rected by the Act of August 18, 1888 (25 Stat. at L. 433), is as follows:

"SEC. 4. That all national banking associations established under the laws of the United States shall, for the purpose of all actions by or against them, real, personal, or mixed, and all suits in equity, be deemed citizens of the states in which they are respectively located; and in such cases the circuit and district courts shall not have jurisdiction other than such as they would have in cases between individual citizens of the same State.

"The provisions of this section shall not be held to affect the jurisdiction of the courts of the United States in cases commenced by the United States or by direction of any officer thereof, or cases for winding up the affairs of any such bank." (25 Stat. at L. 436).

In view of the language of the second clause of the first branch of this section, it is contended that the federal courts cannot exercise the same jurisdiction in respect of national banks, by reason of diverse citizenship, as they possess in controversies between individual citizens of different states.

[650] The rule that every clause in a statute should have effect, and one portion should not be placed in antagonism to another, is well settled; and it is also held that it is the duty of the court to ascertain the meaning of the Legislature from the words used and the subject-matter to which the statute relates, and to restrain its operation within narrower limits than its words import if the court is satisfied that the literal meaning of its language would extend to cases which the Legislature never intended to include in it. *Brewer* v. *Blougher*, 39 U. S. 14 Pet. 178 [10:408]; *Washington Market Co.* v. *Hoffman*, 101 U. S. 112, 115 [25: 782, 783].

The Act of 1887 largely superseded the previous legislation relating to the jurisdiction in general of the circuit courts. Under the first section jurisdiction of all suits of a civil character, and involving a given sum or value, arising under the Constitution or laws of the United States, or in which there might be a controversy between citizens of different states was retained. And so far as national banks were concerned, the jurisdiction could be exercised whether dependent upon the subject-matter or the citizenship.

Out of abundant caution, the first clause of the first branch of the fourth section provided that national banks, for the purposes of actions by or against them, should be deemed citizens of the states in which they were respectively located; and this involved the right to sue, or be sued by, a citizen of another State in the United States courts. Hence, as has been well said, if the second clause were to be construed as contended, it would in effect take away what had just been recognized. *First Nat. Bank* v. *Forest*, 40 Fed. Rep. 705.

But had the section terminated with the first clause, the question might have arisen as to whether a national bank could, because of its federal character, bring suits in the federal courts, or remove causes thereto, as had been originally the case. And apparently to obviate this the clause was added subjecting these banks to the same rules applicable to citizens of the states where they were located. No reason is perceived why it should be held that Congress intended that national banks should not resort to federal tribunals as other corporations and individual citizens might. [651] The fact that there are cases between individual citizens of the same State in which the circuit courts might have jurisdiction, as where the case arises under the Constitution, laws, or treaties of the United States, or the controversy relates to lands claimed under grants of different states, so far from sustaining the contention that the phraseology in question was designed to limit the jurisdiction as to national banks to such cases, justifies the conclusion that it is only to them that the second clause applies. The use of the word "between" is perhaps open to criticism, but it seems to us clear that the clause was intended to have, and must receive the same effect and operation as that of the proviso to the fourth section of the Act of July 12, 1882, that is to say, that the federal courts should not have jurisdiction by reason of the subject-matter other than they would have in cases between individual citizens of the same State, and so not have jurisdiction because of the federal origin of the bank. But jurisdiction dependent upon diversity of citizenship was provided for by the first section and the first clause of the first branch of the fourth section of the Act of 1886, and no limitation in that regard was intended.

The demurrer was rightfully overruled, and *the judgment is affirmed.*

NISHIMURA EKIU, *Appt.*,

v.

THE UNITED STATES, and Chas. A. Garter, U. S. District Attorney in and for the Northern District of California.

(See S. C. Reporter's ed. 651-664.)

Appellate jurisdiction of this court—admission of aliens—habeas corpus, when issued—discretionary power of officer—due process of law—object of habeas corpus—inspector of immigration—duty of inspector—decision of inspector, when final—Act of March 3, 1891.

1. A case which involves the constitutionality of a law of the United States, is within the appellate jurisdiction of this court, notwithstanding the appeal was taken since the Act establishing circuit courts of appeals took effect.
2. The supervision of the admission of aliens into the United States may be intrusted by Congress either to the Department of State or to the Department of the Treasury.
3. An alien immigrant, prevented from landing by any officer claiming authority to do so under an Act of Congress, and thereby restrained of his liberty, is entitled to a writ of habeas corpus to ascertain whether the restraint is lawful.

NOTE.—*Alienage, effect of, as to title to real estate*, see *notes* to Governeur v. Robertson, 6: 488, and Griffith v. Godey, 28: 934.

As to when habeas corpus may issue, and when not; and from what courts, and by what judges; what may be inquired into by writ of, see *note* to United States v. Hamilton, 1: 490.

As to what questions may be considered on habeas corpus, see *note* to *Ex parte* Carll, 27: 288.

As to suspension of writ of habeas corpus, see *note* to Luther v. Borden, 12: 581.

4. Where a statute gives a discretionary power to an officer, to be exercised by him upon his own opinion of certain facts, he is the sole and exclusive judge of the existence of those facts.
5. As to the right of foreigners to enter our country, the decisions of executive or administrative officers, acting within powers expressly conferred by Congress, are due process of law.
6. The object of a writ of habeas corpus is to ascertain whether the prisoner can lawfully be detained in custody; and if sufficient ground for his detention by the government is shown, he is not to be discharged for defects in the original arrest or commitment.
7. The appointment of an inspector of immigration may be made by the Secretary of the Treasury.
8. The statute does not require inspectors to take any testimony, and allows them to decide on their own inspection and examination the question of the right of any alien immigrant to land.
9. The decision of an inspector of immigration in conformity with the Act of 1891, is final and conclusive against an alien's right to land in the United States, and cannot be impeached or reviewed, in the courts or otherwise, save only by appeal to the inspector's official superiors, and in accordance with the provisions of the Act.
10. The Act of March 3, 1891, relative to immigration is constitutional and valid.

[No. 1393.]

Argued and Submitted Dec. 16, 1891. Decided Jan. 18, 1892.

