennedy there states forming such relationships "is within the liberty of persons to choose without being punished as criminals." Lawrence v. Texas, 539 U.S. 558, 567 (2003).

84. *Beller*, 632 F.2d at 810.

85. *Id.*

86. *Id.*

87. *Id.*

88. *Id.*

89. *Id.*

90. *Id.* at 811.

cultures different from our own."[91] Even if "concerns expressed by the Navy might not apply in any particular case, [they] do have some basis in fact. These considerations are enough to sustain the regulation in its military context."[92]

While the court is "mindful that the rule discharging these plaintiffs is a harsh one in their individual cases," it "cannot under the guise of due process give our opinion on the fairness of every application of the military regulation."[93] Indeed, the opinion notes that "[u]pholding the challenged regulations as constitutional is distinct from a statement that they are wise."[94] For Kennedy, "[t]he latter judgment is neither implicit in our decision nor within our province to make."[95] The opinion concludes, "the constitutionality of the regulations stems from the needs of the military, the Navy in particular, and from the unique accommodations between military demands and what might be constitutionally protected activity in some other contexts."[96]

And while "the Navy's blanket rule requiring discharge . . . is perhaps broader than necessary to accomplish some of its goals, as the somewhat narrower regulation now in effect suggests" the policy as applied in the individual cases seems to "permit at least some flexibility."[97] Yet in considering the constitutionality of the mandatory discharge policy—as a judge— Kennedy defers to military and executive judgments:

> In view of the importance of the military's role, the special need for discipline and order in the service, the potential for difficulties arising out of possible close confinement aboard ships or bases for long periods of time, and the possible benefit to recruiting efforts, however, we conclude that *at the present time* the regulation represents a reasonable effort to accommodate the needs of the Government with the interests of the individual.[98]

Then-Judge Kennedy's Ninth Circuit opinions in *Chadha* and in *Beller* offer previews of his approach to separation of powers on the Supreme Court and to his final concurring opinion in *Trump*. In these cases, Kennedy sees limitations federal power as essential to personal liberty and engages in an assertive judicial role to enforce these limits of each branch. Yet his primary concern is to limit the power of Congress and to preserve executive prerogatives. Further, in preserving executive power—particularly in relations with other nations—Kennedy admits the Constitution may not authorize judicial action to protect "what might be constitutionally protected activity in some other

91. *Id.*
92. *Id.* at 812.
93. *Id.*
94. *Id.*
95. *Id.*
96. *Id.*
97. *Id.*
98. *Id.* (emphasis added).

contexts."[99] In such areas, comments on the wisdom of executive policy are "neither implicit in our decision nor within our province to make."[100]

II. JUSTICE KENNEDY, LIBERTY, AND JUDICIAL ENFORCEMENT OF SEPARATION OF POWERS

Both before and during his tenure as a Justice, Kennedy continually argued that separation of powers promote individual liberty. "[T]he enforcement power of the judiciary," Justice Kennedy stated in his confirmation hearing, "is to insure [sic] that the word *liberty* . . . is given its full and necessary meaning, consistent with the purposes of the document as we understand it."[101] For Justice Kennedy, personal liberty includes political interests in constitutional structure and judicial policing of the limits of the power of each branch of government. As he stated in a 1987 address shortly before his nomination, "it is legally wrong, morally wrong, ethically wrong, for an individual to surrender essential power over his or her personality to a remote government that he or she cannot control in a direct and practical way."[102] At his confirmation hearings, Justice Kennedy called such alienation of political liberty "spiritually wrong."[103]

On the Court, Justice Kennedy considered Congress as the remote authority and the greater threat to individual liberty. Even when federal legislation empowers the President beyond the limits of the Constitution, Justice Kennedy directs his criticism to congressional abdication rather than executive overreach.[104] Further, his opinions focus on the functional effect of congressional and even judicial action on the ability of the president to exercise constitutional powers such as appointments, policy execution and foreign policy.

In *Bond v. United States*,[105] Justice Kennedy connects considerations of judicial enforcement of federalism and separation of powers, as he did in *Chadha*.[106] Justice Kennedy states that the Constitution seeks "to protect each

99. *Id.*

100. *Id.*

101. *Nomination of Anthony M. Kennedy to Be Associate Justice of the Supreme Court of the United States: Hearings Before the S. Comm. on the Judiciary*, 100th Cong. 122 (1987) [hereinafter *Hearings*] (emphasis added).

For three examples of judicial studies that find liberty central to understanding Kennedy, *see* FRANK J. COLUCCI, JUSTICE KENNEDY'S JURISPRUDENCE: THE FULL AND NECESSARY MEANING OF LIBERTY (2009) HELEN J. KNOWLES, THE TIE GOES TO FREEDOM: JUSTICE ANTHONY M. KENNEDY ON LIBERTY (2009)); ANTHONY D. BARTL, THE CONSTITUTIONAL PRINCIPLES OF JUSTICE KENNEDY: A JURISPRUDENCE OF LIBERTY AND EQUALITY (2014).

102. Anthony M. Kennedy, Judge, Ninth Cir., Address at the Historical Society for the United States District Court for the Northern District of California: Federalism: The Theory and the Reality 13 (Sept. 17, 1987) (on file with the *Journal*).

103. *Hearings*, *supra* note 101, at 200.

104. *See infra* notes 125–126.

105. 564 U.S. 211 (2011).

106. I explore Kennedy's federalism in more depth in COLUCCI, *supra* note 101, at 135–39 and Frank J. Colucci, *Justice Kennedy's Federalism and the Limits of State Sovereignty*, 49 PUBLIUS: J. FEDERALISM (forthcoming 2019).

branch of government from incursion by others."[107] Yet it also intends that "[t]he structural principles secured by the separation of powers protect the individual."[108] For this proposition, he cites *Chadha*.[109] Although the legislative veto "diminished the role of the Executive," to Justice Kennedy "[a] cardinal principle of separation of powers was vindicated at the insistence of an individual, indeed one who was not a citizen of the United States but who still was a person whose liberty was at risk."[110] He then continues: "If the constitutional structure of our Government that protects individual liberty is compromised, individuals who suffer otherwise justiciable injury may object."[111] "Just as it is appropriate for an individual, in a proper case, to invoke separation of powers or checks-and-balances constraints," he concludes, "so too may a litigant, in a proper case, challenge a law as enacted in contravention of constitutional principles of federalism."[112]

Justice Kennedy's concurrence in *Clinton v. City of New York*, striking congressional legislation granting the president a line-item veto, emphasized his connection between enforcing constitutional structure and preserving individual liberty.[113] He writes in response to Justice Breyer, who claims that the allocation of powers among the branches is a political question.[114] Justice Kennedy replies: "Liberty is always at stake when one or more of the branches seek to transgress the separation of powers."[115] To him, the branch clearly most likely to transgress is the most powerful one: Congress. As he writes, "[c]oncentration of power in the hands of a single branch is a threat to liberty."[116]

In *Clinton*, Justice Kennedy does take a brief originalist turn: "[s]o convinced were the Framers that liberty of the person inheres in structure that at first they did not consider a Bill of Rights necessary."[117] For him, liberty is "not so confined" to "that word in the Fifth and Fourteenth Amendments and as illuminated by the other provisions of the Bill of Rights."[118] Separation of powers, along with federalism, intended "to secure liberty in the fundamental political sense of the term, quite in addition to the idea of freedom from intrusive governmental acts."[119] To Justice Kennedy, this political sense reiterates the conception of political liberty:

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107. *Bond*, 564 U.S. at 222.
108. *Id.*
109. *Id.* at 223.
110. *Id.*
111. *Id.*
112. *Id.* at 223–24.
113. 524 U.S. 417, 449–53 (1998) (Kennedy, J., concurring).
114. *See id.* at 469–97 (Breyer, J., dissenting).
115. *Id.* at 450 (Kennedy, J., concurring).
116. *Id.*
117. *Id.*
118. *Id.*
119. *Id.*

> The idea and the promise were that when people delegate some degree of control to a remote central authority, one branch of government ought not possess the power to shape their destiny without a sufficient check from the other two. In this vision, liberty demands limits on the ability of any one branch to influence basic political decisions.[120]

As in other aspects of his jurisprudence, Justice Kennedy focused on taxation: "It follows that if a citizen who is taxed has the measure of the tax or the decision to spend determined by the Executive alone, without adequate control by the citizen's Representatives in Congress, liberty is threatened."[121] The presidential veto "establishes a new mechanism which gives the President the sole ability to hurt a group that is a visible target, in order to disfavor the group or to extract further concessions from Congress."[122] The individual "loses liberty in a real sense . . . [without] traditional constitutional constraints."[123]

Justice Kennedy finds "[t]he law is the functional equivalent of a line item veto and enhances the President's powers beyond what the Framers would have endorsed."[124] Ultimately, however, he blames Congress for this constitutional violation. "That a congressional cession of power is voluntary," he writes, "does not make it innocuous."[125] Even if the law might act "to restrain persistent excessive spending. . . . Abdication of responsibility is not part of the constitutional design."[126]

Justice Kennedy ties his conception of judicial authority to enforce separation of powers in the name of liberty to *Chadha*, although this vision of *Chadha* seems to reflect more his functional analysis for the Ninth Circuit than Justice Burger's textualism for the Supreme Court majority. Justice Kennedy reiterates his ideal that separation of powers "operates on a horizontal axis to secure a proper balance of legislative, executive and judicial authority."[127] It also "operates on a vertical axis . . . between each branch and the citizens in whose interests powers must be exercised."[128] For him, "[t]he citizen has a vital interest in the regularity of the exercise of governmental power."[129] As he elaborates, "[i]f this point was not clear before Chadha, it should have been so afterwards." Despite the differences in the cases, he finds they share a concern about this direct relationship. "By increasing the power of the President beyond what the Framers envisioned the statute compromises the political liberty of our citizens, liberty which the separation of powers seeks to secure."[130]

120. *Id.* at 450–51.
121. *Id.* at 451.
122. *Id.*
123. *Id.*
124. *Id.*
125. *Id.* at 452.
126. *Id.* at 449, 452.
127. *Id.* at 452.
128. *Id.*
129. *Id.*
130. *Id.*

The *Clinton* opinion concludes with a shot at Congress: "The Constitution is not bereft of controls over improvident spending."[131] One is his beloved federalism, "for political accountability is easier to enforce within the States than nationwide."[132] The other "is control of the political branches by an informed and responsible electorate."[133] He concludes by noting that "[t]he Framers of the Constitution could not command statesmanship. They could simply provide structures from which it might emerge."[134] Their failure "cannot validate an otherwise unconstitutional device."[135]

Justice Kennedy expresses his conception of the judicial role in enforcing separation of powers in several other cases. His concurring opinion in *Public Citizen v. U.S. Department of Justice*, joined by Justices Rehnquist and O'Connor, examines more deeply how using the Federal Advisory Committee Act (FACA) to obtain records on presidential use of American Bar Association ratings of potential judicial nominees constitutes an intrusion on the Executive.[136] Justice Kennedy writes allowing this request would allow Congress to "interfere with the President's constitutional prerogative to nominate federal judges."[137]

Justice Kennedy uses *Public Citizen* as a vehicle for justifying judicial enforcement of separation of powers and judicial policing of Congress. To Kennedy, "[i]t remains one of the most vital functions of this Court to police with care the separation of the governing powers."[138] He admits, in this case, "no immediate threat to liberty is apparent." Nevertheless, he writes, "when structure fails, liberty is always in peril."[139]

While Justice Kennedy later states FACA, as applied in this case, "would be a plain violation of the Appointments Clause of the Constitution," his analysis is not textual but primarily functional.[140] Under Article II, he writes, "[n]o role whatsoever is given either to the Senate or to Congress as a whole in the process of choosing the person who will be nominated for appointment."[141] When the power is exclusive to the President, "we have refused to tolerate *any* intrusion by the Legislative Branch."[142] Among the cases cited is *Chadha*, but Justice Kennedy's focus here is more textual: he cites Justice Burger's Supreme Court opinion, which resting on the presentment clause, rather than his own Ninth

131. *Id.*
132. *Id.*
133. *Id.*
134. *Id.* at 452–53.
135. *Id.* at 453.
136. 491 U.S. 440, 467 (1989) (Kennedy, J., concurring).
137. *Id.* at 469.
138. *Id.* at 468.
139. *Id.*
140. *Id.* at 482.
141. *Id.* at 483.
142. *Id.* at 485.

Circuit opinion.[143] As Justice Kennedy writes, "[i]t is improper for this Court to arrogate to itself the power to adjust a balance settled by the explicit terms of the Constitution."[144] Instead, he states, "we are empowered to act in particular cases to prevent any other Branch from undertaking to alter them."[145]

While the bulk of the opinion relies on textualism, the final paragraph does move more toward a functionalist approach: "It is also plain that the application of FACA would constitute a direct and real interference with the President's exclusive responsibility to nominate federal judges."[146] As he concludes, "[t]he mere fact that FACA would regulate so as to interfere with the manner in which the President obtains information necessary to discharge his duty assigned under the Constitution to nominate federal judges is enough to invalidate the Act."[147]

In *Cheney v. U.S. District Court for the District of Columbia*, another case involving FACA, Justice Kennedy's majority opinion limited attempts by Judicial Watch and Sierra Club to obtain discovery about the composition and meetings of the National Energy Development Group created to advise the president and vice president.[148] The opinion allowed for limitations that "might interfere with officials in the discharge of their duties and impinge on the President's constitutional prerogatives," even when executive privilege is not specifically invoked.[149]

Justice Kennedy's opinion justifies limits on discovery by focusing on the identity of the party. Limiting discovery acts to "give recognition to the paramount necessity of protecting the Executive Branch from vexation litigation that might distract it from the energetic performance of its constitutional duties."[150] Interpreting Congress's intent in FACA raises "separation-of-powers considerations" and should "prevent a lower court from interfering with a coequal branch's ability to discharge its constitutional responsibilities."[151]

Justice Kennedy notes that, unlike the litigation in *United States v. Nixon*, this is a civil case.[152] He focuses on the "burden imposed by discovery orders," the lack of checks on civil discovery, and that the requests in this case "ask for everything under the sky," are "similarly unbounded," and "anything but appropriate."[153] They would provide anything the party would want "and much more besides."[154] He concludes, even "*Nixon* does not require the Executive

143. *See id.* at 486.
144. *Id.*
145. *Id.* at 487.
146. *Id.* at 488.
147. *Id.* at 488–89.
148. 542 U.S. 367, 380–82 (2004).
149. *Id.* at 372–73.
150. *Id.* at 382.
151. *Id.*
152. *Id.* at 383–84 (citing 418 U.S. 683, 713 (1974)).
153. *Id.* at 385, 387–88.
154. *Id.* at 388.