APPEAL from an order of the Circuit Court of the United States for the Northern District of California, remanding Nishimura Ekiu, to the custody of the immigration inspector and confirming the Commissioner's report. *Affirmed.*

Statement by *Mr. Justice* **Gray:**

Habeas corpus, sued out May 13, 1891, by a female subject of the Emperor of Japan, restrained of her liberty and detained at San Francisco upon the ground that she should not be permitted to land in the United States. The case, as appearing by the papers filed, and by the report of a commissioner of the circuit court, to whom the case was referred by that court "to find the facts and his conclusions of law, and to report a judgment therein," and by the admissions of counsel at the argument in this court, was as follows:

The petitioner arrived at the port of San Francisco on the steamship Belgic from Yokohama, Japan, on May 7, 1891. William H. Thornley, commissioner of immigration of the State of California, and claiming to act under instructions from, and contract with the Secretary of the Treasury of the United States, refused to allow her to land; and on May 13, 1891, in a "report of alien immigrants forbidden to land under the provisions of the Act of Congress approved August 3, 1882, at the port of San Francisco, being passengers upon the steamer Belgic, Walker, master, which arrived May 7, 1891, from Yokobama," made these statements as to the petitioner: "Sex, female. Age, 25." "Passport states that she comes to San Francisco in company with her husband, which is not a fact. She states that she has been married two years, and that her husband has been in the United States one year, but she does not know his address. She has $22, and is to stop at some hotel until her husband calls for her."

With this report Thornley sent a letter to the collector, stating that after a careful examination of the alien immigrants on board the Belgic he was satisfied that the petitioner and five others were "prohibited from landing by the existing immigration laws," for reasons specifically stated with regard to each; and that, pending the collector's final decision as to their right to land, he had "placed them temporarily in the Methodist Chinese Mission, as the steamer was not a proper place to detain them, until the date of sailing." On the same day the collector wrote to Thornley, approving his action. [653]

Thereafter, on the same day, this writ of habeas corpus was issued to Thornley, and he made the following return thereon: "In obedience to the within writ I hereby produce the body of Nishimura Ekiu, as within directed, and return that I hold her in my custody by direction of the customs authorities of the port of San Francisco, California, under the provisions of the Immigration Act; that by an understanding between the United States attorney and the attorney for petitioner, said party will remain in the custody of the Methodist Episcopal Japanese and Chinese mission pending a final disposition of the writ." The petitioner remained at the mission house until the final order of the circuit court.

Afterwards, and before a hearing, the following proceedings took place: On May 16 the district attorney of the United States intervened in opposition to the writ of habeas corpus, insisting that the finding and decision of Thornley and the collector were final and conclusive, and could not be reviewed by the court. John L. Hatch, having been appointed on May 14, by the Secretary of the Treasury, inspector of immigration at the port of San Francisco, on May 16 made the inspection and examination required by the Act of March 3, 1891, chap. 551, entitled "An Act in Amendment to the Various Acts Relative to Immigration and the Importation of Aliens under Contract or Agreement to Perform Labor," (the material provisions of which are set out below,*)

*SEC. 1. "The following classes of aliens shall be excluded from admission into the United States, in accordance with the existing acts regulating immigration, other than those concerning Chinese laborers: All idiots, insane persons, paupers or persons likely to become a public charge, persons suffering from a loathsome or a dangerous contagious disease, persons who have been convicted of a felony or other infamous crime or misdemeanor involving moral turpitude," etc.

By sections 3 and 4, certain offenses are defined, and subjected to the penalties imposed by the Act of February 26, 1885, chap. 164, § 3, namely, penalties of $1,000, "which may be sued for and recovered by the United States, or by any person who shall first bring his action therefor," "as debts of like amount are now recovered in the circuit courts of the United States, the proceeds to be paid into the treasury of the United States." 23 Stat. at L. 333.

SEC. 6. "Any person who shall bring into or land in the United States by vessel or otherwise, or who shall aid to bring into or land in the United States by vessel or otherwise, any alien not lawfully entitled to enter the United States, shall be deemed guilty of a misdemeanor, and shall, on conviction, be punished by a fine not exceeding one thousand dollars, or by imprisonment for a term not exceeding one year, or by both such fine and imprisonment."

SEC. 7. "The office of superintendent of immi-

[654] and refused to allow the petitioner to land, and made a report to the collector in the very words of Thornley's report, except in stating the date of the Act of Congress, under which he acted, as March 3, 1891, instead of August 3, 1882; and on May 18, Hatch intervened in opposition to the writ of habeas corpus, stating these doings of his, and that upon said examination he found the petitioner to be "an alien immi-
[655] grant from Yokohama, Empire of Japan," and "a person without means of support, without relatives or friends in the United States," and "a person unable to care for herself, and liable to become a public charge, and therefore inhibited from landing under the provisions of said Act of 1891, and previous acts of which said Act is amendatory;" and insisting that his finding and decision were reviewable by the superintendent of immigration and the Secretary of the Treasury only.

[656] At the hearing before the commissioner of the circuit court, the petitioner offered to introduce evidence as to her right to land; and contended that the Act of 1891, if construed as vesting in the officers named therein exclusive authority to determine that right, was in so far unconstitutional, as depriving her of her liberty without due process of law; and that by the Constitution she had a right to the writ of habeas corpus, which carried with it the right to a determination by the court as to the legality of her detention, and therefore, necessarily, the right to inquire into the facts relating thereto.

The commissioner excluded the evidence offered as to the petitioner's right to land; and reported that the question of that right had been tried and determined by a duly constituted and competent tribunal having jurisdiction in the premises; that the decision of Hatch as inspector of immigration was conclusive on the right of the petitioner to land, and could not be reviewed by the court, but only by the commissioner of immigration and the Secretary of the Treasury; and that the petitioner was not unlawfully restrained of her liberty.

On July 24, 1891, the circuit court confirmed its commissioner's report, and ordered "that she be remanded by the marshal to the custody from which she has been taken, to wit, to the custody of J. L. Hatch, immigration inspector for the port of San Francisco, to be dealt with as he may find that the law requires upon either the present testimony before him, or that [657] and such other as he may deem proper to take." The petitioner appealed to this court.

Mr. **Lyman I. Mowry** for appellant.

Mr. **A. X. Parker**, *Asst. Atty-Gen.*, for appellees.