Branch to bear the onus of critiquing the unacceptable discovery requests line by line."[155]

Justice Kennedy notes the "burden imposed by the discovery orders" and the "overly broad discovery requests approved by the District Court in this case."[156] As he notes, "special considerations control when the Executive Branch's interests in maintaining the autonomy of its office and safeguarding the confidentiality of its communications are implicated."[157]

Given these burdens, the Executive Branch should have other options besides simply invoking executive privilege. That privilege "is an extraordinary assertion of power" in which "coequal branches of the Government are set on a collision course."[158] Such a claim requires courts to "balanc[e] the need for information in a judicial proceeding and the Executive's Article II prerogatives."[159] This "places courts in [an] awkward position" and—as *Nixon* stated—"should be avoided whenever possible."[160] Any belief that limitation requires invocation of executive privilege and this inevitable conflict is a "mistaken assumption" and a "mistaken reading" of *Nixon* "that the assertion of executive privilege is a necessary precondition to the Government's separation-of-powers objections."[161] Rather, "all courts should be mindful of the burdens imposed on the Executive Branch in any future proceedings."[162] Here, the "[s]pecial considerations applicable to President and to the Vice President suggest that courts should be sensitive to requests by the Government."[163]

Justice Kennedy's deference in *Trump* contrasts with his concurrence just a month earlier in *Pereira v. Sessions*, which advocated considering a more active role for courts in policing separation of powers.[164] His short *Pereira* concurrence addresses the questions he presented in his Ninth Circuit *Chadha* opinion and makes explicit his support for reviewing the actions of agencies, finally rejecting the "reflexive deference"[165] he finds in decisions following *Chevron U.S.A.* v. *Natural Resources Defense Council*.[166]

Justice Kennedy's concurring opinion in *Pereira* presents a sharp contrast with his final concurrence in *Trump*. *Pereira*, like *Chadha*, involved an immigrant challenging his removal.[167] Justice Kennedy joined Justice Sotomayor's majority opinion finding that the "stop time" rule—determined by

155. *Id.*
156. *Id.* at 385–86.
157. *Id.* at 385.
158. *Id.* at 389.
159. *Id.*
160. *Id.* at 389–90.
161. *Id.* at 391.
162. *Id.*
163. *Id.* at 391–92.
164. 138 S. Ct. 2105, 2120 (2018) (Kennedy, J., concurring).
165. *Id.*
166. 467 U.S. 837 (1984).
167. *Pereira*, 138 S. Ct. at 2109.

the Attorney General under the Illegal Immigration Reform and Immigrant Responsibility Act—is not triggered when a written notice to appear fails to specify a time and date.[168] "The plain text, the statutory context, and common sense," to Justice Sotomayor, "all lead inescapably and unambiguously to that conclusion."[169] Dissenting, Justice Alito argues "a straightforward application of *Chevron* requires us to accept the Government's construction of the provision at issue."[170]

Justice Kennedy responds directly "to note [his] concern with the way in which the Court's opinion in *Chevron* has come to be understood and applied."[171] To him such "cursory analysis" by courts "suggests an abdication of the Judiciary's proper role in interpreting federal statutes."[172] He finds "the type of reflexive deference exhibited in some of these cases . . . troubling."[173] He continues: "[W]hen deference is applied to other questions of statutory interpretation, such as an agency's interpretation of the statutory provisions that concern the scope of its own authority, it is more troubling still."[174] With this statement, Justice Kennedy reiterated the concern he expressed in his 1984 public speech explaining *Chadha* that it remains "a problem of modern political science to design the remedy for "a sprawling federal bureaucracy" that has grown "uncontrolled."[175]

Justice Kennedy's concurrence in *Pereira* suggests part of a modern remedy. Citing opinions from Justices Roberts, Thomas and Gorsuch, Justice Kennedy writes that "[g]iven the concerns raised by some Members of this Court, it seems necessary and appropriate to reconsider, in an appropriate case, the premises that underlie *Chevron* and how courts have implemented that decision."[176] He concludes that "[t]he proper rules for interpreting statutes and determining agency jurisdiction and substantive agency powers should accord with constitutional separation-of-powers principles and the function and province of the Judiciary."[177] This final concurrence, where Justice Kennedy rejects "reflexive deference" and advocates for an enhanced judicial role, drastically contrasts with his *Trump* concurrence.

Justice Kennedy's broader separation of powers approach on the Court expands upon the framework he articulated on the Ninth Circuit in *Chadha* and *Beller*. His opinions reject "reflexive deference," and advocate for an assertive judiciary to police the other branches in order to preserve individual liberty and

168. *Id.* at 2110.
169. *Id.*
170. *Id.* at 2121 (Alito, J., dissenting).
171. *Id.* at 2120 (Kennedy, J., concurring) (citation omitted).
172. *Id.*
173. *Id.*
174. *Id*.
175. Kennedy, Hoover Lecture, *supra* note 29, at 4.
176. *Pereira*, 138 S. Ct. at 2121 (Kennedy, J., concurring) (citations omitted).
177. *Id*.

the regular exercise of power. His opinions also consider congressional overreach and judicial intrusion to be greater threats than executive overreach.

III. *BOUMEDIENE*: RECONCILING LIBERTY AND SECURITY UNDER LAW

Justice Kennedy did join and write for majorities in several cases after 2001 and voted to strike government actions that violated the rights of enemy combatants. These decisions culminated with his 2008 opinion for the Court in *Boumediene v. Bush*.[178] However, even when those decisions had the effect of limiting executive power, his opinions expressed greater concern with the inability of Congress to justify departures from existing law and policy. They also presumed an essential role for courts as neutral or impartial factfinders in balancing liberty and security within the framework of law.

In earlier cases involving those detained at Guantanamo after September 11, 2001, Justice Kennedy expressed willingness to use judicial power to limit executive power and to protect habeas corpus as part of his ideal of separation of powers to vindicate individual liberty. In *Rasul v. Bush*,[179] he concurred that federal courts have the jurisdiction to hear habeas challenges brought by detainees.[180] Against claims of military necessity, his opinion finds that under the indefinite lease of the base, "Guantanamo Bay is in every practical respect a United States territory, and it is one far removed from any hostilities."[181]

Kennedy concludes that "courts maintain the power and the responsibility to protect persons from unlawful detention even where military affairs are implicated."[182] Detainees "are being held indefinitely, and without benefit of any legal proceeding to determine their status."[183] The government claim of a power to detain indefinitely "suggests a weaker case of military necessity and much greater alignment with the traditional function of habeas corpus."[184] He concedes that in transport "detention without proceedings or trial would be justified by military necessity for a matter of weeks."[185] Yet for those held, "as the period of detention stretches from months to years, the case for continued detention to meet military exigencies becomes weaker."[186]

In *Hamdan v. Rumsfeld*, Justice Kennedy's concurrence finds Military Commission Order No. 1 "exceeds limits that certain statutes, duly enacted by Congress, have placed on the President's authority to convene military

178. 553 U.S. 723 (2008).
179. 542 U.S. 466 (2004).
180. *Id*. at 485 (Kennedy, J., concurring).
181. *Id*. at 487.
182. *Id*.
183. *Id*. at 487–88.
184. *Id.* at 488.
185. *Id.*
186. *Id*.

courts."[187] He fears military tribunals "without independent review."[188] Echoing his statements from earlier cases, he reiterates: "[c]oncentration of power puts personal liberty in peril of arbitrary action by officials, an incursion the Constitution's three-part system is designed to avoid."[189]

Justice Kennedy contrasts the newly created military commissions with "regular military courts in our system," established by Congress, finding "several noteworthy departures."[190] He notes that, "[a]t a minimum a military commission like the one at issue—a commission specially convened by the President to try specific persons without express congressional authorization—can be 'regularly constituted' by the standards of our military justice system only if some practical need explains deviations."[191] He discusses rules from the Uniform Code of Military Justice, including who can serve as a judge, the powers that officials can exercise at trial, appointing commission members, and routing of review and appeals.[192] "[T]he greater powers of the Appointing Authority . . . raise concerns that the commission's decisionmaking may not be neutral."[193] These differences "remove safeguards that are important to the fairness of the proceedings and the independence of the court."[194] Thus the new commissions "cannot be considered regularly constituted under United States law and thus does not satisfy Congress' requirement that military commissions conform to the law of war."[195] Justice Kennedy concedes that, "[b]ecause Congress has prescribed these limits, Congress can change them, requiring a new analysis consistent with the Constitution and other governing laws."[196]

In *Boumediene v. Bush*, Justice Kennedy wrote for a 5–4 majority reaffirming that Guantanamo detainees "have the habeas corpus privilege," for which the Detainee Treatment Act (DTA) and Military Commissions Act (MCA) do not provide "an adequate and effective substitute."[197] Yet his primary concern was whether the DTA passed by Congress was consistent with the role for courts provided the Suspension Clause, which "protects the rights of the detained by affirming the duty and authority of the Judiciary to call the jailer to account."[198] After finding "doubt" in the record, he decides to "decline . . . to infer too much, one way or the other, from the lack of historical evidence on point."[199]

187. 548 U.S. 557, 636 (2006) (Kennedy, J., concurring).
188. *Id.* at 638.
189. *Id.*
190. *Id.* at 644, 648.
191. *Id.* at 645.
192. *Id.* at 639–46.
193. *Id.* at 650.
194. *Id.* at 651.
195. *Id.*
196. *Id.* at 653.
197. 553 U.S. 723, 732–33 (2008).
198. *Id.* at 745; *see also* U.S. CONST. art. I, § 9, cl. 2.
199. *Boumediene*, 533 U.S. at 752.

While it is the executive who detains prisoners, the constitutional criticisms Justice Kennedy launches in *Boumediene* aim squarely at Congress. He states that "here we confront statutes, the DTA and the MCA, that were intended to circumscribe habeas review."[200] Unlike other laws "coextensive with traditional habeas corpus," Justice Kennedy finds, in limiting regulating jurisdiction and grounds for appeal, Congress "intended the Court of Appeals to have a more limited role in enemy combatant status determinations than a district court has in habeas corpus proceedings."[201]

For Justice Kennedy's functional definition, "[w]hat matters is the sum total of procedural protections afforded to the detainee at all stages, direct and collateral."[202] Yet he process does not suffice: "Even when the procedures authorizing detention are structurally sound, the Suspension Clause remains applicable and the writ relevant."[203] As he concludes, "when the judicial power to issue habeas corpus properly is invoked the judicial officer must have adequate authority to make a determination in light of the relevant law and facts and to formulate and issue appropriate orders for relief, including, if necessary, an order directing the prisoner's release."[204] Any re-examination of procedures should "come close to reinstating the § 2241 habeas corpus process Congress sought to deny them."[205] The MCA, supplemented by the DTA, "cannot bear this interpretation."[206] Congress provided "an inadequate substitute for habeas corpus" and "effects an unconstitutional suspension of the writ."[207]

Justice Kennedy explicitly acknowledges "[t]he real risks, the real threats, of terrorist attacks are constant and not soon likely to abate."[208] He admits, as in *Rasul*, that "[p]ractical considerations and exigent circumstances inform the definition and reach of the law's writs."[209] These may require that habeas not "be available at the moment the prisoner is taken into custody."[210] But, he writes, "[t]he cases before us, however, do not involve detainees who have been held for a short period of time."[211] Some have been held for six years or more.[212] "[T]he costs of delay can no longer be borne by those who are held in custody."[213]

200. *Id*. at 776.
201. *Id*. at 777, 778.
202. *Id*. at 783.
203. *Id*. at 785.
204. *Id*. at 787.
205. *Id*. at 792.
206. *Id.*
207. *Id*.
208. *Id.* at 793.
209. *Id.*
210. *Id*.
211. *Id.* at 794.
212. *Id.*
213. *Id.* at 795.

Justice Kennedy's *Boumediene* opinion concludes with a statement about the "proper deference" that should be given to "political branches."[214] He especially mentions the President's "substantial authority to apprehend and detain those who pose a real danger to our security."[215] Further, he states, "[o]ur opinion does not undermine the Executive's powers as Commander in Chief."[216] The final section, however, provides no similar respect to Congress as an institution. It mentions "some designated Members of Congress" who "begin the day with briefings that may describe new and serious threats to our Nation and its people."[217] They are among "[t]he political branches" who, "consistent with their independent obligations to interpret and uphold the Constitution, can engage in a genuine debate about how best to preserve constitutional values while protecting the Nation from terrorism."[218]

In the end, Justice Kennedy sees both habeas—"a right of first importance"—and the judiciary as central to "fidelity to freedom's first principles."[219] "Chief among these are freedom from arbitrary and unlawful restraint and the personal liberty that is secured by adherence to the separation of powers" which produce "the judicial authority to consider petitions for habeas corpus relief."[220] He admits "[t]he laws and Constitution are designed to survive, and remain in force, in extraordinary times"[221] and concludes, "[l]iberty and security can be reconciled; and in our system they are reconciled within the framework of the law."[222]

IV. JUSTICE KENNEDY AND PRESERVATION OF EXECUTIVE PRIMACY IN FOREIGN AFFAIRS

While Justice Kennedy enforced limits on executive power in areas involving enemy combatants after 2001, in other areas over the same timeframe he consistently employed judicial power to preserve and protect the exercise of executive power from interferences by Congress and the courts. In several cases, he concedes that substantial claims to liberty are at stake, yet he supports judicial deference to executive decisions in areas concerning national defense and foreign affairs for fear of congressional or judicial intrusion on executive policymaking.