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gration is hereby created and established, and the President, by and with the advice and consent of the Senate, is authorized and directed to appoint such officer, whose salary shall be four thousand dollars per annum, payable monthly. The superintendent of immigration shall be an officer in the Treasury Department, under the control and supervision of the Secretary of the Treasury, to whom he shall make annual reports in writing of the transactions of his office, together with such special reports in writing as the Secretary of the Treasury shall require."

SEC. 8. "Upon the arrival by water at any place within the United States of any alien immigrants it shall be the duty of the commanding officer and the agents of the steam or sailing vessel by which they came to report the name, nationality, last residence, and destination of every such alien, before any of them are landed, to the proper inspection officers, who shall thereupon go or send competent assistants on board such vessel and there inspect all such aliens, or the inspection officers may order a temporary removal of such aliens for examination at a designated time and place, and then and there detain them until a thorough inspection is made. But such removal shall not be considered a landing during the pendency of such examination. The medical examination shall be made by surgeons of the marine hospital service. In cases where the services of a marine hospital surgeon cannot be obtained without causing unreasonable delay the inspector may cause an alien to be examined by a civil surgeon, and the Secretary of the Treasury shall fix the compensation for such examination. The inspection officers and their assistants shall have power to administer oaths, and to take and consider testimony touching the right of any such aliens to enter the United States, all of which shall be entered of record. During such inspection after temporary removal the superintendent shall cause such aliens to be properly housed, fed and cared for, and also, in his discretion, such as are delayed in proceeding to their destination after inspection. All decisions made by the inspection officers or their assistants touching the right of any alien to land, when adverse to such right, shall be final unless appeal be taken to the superintendent of immigration, whose action shall be subject to review by the Secretary of the Treasury. It shall be the duty of the aforesaid officers and agents of such vessel to adopt due precautions to prevent the landing of any alien immigrant at any place or time other than that designated by the inspection officers; and any such officer or agent or person in charge of such vessel, who shall either knowingly or negligently land or permit to land any alien immigrant at any place or time other than that designated by the inspection officers, shall be deemed guilty of a misdemeanor and punished by a fine not exceeding one thousand dollars, or by imprisonment for a term not exceeding one year, or by both such fine and imprisonment."

"The Secretary of the Treasury may prescribe rules for inspection along the borders of Canada, British Columbia and Mexico so as not to obstruct or unnecessarily delay, impede or annoy passengers in ordinary travel between said countries: Provided, that not exceeding one inspector shall be appointed for each customs district, and whose salary shall not exceed twelve hundred dollars per year.

"All duties imposed and powers conferred by the second section of the Act of August third, eighteen hundred and eighty-two, upon state commissioners, boards of officers acting under contract with the Secretary of the Treasury, shall be performed and exercised, as occasion may arise, by the inspection officers of the United States."

SEC. 10. "All aliens who may unlawfully come to the United States shall, if practicable, be immediately sent back on the vessel by which they were brought in. The cost of their maintenance while on land, as well as the expense of the return of such aliens, shall be borne by the owner or owners of the vessel on which such aliens came; and if any master, agent, consignee or owner of such vessel shall refuse to receive back on board the vessel such aliens, or shall neglect to detain them thereon, or shall refuse or neglect to return them to the port from which they came, or to pay the cost of their maintenance while on land, such master, agent, consignee or owner shall be deemed guilty of a misdemeanor, and shall be punished by a fine not less than three hundred dollars for each and every offense; and any such vessel shall not have clearance from any port of the United States while any such fine is unpaid."

Sec. 11 provides for the return within one year of any alien coming into the United States in violation of law.

Sec. 12 saves all prosecutions and proceedings, criminal or civil, begun under any Act hereby amended.

By sec. 13 the Circuit and District Courts of the United States are "invested with full and concurrent jurisdiction of all causes, civil and criminal, arising under any of the provisions of this Act;" and the Act is to go into effect on April 1, 1891. 26 Stat. at L. 1084–1086.

[659]

Mr. Justice **Gray**, after stating the case as above, delivered the opinion of the court:

As this case involves the constitutionality of a law of the United States, it is within the appellate jurisdiction of this court, notwithstanding the appeal was taken since the Act establishing circuit courts of appeals took effect. Act of March 3, 1891, chap. 517, § 5; 26 Stat. at L. 827, 828, 1115.

It is an accepted maxim of international law, that every sovereign nation has the power, as inherent in sovereignty, and essential to self-preservation, to forbid the entrance of foreigners within its dominions, or to admit them only in such cases and upon such conditions as it may see fit to prescribe. Vattel, lib. 2, §§ 94, 100; 1 Phillimore (3d ed.) chap. 10, § 220. In the United States this power is vested in the national government, to which the Constitution has committed the entire control of international relations, in peace as well as in war. It belongs to the political department of the government, and may be exercised either through treaties made by the President and Senate, or through statutes enacted by Congress, upon whom the Constitution has conferred power to regulate commerce with foreign nations, including the entrance of ships, the importation of goods and the bringing of persons into the ports of the United States; to establish a uniform rule of naturalization; to declare war, and to provide and maintain armies and navies; and to make all laws which may be necessary and proper for carrying into effect these powers and all other powers vested by the Constitution in the government of the United States or in any department or officer thereof. U. S. Const. art. 1, § 8; *Head Money Cases*, 112 U. S. 580 [28: 798]; *Chae Chan Ping* v. *United States*, 130 U. S. 581, 604–609 [32: 1068, 1075, 1076].

The supervision of the admission of aliens into the United States may be intrusted by Congress either to the Department of State, having the general management of foreign relations, or to the Department of the Treasury, charged with the enforcement of the laws regulating foreign commerce; and Congress has often passed acts forbidding the immigration of particular classes of foreigners, and has committed the execution of these acts to the Secretary of the Treasury, to collectors of customs, and to inspectors acting under their authority. See, for instance, Acts of March 3, 1875, chap. 141; 18 Stat. at L. 477; August 3, 1882, chap. 376; 22 Stat. at L. 214; February 23, 1887, chap. 220; 24 Stat. at L. 414; October 19, 1888, chap. 1210; 25 Stat. at L. 566; as well as the various acts for the exclusion of the Chinese.