In later cases, Justice Kennedy preserved executive power and presidential primacy concerning foreign affairs. In *Zadvydas v. Davis*, he dissented from Breyer's majority opinion interpreting the Immigration and Nationality Act to

214. *Id.* at 796.
215. *Id.* at 797.
216. *Id.*
217. *Id.*
218. *Id.* at 798.
219. *Id.* at 797, 798.
220. *Id.* at 797.
221. *Id.* at 798.
222. *Id.*

prevent federal detention of removable aliens more than ninety days beyond the completion of their removal period if considered by the Attorney General to be a risk to the community or unlikely to comply with removal after the completion of their sentence.[223] Justice Kennedy admits "[t]he aliens' claims are substantial; their plight is real."[224] Yet, in the end, "a removable alien does not have the same liberty interest as a citizen does."[225] More fundamentally, for Justice Kennedy, the time limit imposed by the majority may infringe on the inherent authority of the Executive Branch to conduct negotiations with other nations.[226]

Justice Kennedy emphasizes "the obvious necessity that the Nation speak with one voice on immigration and foreign affairs matters."[227] With this limit, he writes, "other countries can effect the release of these individuals back into the American community" and "may ignore or disclaim responsibility to accept their return."[228] He characterizes this effect as "interference with sensitive foreign relations [and] becomes even more acute where hostility or tension characterizes the relationship, for other countries can use the fact of judicially mandated release to their strategic advantage, refusing the return of their nationals to force dangerous aliens upon us."[229]

Justice Kennedy fears that courts "can expand or contract the reasonable period of detention based on [their] own assessment of the course of negotiations with foreign powers."[230] This judicial power "goes far to undercut the position of the Executive in repatriation negotiations" and has the effect of "weakening the hand of our Government."[231] He concludes with concern that judicial consideration of foreseeability of removal "would require the Executive Branch to surrender its primacy in foreign affairs and submit reports to the courts respecting its ongoing negotiations in the international sphere."[232]

In *Zivotofsky v. Kerry*, Justice Kennedy reasserted his commitment to protecting executive foreign policy prerogatives from congressional interference.[233] He joined liberal Justices in the *Zivotofsky* majority and wrote an opinion to emphasize the need for the nation to speak with one voice in foreign policy in terms of recognizing other nations.[234] His opinion appeals to the text of the Constitution, including the Reception Clause and treaty making

223. 533 U.S. 678, 705 (2001) (Kennedy, J., dissenting).
224. *Id.* at 718.
225. *Id*. at 717.
226. *Id.* at 705.
227. *Id.* at 711.
228. *Id*.
229. *Id*. at 711–12.
230. *Id*. at 712.
231. *Id*. at 713.
232. *Id*. at 725.
233. 135 S. Ct. 2076, 2081 (2015).
234. *Id.* at 2086.

power of Article II, by using original intent and historical practice and understanding .[235]

Ultimately, however, Kennedy relies on "functional considerations."[236] "Put simply the Nation must have a single policy regarding which governments are legitimate in the eyes of the United States."[237] As he reiterates, "[t]hese assurances cannot be equivocal," and "[t]hat voice must be the President's."[238] The presidency "has the characteristic of unity at all times."[239] "The President is capable, in ways Congress is not, of engaging in the delicate and often secret diplomatic contacts that may lead to a decision on recognition," and "is also better positioned to take the decisive, unequivocal action necessary to recognize other states at international law."[240]

Justice Kennedy admits recognition of other nations "is just one part of a political process that may require Congress to make laws," but finds that functionally "the exclusive recognition power is essential to the conduct of Presidential duties."[241] It is "an executive power that Congress may not qualify."[242] Kennedy focuses on effects: "If the President is to be effective in negotiations over a formal recognition determination, it must be evident to his counterparts abroad that he speaks for the Nation on that precise question."[243]

He concedes, "[i]t is not for the President alone to determine the whole content of the Nation's foreign policy" and that "it is essential the congressional role in foreign affairs be understood and respected."[244] Nevertheless, "[r]ecognition is an act with immediate and powerful significance for international relations, so the President's position must be clear."[245] Thus, in the interest in speaking with one voice, "Congress cannot require him to contradict his own statement regarding a determination of formal recognition."[246]

Justice Kennedy reasons from this exclusive executive recognition power that Congress's act to require a specific nation to be noted on a passport to be an unconstitutional intrusion. "That congressional command would not only prevent the Nation from speaking with one voice but also prevent the Executive itself from doing so in conducting foreign relations."[247] Place of birth is considered "an official executive statement implicating recognition."[248] While

235. *Id*. at 2085–86.
236. *Id*. at 2086.
237. *Id.*
238. *Id*.
239. *Id.*
240. *Id*.
241. *Id*. at 2087.
242. *Id.*
243. *Id*.
244. *Id*. at 2090.
245. *Id.*
246. *Id.*
247. *Id*. at 2095.
248. *Id.*

he admits "Congress has substantial authority over passports," he concludes "[t]o allow Congress to control the President's communication in the context of a formal recognition determination is to allow Congress to exercise that exclusive power itself."[249] In the interest of speaking with one voice in foreign policy, the Legislative Branch cannot "command the President to contradict an earlier recognition determination in the issuance of passports."[250]

In *Ziglar v. Abbasi*, Justice Kennedy's majority opinion held that those detained after September 11 who may have suffered abuse, discrimination, and violations of constitutional rights before removal could not sue the federal agents and wardens responsible.[251] While the opinion mentioned that the Plaintiff's theory of liability was based on *Bivens v. Six Unknown Federal Narcotics Agents*,[252] he argued that the now-"disfavored" doctrine arose when "the Court followed a different approach to recognizing implied causes of action than it follows now," one "far more cautious."[253] He specifically cites separation-of-powers principles as a justification for refusing expansion.[254]

As in earlier opinions, Kennedy stresses how such litigation can influence the exercise of executive power. "Claims against federal officials often create substantial costs, in the form of defense and indemnification," he writes.[255] "In addition, the time and administrative costs attendant upon intrusions resulting from the discovery and trial process are significant factors to be considered."[256] Kennedy finds courts ill-suited to weigh "the projected costs and consequences to the Government itself when the tort and monetary liability mechanisms of the legal system are used to bring about the proper formulation and implementation of public policies."[257]

In *Ziglar*, arising after the September 11 terrorist attacks, Justice Kennedy expressed concern about "special factors" that include the effect of discovery and publicity about public policy choices made by the executive and by high-ranking officials.[258] Even in suits brought against an individual official, he writes, "these claims would call into question the formulation and implementation of a general policy. This, in turn, would necessarily require inquiry and discovery into the whole course of the discussions and deliberations that led to the policies and governmental acts being challenged."[259] He fears "the burden and demand of litigation might well prevent them—or, to be more

249. *Id.* at 2096.
250. *Id.*
251. 137 S. Ct. 1843, 1896 (2017).
252. 403 U.S. 388 (1971).
253. *Ziglar*, 137 S. Ct. at 1855, 1857.
254. *Id.* at 1861.
255. *Id.* at 1856.
256. *Id.*
257. *Id.* at 1858.
258. *Id.* at 1861.
259. *Id.* at 1860.

precise, future officials like them—from devoting the time and effort required for the proper discharge of their duties."[260] For this proposition he cites his own opinion in *Cheney*.[261]

Justice Kennedy fears the implications of a "discovery and litigation process would either border upon or directly implicate the discussion and deliberations that led to the formation of the policy in question."[262] For Justice Kennedy, "[a]llowing a damages suit in this context, or in a like context in other circumstances, would require courts to interfere in an intrusive way with sensitive functions of the Executive Branch."[263] Further, this litigation has the potential to "challenge . . . major elements of the Government's whole response to the September 11 attacks, thus of necessity requiring an inquiry into sensitive issues of national security."[264] But, "[n]ational-security policy is the prerogative of the Congress and President."[265] Thus, "[t]he risk of personal damages liability is more likely to cause an official to second-guess difficult but necessary decisions concerning national-security policy."[266]