[660]

An alien immigrant, prevented from landing by any such officer claiming authority to do so under an Act of Congress, and thereby restrained of his liberty, is doubtless entitled to a writ of habeas corpus to ascertain whether the restraint is lawful. *Chew Heong* v. *United States*, 112 U. S. 536 [28: 770]; *United States* v. *Jung Ah Lung*, 124 U. S. 621 [31: 591]; *Wan Shing* v. *United States*, 140 U. S. 424 [35: 503]; *Lau Ow Bew, petitioner*, 141 U. S. 583 [35: 868]. And Congress may, if it sees fit, as in the statutes in question in *United States* v. *Jung Ah Lung*, just cited, authorize the courts to investigate and ascertain the facts on which the right to land depends. But, on the other hand, the final determination of those facts may be intrusted by Congress to executive officers; and in such a case, as in all others, in which a statute gives a discretionary power to an officer, to be exercised by him upon his own opinion of certain facts, he is made the sole and exclusive judge of the existence of those facts, and no other tribunal, unless expressly authorized by law to do so, is at liberty to re-examine or controvert the sufficiency of the evidence on which he acted. *Martin* v. *Mott*, 25 U. S. 12 Wheat. 19, 31 [6: 537, 541]; *Philadelphia & T. R. Co.* v. *Stimpson*, 39 U. S. 14 Pet. 448, 458 [10: 535, 540]; *Benson* v. *McMahon*, 127 U. S. 457 [32: 234]; *Oteiza y Cortes* v. *Jacobus*, 136 U. S. 330 [34: 464]. It is not within the province of the judiciary to order that foreigners who have never been naturalized, nor acquired any domicil or residence within the United States, nor even been admitted into the country pursuant to law, shall be permitted to enter, in opposition to the constitutional and lawful measures of the legislative and executive branches of the national government. As to such persons, the decisions of executive or administrative officers, acting within powers expressly conferred by Congress, are due process of law. *Murray* v. *Hoboken Land & Imp. Co.* 59 U. S. 18 How. 272 [15: 372]; *Hilton* v. *Merritt*, 110 U. S. 97 [28: 83].

The Immigration Act of August 3, 1882, chap. 376, which was held to be constitutional in the *Head Money Cases*, above cited, imposed a duty of fifty cents for each alien passenger coming by vessel into any port of the United States, to be paid to the collector of customs, and by him into the Treasury, to constitute an immigrant fund; by § 2, the Secretary of the Treasury was charged with the duty of executing the provisions of the Act, and with the supervision of the business of immigration to the United States, and, for these purposes, was empowered to make contracts with any state commission, board or officers, and it was made their duty to go on board vessels and examine the condition of immigrants, "and if on such examination there shall be found among such passengers any convict, lunatic, idiot, or any person unable to take care of himself or herself without becoming a public charge, they shall report the same in writing to the collector of such port, and such persons shall not be permitted to land;" and by § 3, the Secretary of the Treasury was authorized to establish rules and regulations, and to issue instructions, to carry out this and other immigration laws of the United States. 22 Stat. at L. 214.

[662]

The doings of Thornley, the state commissioner of immigration, in examining and detaining petitioner, and in reporting to the collector, appear to have been under that Act, and would be justified by the second section thereof, unless that section should be taken to have been impliedly repealed by the last paragraph of section 8 of the Act of March 3, 1891, chap. 551, by which all duties imposed and powers conferred by that section upon state commissions, boards or officers, acting under contract with the Secretary of the Treasury, "shall be performed and exercised,

as occasion may arise, by the inspection officers of the United States." 26 Stat. at L. 1085.

But it is unnecessary to express a definite opinion on the authority of Thornley to inspect and detain the petitioner.

Putting her in the mission house, as a more suitable place than the steamship, pending the decision of the question of her right to land, and keeping her there, by agreement between her attorney and the attorney for the United States, until final judgment upon the writ of habeas corpus, left her in the same position, so [662] far as regarded her right to land in the United States, as if she never had been removed from the steamship.

Before the hearing upon the writ of habeas corpus, Hatch was appointed by the Secretary of the Treasury inspector of immigration at the port of San Francisco, and, after making the inspection and examination required by the Act of 1891, refused to allow the petitioner to land, and made a report to the collector of customs, stating facts which tended to show, and which the inspector decided did show, that she was a "person likely to become a public charge," and so within one of the classes of aliens "excluded from admission into the United States" by the first section of that Act. And Hatch intervened in the proceedings on the writ of habeas corpus, setting up his decision in bar of the writ.

A writ of habeas corpus is not like an action to recover damages for an unlawful arrest or commitment, but its object is to ascertain whether the prisoner can lawfully be detained in custody; and if sufficient ground for his detention by the government is shown, he is not to be discharged for defects in the original arrest or commitment. *Ex parte Bollman*, 8 U. S. 4 Cranch, 75, 114, 125 [2: 554, 567, 570]; *Coleman* v. *Tennessee*, 97 U. S. 509, 519 [24: 1118, 1123]; *United States* v. *McBratney*, 104 U. S. 621, 624 [26: 869, 870]; *Kelley* v. *Thomas*, 15 Gray, 192; *Rex* v. *Marks*, 3 East, 157; *Shuttleworth's Case*, 9 Q. B. 651.

The case must therefore turn on the validity and effect of the action of Hatch as inspector of immigration.

Section 7 of the Act of 1891 establishes the office of superintendent of immigration, and enacts that he "shall be an officer in the Treasury Department, under the control and supervision of the Secretary of the Treasury." By § 8 "the proper inspection officers" are required to go on board any vessel bringing alien immigrants and to inspect and examine them, and may for this purpose remove and detain them on shore, without such removal being considered a landing; and "shall have power to administer oaths, and to take and consider testimony touching the right of any such aliens to enter the United States, all of which shall be entered of record;" "all decisions made by the inpection officers or their assistants touching the right of any alien to land, when adverse to such right, shall be final unless appeal be taken to the superintendent of immigration, whose action shall be subject to review by the Secretary of the Treasury;" and the Secretary of the Treasury may prescribe rules for inspection along the borders of Canada, British Columbia and Mexico, "provided that not exceeding one inspector shall be appointed for each custom district."

It was argued that the appointment of Hatch was illegal because it was made by the Secretary of the Treasury, and should have been made by the superintendent of immigration. But the Constitution does not allow Congress to vest the appointment of inferior officers elsewhere than "in the President alone, in the courts of law or in the heads of department;" the Act of 1891 manifestly contemplates and intends that the inspectors of immigration shall be appointed by the Secretary of the Treasury; and appointments of such officers by the superintendent of immigration could be upheld only by presuming them to be made with the concurrence or approval of the Secretary of the Treasury, his official head. U. S. Const. art. 2, § 2; *United States* v. *Hartwell*, 73 U. S. 6 Wall. 385 [18: 830]; *Stanton* v. *Wilkeson*, 8 Ben. 357; *Price* v. *Abbott*, 17 Fed. Rep. 506.