This decision, Kennedy admits, may result in "insufficient deterrence to prevent officers from violating the Constitution."[267] He concedes "some executive actions have the sweeping potential to affect the liberty of so many is a reason to consider proper means to impose restraint and to provide some redress from injury."[268] Nonetheless, in this case his greater fear is that "high officers who face personal liability for damages might refrain from taking urgent and lawful action in a time of crisis. And, as already noted, the costs and difficulties of later litigation might intrude upon and interfere with the proper exercise of their office."[269] He recognizes the need for "balance to be struck, in situations like this one, between deterring constitutional violations and freeing high officials to make the lawful decisions necessary to protect the Nation in times of great peril."[270] Yet he finds, "[t]he proper balance is one for the Congress, not the Judiciary, to undertake."[271]

In these opinions leading to *Trump*, Justice Kennedy expresses further commitment to preserving executive power. He goes beyond form to assess the practical effect congressional legislation and judicial proceedings will have on the ability of the President and executive officials to design and implement foreign policy and influence relations with other nations. He acknowledges the

260. *Id.* at 1860 (citing Cheney v. U.S. Dist. Court for D.C., 542 U.S. 367, 382 (2004)).
261. *Id.*
262. *Id.* at 1860–61.
263. *Id.* at 1861.
264. *Id.*
265. *Id.*
266. *Id.*
267. *Id.* at 1863.
268. *Id.*
269. *Id.*
270. *Id.*
271. *Id.*

effect these decisions may have on individual liberty and the ability to hold officials accountable for violations of the Constitution, but his commitment to constitutional structure mandates judicial deference to the Executive to prevent intrusion or interference with the primary role of the Executive in speaking for the nation as well as making and implementing foreign policy.

V. *TRUMP V. HAWAII*: RECONCILING "SUBSTANTIAL DEFERENCE" AND "FREEDOM THAT LASTS"

Justice Kennedy's short concurrence in *Trump* is notable for four reasons: what it says; what it does not say; the case it cites; and the cases it alludes to, but does not explicitly cite. His final words as a Justice seek to reassure but instead project concern.

If the constitutional issue is as straightforward as the majority and Justice Kennedy suggest, the final two paragraphs of Justice Kennedy's concurrence seem unnecessary. He joined "in full" Roberts's majority opinion, which finds: "Under these circumstances, the Government has set forth a sufficient national security justification to survive rational basis review."[272] Justice Roberts further asserted that "[w]e express no view on the soundness of the policy. We simply hold today that plaintiffs have not demonstrated a likelihood of success on the merits of their constitutional claim."[273] In "further observation," Justice Kennedy finds "appropriate" to explicitly recognize the costs of executive deference and a reconsideration of which branch is most likely to sacrifice liberty the most.[274]

Rather than rejecting the "reflexive deference" he finds "troubling" in *Pereira*,[275] Kennedy's *Trump* opinion relies on "the substantial deference that is and must be accorded to the Executive in the conduct of foreign affairs"[276] characteristic of his earlier opinions. His *Trump* concurrence is notable for what it does not say—and the cases it does not cite—and for its target audience.

Justice Kennedy notes that "there may be some common ground" between the majority and dissent.[277] Both, in his view, suggest "governmental action may be subject to judicial review to determine whether or not it is 'inexplicable by anything but animus,' which in this case would be animosity to a religion."[278] His statement about the constitutional responsibility in this case is more striking for what it omits than for what it says. To support this proposition of common ground that courts "in some instances" have the power to review government actions as "'inexplicable by anything but animus,'" Kennedy quotes his own

272. Trump v. Hawaii, 138 S. Ct. 2392, 2423 (2018).
273. *Id.*
274. *Id.* at 2424 (Kennedy, J., concurring).
275. Pereira v. Sessions, 138 S. Ct. 2105, 2120 (2018) (Kennedy, J., concurring).
276. *Trump*, 138 S. Ct. at 2424.
277. *Id.* at 2423.
278. *Id.* at 2423–24 (citation omitted).

majority opinion in *Romer v. Evans*,[279] which struck a Colorado constitutional Amendment because it "identifies persons by a single trait and then denies them protection across the board."[280]

Romer is the only case Justice Kennedy cites in his *Trump* concurrence. But other relevant opinions are implicit in his argument. On the point of animus based on religion, Justice Kennedy does not cite the opinion that most directly addresses animosity to religion: *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*.[281] There Justice Kennedy articulates a "fundamental nonpersecution principle of the First Amendment,"[282] finding government action "violated the Nation's essential commitment to religious freedom."[283]

In finding impermissible animus against Church of the Lukumi Babalu Aye and the Santeria religion, Justice Kennedy's opinion considered "both direct and circumstantial evidence."[284] For him, "[r]elevant evidence includes, among other things, the historical background of the decision under challenge, the specific series of events leading to the enactment or official policy in question, and the legislative or administrative history, including contemporaneous statements made by members of the decisionmaking body."[285] Considering the evidence in depth, he concludes "the neutrality inquiry leads to one conclusion: The ordinances had as their object the suppression of religion."[286]

The consideration of background context as well as "both direct and circumstantial evidence" that was critical to Justice Kennedy's rationale in *Church of the Lukumi* and in *Romer*, however, conflicts with his commitment to executive prerogative in the area of foreign affairs. Even some of the dissenters in *Trump* express willingness to allow the government greater chance to make the case for the constitutionality of the ban. Justice Breyer, for example, concedes "[d]eclarations, anecdotal evidence, facts, and numbers taken from *amicus* briefs are not judicial factfindings. The Government has not had an opportunity to respond, and a court has not had an opportunity to decide."[287]

This reality raises a dilemma for Justice Kennedy. Judicial examination of such "direct and circumstantial evidence" raises concerns he mentioned in previous cases. Alluding—though not referring—to the effects of discovery he stated in *Cheney* and in *Zivotofsky*, Justice Kennedy then states "even if further proceedings are permitted, it would be necessary to determine that any discovery

279. *Id.* at 2423 (quoting Romer v. Evans, 517 U.S. 620, 632 (1996)).

280. 517 U.S. at 620.

281. 508 U.S. 520 (1993). Justice Kennedy's opinion in *Church of the Lukumi* is cited three times by the *Trump* dissenters: by Justice Breyer after his second sentence and by Justice Sotomayor in text and in a footnote. *Trump*, 138 S. Ct. at 2429, 2434, 2439, fn.3.

282. *Church of the Lukumi*, 508 U.S. at 523.

283. *Id.* at 523.

284. *Id.* at 540.

285. *Id.*

286. *Id.* at 542.

287. Trump v. Hawaii, 138 S. Ct. 2392, 2433 (2018) (Breyer, J., dissenting).

and other preliminary matters would not themselves intrude on the foreign affairs power of the Executive."[288]

Justice Kennedy attempts to balance his commitments to executive deference and to an aggressive judicial power to define and enforce the full and necessary meaning of liberty. Under the Constitution, he admits, "[t]here are numerous instances in which the statements and actions of Government officials are not subject to judicial scrutiny or intervention."[289] For Justice Kennedy, however, "[t]hat does not mean those officials are free to disregard the Constitution and the rights it proclaims and protects."[290] The obligation to uphold their oath to the Constitution "is not confined to those spheres in which the Judiciary can correct or even comment upon what those officials say or do."[291]

Kennedy's statement in *Trump* echoes his 1980 Ninth Circuit writing in *Beller* that courts cannot "give our opinion on the fairness of every application of the military regulation."[292] *Beller* reiterated "[u]pholding the challenged regulations as constitutional is distinct from a statement that they are wise," as "[t]he latter judgment is neither implicit in our decision nor within our province to make."[293] In *Trump*, however, Justice Kennedy' doubts expressed on behalf of an "anxious world"[294] itself serves as an implicit comment on the travel ban.

Justice Kennedy's final two paragraphs in *Trump* echo faintly the final words of his earlier, uncited opinion concerning unconstitutional official animus against religion. In *Church of the Lukumi*, Kennedy concludes:

> The Free Exercise Clause commits government itself to religious tolerance, and upon even slight suspicion that proposals for state intervention stem from animosity to religion or distrust of its practices, all officials must pause to remember their own high duty to the Constitution and to the rights it secures. Those in office must be resolute in resisting importunate demands and must ensure that the sole reasons for imposing the burdens of law and regulation are secular. Legislators may not devise mechanisms, overt or disguised, designed to persecute or oppress a religion or its practices. The laws here in question were enacted contrary to these constitutional principles, and they are void.[295]

In *Trump*, Justice Kennedy sounds similar themes to seek to reassert this constitutional meaning and promise. He concludes "the very fact that an official may have broad discretion, discretion free from judicial scrutiny, makes it all the more imperative for him or her to adhere to the Constitution and to its meaning

288. *Id.* at 2424 (Kennedy, J., concurring).

289. *Id.*

290. *Id.*

291. *Id.*

292. Beller v. Middendorf, 632 F.2d 788, 812 (9th Cir. 1980), *overruled by* Witt v. Dep't of the Air Force, 527 F.3d 806 (9th Cir. 2008).

293. *Id.*

294. *Trump*, 138 S. Ct. at 2424 (Kennedy, J., concurring).

295. Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 547 (1993).

and its promise."[296] He reiterates the importance of protections of "freedom of belief and expression" and writes "[i]t is an urgent necessity that officials adhere to these constitutional guarantees and mandates in all their actions, even in the sphere of foreign affairs."[297] While his closing words about constitutional commitments may have soothed in *Church of the Lukumi*, they ring hollow in the context of the *Trump* decision.

Kennedy's "further observation"[298] in *Trump* attempts to reconcile his reading of the Constitution with constitutional structure based on executive deference. If some constitutional and executive behavior is beyond "those spheres in which the Judiciary can correct or even comment upon what those officials say or do," then who is the audience?[299] What need is there for a disclaimer that even when "statements and actions of Government officials are not subject to judicial scrutiny or intervention. That does not mean those officials are free to disregard the Constitution and the rights it proclaims and protects"?[300] Why emphasize that "[t]he oath that all officials take to adhere to the Constitution is not confined to those [judicial] spheres"?[301]

The tension Kennedy identifies in *Trump* between executive discretion, the Constitution, and the oath appears uncited, yet clear, references to Chief Justice Marshall's foundational opinion in *Marbury v. Madison*.[302] Marshall states early in *Marbury* that "[b]y the Constitution of the United States, the President is invested with certain important political powers, in the exercise of which he is to use his own discretion, and is accountable only to his country in his political character, and to his own conscience."[303] He continues, "whatever opinion may be entertained of the manner in which executive discretion may be used, still there exists, and can exist, no power to control that discretion. The subjects are political. They respect the nation, not individual rights, and, being entrusted to the executive, the decision of the executive is conclusive."[304]

Marshall in *Marbury* also invokes the constitutional oath as a limit on unconstitutional action by the officials who take it.[305] In discussing the duty of judges to enforce a written constitution, he notes "the principle, supposed to be essential to all written constitutions, that a law repugnant to the constitution is void; and that *courts*, as well as other departments, are bound by that instrument."[306] Marshall, too, appeals to the oath judges take:

296. *Trump*, 138 S. Ct. at 2424 (Kennedy, J., concurring).
297. *Id.*
298. *Id.*
299. *Id.*
300. *Id.*
301. *Id.*
302. 5 U.S. 137 (1803).
303. *Id.* at 165–66.
304. *Id.* at 166.
305. *Id.* at 180.
306. *Id.*

> Why does a judge swear to discharge his duties agreeably to the constitution of the United States, if that constitution forms no rule for his government? [I]f it is closed upon him, and cannot be inspected by him?
>
> If such be the real state of things, this is worse than solemn mockery. To prescribe, or to take this oath, becomes equally a crime.[307]

In *Trump*, Justice Kennedy reinforces that "the very fact that an official may have broad discretion, discretion free from judicial scrutiny, makes it all the more imperative for him or her to adhere to the Constitution and to its meaning and its promise."[308] This appears a concession that, perhaps, the Constitution is not enough, and recognition that an oath to adhere to it cannot be enforced.

Justice Kennedy's concurrence in *Trump*, ultimately, is best understood as an appeal to conscience: to the conscience of executive officials, and to that of the President himself. Only in this way does his lecture about the First Amendment concerning establishment, free exercise of religion, and "freedom of belief and expression" make sense.[309] Justice Kennedy implies the current Executive Branch either poses a threat to those values or can reasonably be perceived as one. "It is an urgent necessity that officials adhere to these constitutional guarantees and mandates in all their actions, even in the sphere of foreign affairs."[310] He hopes that this adherence to constitutional guarantees will occur, speaking for "an anxious world," one that "must know that our Government remains committed always to the liberties the Constitution seeks to preserve and protect, so that freedom extends outward, and lasts."[311] Yet Kennedy's expression of hope implies fear, anxiety, and doubt—if not about whether courts should defer to the executive, then about whether such deference truly serves the values that the Constitution is designed to secure.

VI. FURTHER OBSERVATIONS: COULD CONSTITUTIONAL STRUCTURE IMPERIL LIBERTY?

Justice Kennedy's final opinion in *Trump* both reflects the constitutional commitments to executive power he has asserted throughout his career and casts doubt upon the assumptions behind his larger separation of powers jurisprudence. Dating from his *Chadha* opinion on the Ninth Circuit, he has

307. *Id.*

308. Trump v. Hawaii, 138 S. Ct. 2392, 2424 (2018) (Kennedy, J., concurring).

309. *Id.* By some measures, Kennedy has been the justice most committed to protecting free expression across context and ideology. *See* COLUCCI, *supra* note 101, at 75–101. *See generally* Eugene Volokh, *How the Justices Voted in Free Speech Cases, 1994–2000*, 48 UCLA L. REV. 1191 (2001), http://www2.law.ucla.edu/volokh/howvoted.htm (updated through 2002). Kennedy reiterated these commitments in two statements during his final Term: the majority opinion in *Masterpiece Cakeshop v. Colo. Civil Rights Comm'n*, 138 S. Ct. 1719 (2018) and his concurring opinion in *Nat'l Inst. of Family & Life Advocates v. Becerra*, 138 S. Ct. 2361 (2018).

For a recent reconsideration that ranks other justices ahead of Kennedy, see Lee Epstein et al., *Do Justices Defend the Speech They Hate?*, 6 J.L. & COURTS 237, 237–62 (2018).

310. *Trump*, 138 S. Ct. at 2424.