It was also argued that Hatch's proceedings did not conform to section 8 of the Act of 1891, because it did not appear that he took testimony on oath, and because there was no record of any testimony or of his decision. But the statute does not require inspectors to take any testimony at all, and allows them to decide on their own inspection and examination the question of the right of any alien immigrant to land. The provision relied on merely empowers inspectors to administer oaths and to take and consider testimony, and requires only testimony so taken to be entered of record.

The decision of the inspector of immigration being in conformity with the Act of 1891, there can be no doubt that it was final and conclusive against the petitioner's right to land in the United States. The words of section 8 are clear to that effect, and were manifestly intended to prevent the question of an alien immigrant's right to land, when once decided adversely by an inspector, acting within the jurisdiction conferred upon him, from being impeached or reviewed, in the courts or otherwise, save only by appeal to the inspector's official superiors, and in accordance with the provisions of the Act. Section 13, by which the circuit and district courts of the United States are "invested with full and concurrent jurisdiction of all causes, civil and criminal, arising under any of the provisions of this Act," evidently refers to causes of judicial cognizance, already provided for, whether civil actions in the nature of debt for penalties under sections 3 and 4, or indictments for misdemeanors under sections 6, 8 and 10. Its intention was to vest concurrent jurisdiction of such causes in the circuit and district courts; and it is impossible to construe it as giving the courts jurisdiction to determine matters which the Act has expressly committed to the final determination of executive officers. [663]

The result is, that the Act of 1891 is constitutional and valid; the inspector of immigration was duly appointed; his decision against the petitioner's right to land in the United States was within the authority conferred upon him by that Act; no appeal having been taken to the superintendent of immigration, that decision was final and conclusive; the petitioner is not unlawfully restrained of her liberty; and *the order of the circuit court is affirmed.*

Mr. Justice **Brewer** dissented.

for the violation of his duty under a state statute in reference to an election of a representative to Congress. As this question has been fully considered in the previous [following] case, it is unnecessary to add any thing further on the subject. Our opinion is, that Congress had constitutional power to enact the law; and that the cause of commitment was lawful and sufficient.

The petitioner, therefore, must be remanded to the custody of the Marshal for the Southern District of Ohio; and it is so ordered.

Dissenting, Mr. Justice **Field**, and Mr. Justice **Clifford**.

[See opinion, post, 727.]

HABEAS CORPUS CASES.

Ex Parte ALBERT SIEBOLD et al.

(See S. C., Reporter's ed., 371-399; 404-422.)

Habeas Corpus—jurisdiction as to—erroneous decision—personal liberty—constitutionality of law—power of Congress—Enforcement Act—election law—officers of election—collision of jurisdiction—paramount national authority—marshals—exclusive power—state officers—supervisors of election.

† 1. The appellate jurisdiction of this court, exercisible by habeas corpus, extends to a case of imprisonment upon conviction and sentence in an inferior court of the United States, under and by virtue of an unconstitutional Act of Congress, whether this court has jurisdiction to review the judgment by writ of error or not.

2. The jurisdiction of this court by habeas corpus, when not restrained by some special law, extends, generally, to imprisonment by inferior tribunals of the United States which have no jurisdiction of the cause, or whose proceedings are otherwise void and not merely erroneous; and such a case occurs when the proceedings are had under an unconstitutional Act.

3. But when the court below has jurisdiction of the cause, and the matter charged is indictable under a constitutional law, any errors committed by the inferior court can only be reviewed by writ of error.

4. Where personal liberty is concerned, the judgment of an inferior court affecting it is not so conclusive but that the question of its authority to try and imprison the party may be reviewed on habeas corpus by a superior court or judge having power to award the writ.

5. Certain Judges of Election in the City of Baltimore, appointed under state laws, were convicted in the Circuit Court of the United States, under sections 5515 and 5522 of the Revised Statutes of the United States, for interfering with and resisting the Supervisors of Election and Deputy-Marshals of the United States in the performance of their duty at an election of Representatives to Congress, under sections 2016, 2017, 2021, 2022, title XXVI., of the Revised Statutes. *Held*, that the question of the constitutionality of said laws is good ground for this court to issue a writ of habeas corpus to inquire into the legality of the imprisonment under such conviction; and if the laws are determined to be unconstitutional, the prisoner should be discharged.

6. Congress had power by the Constitution to pass the sections referred to, viz.: section 5515 of the Revised Statutes, which makes it a penal offense against the United States for any officer of election, at an election held for a Representative in Congress, to neglect to perform, or to violate, any duty in regard to such election, whether required by a law of the State or of the United States, or knowingly to do any act unauthorized by any such law, with intent to affect such election, or to make a fraudulent certificate of the result, etc.; and section 5522, which makes it a penal offense for any officer or other person, with or without process, to obstruct, hinder, bribe or interfere with a Supervisor of Election or Marshal or Deputy-Marshal, in the performance of any duty required of them by any law of the United States, or to prevent their free attendance at the places of registration or election, etc.; also, sections 2011, 2012, 2016, 2017, 2021, 2022, title XXVI., of the Revised Statutes which authorize the circuit courts to appoint supervisors of such elections, and the marshal to appoint special deputies to aid and assist them, and which prescribe the duties of such Supervisors and Deputy-Marshals, these being the laws provided by Congress in the Enforcement Act of May 31, 1870, and the supplement thereto of February 28, 1871, for supervising the elections of Representatives, and for preventing frauds therein.

7. The circuit courts have jurisdiction of indictments under these laws, and a conviction and sentence in pursuance thereof is lawful cause of imprisonment, from which this court has no power to relieve on habeas corpus.

8. In making regulations for the election of Representatives, it is not necessary that Congress should assume entire and exclusive control thereof. By virtue of that clause of the Constitution which declares that "The times, places and manner of holding elections for Senators and Representatives shall be prescribed in each State by the Legislature thereof; but the Congress may at any time by law make or alter such regulations, except as to the place of choosing Senators," Congress has a supervisory power over the subject, and may either make entirely new regulations, or add to, alter or modify the regulations made by the State.