311. *Id.*

aggressively used judicial power to vindicate separation of powers. The opinion and decision in *Trump* reflect his ideals—dating back to *Beller*—of deferring to executive power, particularly in areas that implicate aspects of foreign affairs. He has been especially attentive to both legislative and judicial actions that may intrude on the core powers of the executive.

Justice Kennedy's larger separation of powers jurisprudence initially operated on two assumptions: that constitutional structure promotes liberty, and that Congress is the branch most likely to threaten it. Justice Kennedy's vote and passionate words in *Trump* cast doubt on both of these premises. His earlier view of the Constitution—as he stated in *Boumediene* presumes that liberty and security can be reconciled within framework of law. Several of Justice Kennedy's opinions—from *Beller* to *Zadvydas* to *Ziglar* to *Trump*—suggest structure itself may shield executive officials from accountability under the law for violations of liberty.

His concurrence in *Trump* offers a final lesson about the nature of liberty, the Constitution, and the essential limits of judicial power. Justice Kennedy was the Justice most likely to strike laws for violating the Constitution,[312] leading one scholar to conclude he placed "no areas of law and policy off limits to judicial action."[313] From his confirmation, Justice Kennedy has expressed liberty as the highest constitutional value and advocated a judicial duty "to insure that the word 'liberty' in the Constitution is given its full and necessary meaning, consistent with the purposes of the document as we understand it."[314]

Throughout his career, Justice Kennedy emphasized liberty as the first and last words of significant opinions protecting individual rights.[315] He has joined opinions stating "[l]iberty finds no refuge in a jurisprudence of doubt,"[316] and that, "[w]hen contending parties invoke the process of the courts, however, it becomes our unsought responsibility to resolve the federal and constitutional issues the judicial system has been forced to confront."[317]

Yet Justice Kennedy's concurrence in *Trump* introduces doubt about the extent of that judicial responsibility and about whether constitutional structure and deference to the executive in the area of foreign policy really do promote liberty. He questions "[w]hether judicial proceedings may properly continue in this case" and whether "it would be necessary to determine that any discovery

312. Frank J. Colucci, *Sherry's Model Justice: Anthony Kennedy*, 16 GREEN BAG 2D. 455, 455–56 (2013).

313. THOMAS M. KECK, THE MOST ACTIVIST SUPREME COURT IN HISTORY: THE ROAD TO MODERN JUDICIAL CONSERVATISM 253 (2004).

314. *Hearings*, *supra* note 101, at 122.

315. Three examples: (1) The joint opinion in *Planned Parenthood of Se. Penn. v. Casey* begins and ends with "liberty," 505 U.S. 833, 844, 901 (1992); (2) *Lawrence v. Texas* begins with "liberty" and ends with "freedom," 539 U.S. 558, 562, 579 (2003); (3) *Obergefell v. Hodges* uses "liberty" three times in the first paragraph, 135 S. Ct. 2584, 2593 (2015).

316. *Casey*, 505 U.S. at 844.

317. Bush v. Gore, 531 U.S. 98, 111 (2000).

and other preliminary matters would not themselves intrude on the foreign affairs power of the Executive."[318]

Justice Kennedy's earlier opinions expressed an essential connection between constitutional structure and liberty. *Boumediene*, for example, stands on the ideal "[t]he laws and Constitution are designed to survive, and remain in force, in extraordinary times. Liberty and security can be reconciled; and in our system they are reconciled within the framework of the law."[319] His opinion in *Trump*—reflecting themes from his *Beller* opinion through more recent cases involving deference to the executive in foreign affairs—raises doubts about whether law alone is truly capable of reconciling liberty and security.[320]

Kennedy's last opinion on the Court reaffirmed his broader commitment to "substantial deference" to the executive in foreign affairs.[321] But *Trump* went further, rejecting the ideal of judicial power to define and enforce liberty that had stood at the center of his jurisprudence. His opinion concedes that some executive decisions involving foreign policy are beyond the scope of courts and law, even when they implicate core claims of individual liberty.

Kennedy's "further observations" in *Trump*, expressing "urgent necessity" on behalf of "[a]n anxious world," signal a final reckoning about the connection between constitutional structure and liberty.[322] His closing appeal to executive conscience recalls his earlier statement that "the Framers of the Constitution could not command statesmanship. They could simply provide structures from which it might emerge."[323] In *Clinton*, failure of statesmanship did not justify an unconstitutional law; in *Trump*, anxiety about the true motives cannot invalidate a power over foreign policy granted by the Constitution to the Executive.

"When structure fails," Kennedy wrote as a younger Justice, "liberty is always in peril."[324] Yet constitutional structure cannot guarantee that those exercising powers do so wisely, or that the people it serves retain confidence in their commitment to the broader purposes constitutions are established to secure.[325] As then-Judge Kennedy stated in 1982 before coming to the Court,

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318. Trump v. Hawaii, 138 S. Ct. 2392, 2424 (2018) (Kennedy, J., concurring).

319. Boumediene v. Bush, 553 U.S. 723, 798 (2008).

320. For criticism of the connection Kennedy expressed in *Bond* and *Boumediene* between separation of powers and liberty, see Aziz Z. Huq, *Libertarian Separation of Powers*, 8 N.Y.U. J.L. & LIBERTY 1006, 1007, 1039 (2014).

321. *Trump*, 138 S. Ct. at 2424 (Kennedy, J., concurring).

322. *Id.*

323. Clinton v. City of New York, 524 U.S. 417, 452–53 (1998).

324. Pub. Citizen v. U.S. Dep't. of Justice, 491 U.S. 440, 468 (1989).

325. For extended discussion of the distinction between maintaining a constitution and commitment to constitutionalism, see Walter F. Murphy, *Constitutions, Constitutionalism, and Democracy*, *in* CONSTITUTIONALISM AND DEMOCRACY: TRANSFORMATIONS IN THE CONTEMPORARY WORLD 3, 3–25 (Douglas Greenburg et al. eds., 1993).

As Donald P. Kommers once put the difference: "A constitution is a written document. Constitutionalism is a state of mind. Thus one can have a constitution without constitutionalism." Donald P. Kommers, *Negative Lessons from the American Experience: A Response to Professor Katz*, *in* STANLEY M. KATZ, CONSTITUTIONALISM IN EAST CENTRAL EUROPE: SOME NEGATIVE LESSONS FROM THE AMERICAN

"the Constitution, in some of its most critical aspects, is what the political branches of government have made it, whether the judiciary approves or not."[326] When officials empowered under the Constitution act in ways that depart from its meaning and promise, structure itself imperils any confidence "that freedom extends outward, and lasts."[327] Kennedy's final opinion in *Trump* sounds a warning that extends beyond the instant case: The framework of law, enforced by courts, cannot suffice to reconcile liberty and security.

EXPERIENCE 20, 20 (1994), https://www.ghi-dc.org/fileadmin/user_upload/GHI_Washington/PDFs/Constitutionalism_in_East_Central_Europe.pdf. Kommers explicitly identified "the exponential growth of presidential power in our time, particularly in the fields of foreign and military affairs" as one of the "breakdowns" in American constitutionalism. *Id.* at 25.

326. *Hearings*, *supra* note 101, at 221 (quoting Kennedy, L.A. Patent Lawyer's Assoc., *supra* note 75, at 9).

327. *Trump*, 138 S. Ct. at 2424 (Kennedy, J. concurring).