9. In the exercise of such supervisory power, Congress may impose new duties on the officers of election, or additional penalties for breach of duty or for the perpetration of fraud; or provide for the attendance of officers to prevent frauds and see that the elections are legally and fairly conducted.

10. The exercise of such power can properly cause no collision of regulations or jurisdiction, because the authority of Congress over the subject is paramount, and any regulations it may make necessarily supersede inconsistent regulations of the State. This is involved in the power to "make or alter."

11. There is nothing in the relation of the state and the national sovereignties to preclude the co-operation of both in the matter of elections of Representatives. If both were equal in authority over the subject, collisions of jurisdiction might ensue; but the authority of the National Government being paramount, collisions can only occur from unfounded jealousy of such authority.

12. Congress had power by the Constitution to vest in the circuit courts the appointment of Supervisors of Election. It is expressly declared that "Congress may, by law, vest the appointment of such inferior officers as they think proper, in the President alone, in the courts of law, or in the heads of departments." Whilst, as a question of propriety, the appointment of officers whose duties appertain to one department ought not to be lodged in another, the matter is, nevertheless, left to the discretion of Congress.

13. The provision which authorizes the Deputy-Marshals to keep the peace at the elections is not unconstitutional. The National Government has the right to use physical force in any part of the United States to compel obedience to its laws, and to carry into execution the powers conferred upon it by the Constitution.

14. The concurrent jurisdiction of the National Government with that of the States, which it has in the exercise of its powers of sovereignty in every part of the United States, is distinct from that exclusive jurisdiction which it has by the Constitution in the District of Columbia, and in those places acquired for the erection of forts, magazines, arsenals, etc.

15. The provisions adopted for compelling the state officers of election to observe the state laws regulating elections of Representatives, not altered by Congress, are within the supervisory powers of Congress over such elections. The duties to be performed in this behalf are owed to the United States as well as to the State; and their violation is an offense against the United States which Congress may rightfully inhibit and punish. This, necessarily, follows from the direct interest which the National Government has in the due election of its Repre-

† Head notes by Mr. Justice Bradley.

Note.—Power of federal courts to issue writs of habeas corpus—see note, 42 L. ed. U. S., 92.

sentatives and from the power which the Constitution gives to Congress over this particular subject.

[No. 7 Orig.]

Argued Oct. 24, 1879. Decided Mar. 8, 1880.

Petition for writ of habeas corpus to John M. McClintock, the Marshal of the United States for the District of Maryland, and to James H. Irvin, Warden of the Jail of the City of Baltimore, and for certiorari to the Circuit Court of the United States for said District.

The case is further stated by the court.

Messrs. **Hoadly, Johnson** and Colston and Chas. J. M. Gwinn, for petitioners.

Mr. **Chas. Devens,** Atty-Gen., contra.

Mr. Justice **Bradley** delivered the opinion of the court:

The petitioners in this case were Judges of Election at different voting precincts in the City of Baltimore, at the election held in that city, and in the State of Maryland, on the 5th day of November, 1878, at which Representatives to the 46th Congress were voted for.

At the November Term of the Circuit Court of the United States for the District of Maryland, an indictment against each of the petitioners was found in said court, for offenses alleged to have been committed by them respectively at their respective precincts whilst being such Judges of Election; upon which indictments they were severally tried, convicted and sentenced by said court to fine and imprisonment. They now apply to this court for a writ of habeas corpus to be relieved from imprisonment.

Before making this application, each petitioner, in the month of September last, presented a separate petition to the Chief Justice of this court (within whose circuit Baltimore is situated), at Lynn, in the State of Connecticut, where he then was, praying for a like habeas corpus to be relieved from the same imprisonment. The Chief Justice thereupon made an order that the said Marshal and Warden should show cause, before him, on the second Tuesday of October, in the City of Washington, why such writs should not issue. That being the first day of the present Term of this court, at the instance of the Chief Justice the present application was made to the court by a new petition addressed thereto, and the petitions and *374] papers which had been *presented to the Chief Justice were, by consent, made a part of the case. The records of the several indictments and proceedings thereon were annexed to the respective original petitions, and are before us. These indictments were framed partly under section 5515 and partly under section 5522 of the Revised Statutes of the United States; and the principal questions raised by the application are, whether those sections, and certain sections of the title of the Revised Statutes relating to the elective franchise, which they are intended to enforce, are within the constitutional power of Congress to enact. If they are not, then it is contended that the circuit court has no jurisdiction of the cases, and that the convictions and sentences of imprisonment of the several petitioners were illegal and void.

The jurisdiction of this court to hear the case is the first point to be examined. The question is, whether a party imprisoned under a sentence of a United States Court, upon conviction of a crime created by and indictable under an unconstitutional Act of Congress, may be discharged from imprisonment by this court on habeas corpus, although it has no appellate jurisdiction by writ of error over the judgment. It is objected that the case is one of original and not appellate jurisdiction and, therefore, not within the jurisdiction of this court. But we are clearly of opinion that it is appellate in its character. It requires us to revise the act of the circuit court in making the warrants of commitment upon the convictions referred to. This, according to all the decisions, is an exercise of appellate power. Ex Parte Burford, 3 Cranch, 448; Ex parte Bollman, 4 Cranch, 100, 101; Ex parte Yerger, 8 Wall., 98, 19 L. ed., 336.

That this court is authorized to exercise appellate jurisdiction by habeas corpus directly is a position sustained by abundant authority. It has general power to issue the writ, subject to the constitutional limitations of its jurisdiction, which are, that it can only exercise original jurisdiction in cases affecting ambassadors, public ministers and consuls, and cases in which a State is a party; but has appellate jurisdiction in all other cases of federal cognizance, "With such exceptions and under such regulations as Congress shall make." Having this general power to issue the writ, the court may issue it in the exercise of original jurisdiction where it has original jurisdiction; and *may issue it in the exercise of appellate jurisdiction [*375 where it has such jurisdiction, which is in all cases not prohibited by law except those in which it has original jurisdiction only. Ex parte Bollman [supra]; Ex parte Watkins, 3 Pet., 202; Ex parte Watkins, 7 Pet., 568; Ex parte Wells, 18 How., 307, 328, 15 L. ed., 421, 431; Ableman v. Booth, 21 How., 506, 16 L. ed., 169; Ex parte Yerger, 8 Wall., 85, 19 L. ed., 332.

There are other limitations of the jurisdiction, however, arising from the nature and objects of the writ itself, as defined by the common law, from which its name and incidents are derived. It cannot be used as a mere writ of error. Mere error in the judgment or proceedings, under and by virtue of which a party is imprisoned, constitutes no ground for the issue of the writ. Hence, upon a return to a habeas corpus, that the prisoner is detained under a conviction and sentence by a court having jurisdiction of the cause, the general rule is, that he will be instantly remanded. No inquiry will be instituted into the regularity of the proceedings, unless, perhaps, where the court has cognizance by writ of error or appeal to review the judgment. In such a case, if the error be apparent and the imprisonment unjust, the appellate court may, perhaps, in its discretion, give immediate relief on habeas corpus, and thus save the party the delay and expense of a writ of error. Bac. Abr. Hab. Corp., B, 13; Bethell's Case, Salk., 348; 5 Mod., 19. But the general rule is, that a conviction and sentence by a court of competent jurisdiction is lawful cause of imprisonment, and no relief can be given by habeas corpus.

The only ground on which this court, or any court, without some special statute authorizing it, will give relief on habeas corpus to a prison-

er under conviction and sentence of another court is the want of jurisdiction in such court over the person or the cause, or some other matter rendering its proceedings void.

This distinction between an erroneous judgment and one that is illegal or void is well illustrated by the two cases of Ex parte Lange, 18 Wall., 163, 21 L. ed., 872, and Ex parte Parks, 93 U. S., 18, 23 L. ed., 787. In the former case, we held that the judgment was void, and released the petitioner accordingly; in the latter, we held that the judgment, whether erroneous or not, was not void, because the court had jurisdiction of the cause; and we refused to interfere.

*376] *Chief Justice Abbott, in Rex v. Suddis, 1 East, 306, said: "It is a general rule that, where a person has been committed under the judgment of another court of competent criminal jurisdiction, this court (the King's Bench) cannot review the sentence upon a return to a habeas corpus. In such cases, this court is not a court of appeal."

It is stated, however, in Bacon's Abridgment, probably in the words of Chief Baron Gilbert, that, "If the commitment be against law, as being made by one who had no jurisdiction of the cause, or for a matter for which by law no man ought to be punished, the court are to discharge." Bac. Abr. Hab. Corp., B, 10. The latter part of this rule, when applied to imprisonment under conviction and sentence, is confined to cases of clear and manifest want of criminality in the matters charged, such as in effect to render the proceedings void. The authority usually cited under this head is Bushel's Case, decided in 1670. There, twelve jurymen had been convicted in the Oyer and Terminer for rendering a verdict (against the charge of the court) acquitting William Penn and others, who were charged with meeting in conventicle. Being imprisoned for refusing to pay their fines, they applied to the Court of Common Pleas for a habeas corpus; and though the court, having no jurisdiction in criminal matters, hesitated to grant the writ, yet, having granted it, they discharged the prisoners, on the ground that their conviction was void, inasmuch as jurymen cannot be indicted for rendering any verdict they choose. The opinion of Chief Justice Vaughan in the case has rarely been excelled for judicial eloquence. Bushel's Case, T. Jones, 13; S. C., Vaughan, 135; S. C., 6 Howell, St. Tr., 999.

Without attempting to decide how far this case may be regarded as law for the guidance of this court, we are clearly of opinion that the question raised in the cases before us is proper for consideration on habeas corpus. The validity of the judgment is assailed on the ground that the Acts of Congress under which the indictments were found are unconstitutional. If this position is well taken, it affects the foundation of the whole proceedings. An unconstitutional law is void, and is as no law. An offense created by it is not a crime. A conviction under it is not merely erroneous, but is illegal and

*377] void *and cannot be a legal cause of imprisonment. It is true, if no writ of error lies, the judgment may be final, in the sense that there may be no means of reversing it. But personal liberty is of so great moment in the eye of the law that the judgment of an infer or court affecting it is not deemed so conclusive but that, as we have seen, the question of the court's authority to try and imprison the party may be reviewed on habeas corpus by a superior court or judge having authority to award the writ. We are satisfied that the present is one of the cases in which this court is authorized to take such jurisdiction. We think so, because, if the laws are unconstitutional and void, the circuit court acquired no jurisdiction of the causes. Its authority to indict and try the petitioners arose solely upon these laws.

We proceed, therefore, to examine the cases on their merits.

The indictments commence with an introductory statement that, on the 5th of November, 1878, at the Fourth [or other] Congressional District of the State of Maryland, a lawful election was held, whereat a Representative for that congressional district in the 46th Congress of the United States was voted for; that a certain person [naming him] was then and there a supervisor of election of the United States, duly appointed by the circuit court aforesaid, pursuant to the section 2012th of the Revised Statutes, for the third [or other] voting precinct of the fifteenth [or other] ward of the City of Baltimore, in the said congressional district, for and in respect of the election aforesaid, thereat; that a certain person [naming him] was then and there a special Deputy-Marshal of the United States, duly appointed by the United States Marshall for the Maryland district, pursuant to section 2021 of the Revised Statutes, and assigned for such duty as is provided by that and the following section, to the said precinct of said ward of said city, at the congressional election aforesaid, thereat. Then come the various counts.

The petitioner, Bowers, was convicted on the second count of the indictment against him, which was as follows:

"That the said Henry Bowers, afterwards, to wit: on the day and year aforesaid, at the said voting precinct within the district aforesaid, unlawfully did obstruct, hinder and, by the use *of his power and authority as [*378 such Judge as aforesaid (which Judge he then and there was), interfere with and prevent the said supervisor of election in the performance of a certain duty in respect to said election required of him, and which he was then and there authorized to perform by the law of the United States, in such case made and provided, to wit: that of personally inspecting and scrutinizing, at the beginning of said day of election, and of the said election, the manner in which the voting was done at the said poll of election, by examining and seeing whether the ballot first voted at said poll of election was put and placed in a ballot-box containing no ballots whatever, contrary to the 5522nd section of said statutes, and against the peace, government and dignity of the United States."

Tucker, who was indicted jointly with one, Gude, was convicted upon the second and fifth counts of the indictment against them, which were as follows:

"(2.) That the said Justus J. Gude and the said Walter Tucker afterwards, to wit: on the day and year aforesaid, at the said voting precinct of said ward of said city, unlawfully and by exercise of their power and authority as such Judges as aforesaid, did prevent and hinder the free attendance and presence of the said James

N. Schofield (who was then and there such Deputy-Marshal as aforesaid, in the due execution of his said office), at the poll of said election of and for the said voting precinct, and the full and free access of the same Deputy-Marshal to the same poll of election, contrary to the said last mentioned section of said statutes (sec. 5522), and against the peace, government and dignity of the United States.

(5.) That the said Justus J. Gude and the said Walter Tucker, on the day and year aforesaid, at the precinct aforesaid, within the district aforesaid (they being then and there such officers of said election as aforesaid), knowingly and unlawfully at the said election did a certain act, not then and there authorized by any law of the State of Maryland, and not authorized then and there by any law of the United States, by then and there fraudulently and clandestinely putting and placing in the ballot-box of the said precinct twenty (and more) ballots (within the intent and meaning of section 5514 of said statutes), which had not been voted at said election in said precinct before the bal- [*379] lots, *then and there lawfully deposited in the same ballot-box, had been counted, with intent thereby to affect said election and the result thereof, contrary to section 5515 of said statutes, and against the peace, government and dignity of the United States."

This charge, it will be observed, is for the offense commonly known as "stuffing the ballot-box."

The counts on which the petitioners, Burns and Coleman, were convicted were similar to those above specified. Burns was charged with refusing to allow the supervisor of elections to inspect the ballot-box, or even to enter the room where the polls were held, and with violently resisting the Deputy-Marshal who attempted to arrest him, as required by section 2022 of the Revised Statutes. The charges against Coleman were similar to those against Burns, with the addition of a charge for stuffing the ballot-box. Siebold was only convicted on one count of the indictment against him, which was likewise a charge of stuffing the ballot-box.

The sections of the law on which these indictments are founded, and the validity of which is sought to be impeached for unconstitutionality, are summed up by the counsel of the petitioners in their brief as follows (omitting the comments thereon):

The counsel say:

"These cases involve the question of the constitutionality of certain sections of title XXVI., of the Revised Statutes, entitled 'The Elective Franchise.'

Section 2011. The Judge of the Circuit Court of the United States, wherein any city or town having upwards of twenty thousand inhabitants is situated, upon being informed by two citizens thereof, prior to any registration of voters for, or any election at which a representative or delegate in Congress is to be voted for, that it is their desire to have such registration or election guarded and scrutinized, shall open the circuit court at the most convenient point in the circuit.

Section 2012. The judge shall appoint two supervisors of election for every election district in such city or town.

Section 2016. The supervisors are authorized and required to attend all times and places fixed for registration of voters; *to challenge [*380] such as they deem proper; to cause such names to be registered as they may think proper to be so marked; to inspect and scrutinize such register of voters; and for purposes of identification to affix their signatures to each page of the original list.

Section 2017. The supervisors are required to attend the times and places for holding elections of representatives or delegates in Congress, and of counting the votes cast; to challenge any vote, the legality of which they may doubt; to be present continually where the ballot-boxes are kept, until every vote cast has been counted, and the proper returns made, required under any law of the United States, or any state, territorial or municipal law; and to personally inspect and scrutinize at any and all times, on the day of election, the manner in which the poll books, registry lists and tallies are kept; whether the same are required by any law of the United States, or any state, territorial or municipal laws.

Section 2021 requires the Marshal, whenever any election at which representatives or delegates in Congress are to be chosen, upon application by two citizens in cities or towns of more than twenty thousand inhabitants, to appoint special deputy-marshals, whose duty it shall be to aid and assist the supervisors in the discharge of their duties, and attend with them at all registrations of voters or election at which representatives to Congress may be voted for.

Section 2022 requires the Marshal, and his general and special deputies, to keep the peace and protect the supervisors in the discharge of their duties; preserve order at such place of registration and at such polls; prevent fraudulent registration and voting, or fraudulent conduct on the part of any officer of election, and immediately to arrest any person who commits, or attempts to commit, any of the offenses prohibited herein, or any offense against the laws of the United States."

The counsel then refer to and summarize sections 5514, 5515 and 5522 of the Revised Statutes. Section 5514 merely relates to a question of evidence, and need not be copied. Sections 5515 and 5522, being those upon which the indictments are directly framed, are proper to be set out in full. They are as follows:

*"Section 5515. Every officer of an [*381] election at which any representative or delegate in Congress is voted for, whether such officer of election be appointed or created by or under any law or authority of the United States, or by or under any State, territorial, district or municipal law or authority, who neglects or refuses to perform any duty in regard to such election required of him by any law of the United States, or of any State or Territory thereof; or who violates any duty so imposed; or who knowingly does any acts thereby unauthorized, with intent to affect any such election, or the result thereof; or who fraudulently makes any false certificate of the result of such election in regard to such representative or delegate; or who withholds, conceals or destroys any certificate of record so required by law respecting the election of any such representative or delegate; or who neglects or refuses to make and return such certificate as required by law; or who aids, coun-

sels, procures or advises any voter, person or officer to do any act by this or any of the preceding sections made a crime, or to omit to do any duty the omission of which is by this or any of such sections made a crime, or attempts to do so, shall be punished as prescribed in section 5511.

Section 5522. Every person, whether with or without any authority, power or process, or pretended authority, power or process, of any State, Territory or municipality, who obstructs, hinders, assaults, or by bribery, solicitation or otherwise interferes with or prevents the supervisors of election, or either of them, or the Marshal or his general or special deputies, or either of them, in the performance of any duty required of them, or either of them, or which he or they, or either of them, may be authorized to perform by any law of the United States, in the execution of process or otherwise, or who, by any of the means before mentioned, hinders or prevents the free attendance and presence at such places of registration; or at such polls of election, or full and free access and egress to and from any such place of registration or poll of election; or in going to and from any such place of registration or poll of election, or to and from any room, where any such registration or election or canvass of votes or of making any returns or certificates thereof, may be had; or who molests, interferes with, removes or ejects from any such place of registration or poll of election or of canvassing votes cast thereat; or of making returns or certificates thereof, any *382] supervisor *of election, the Marshal or his general or special deputies, or either of them; or who threatens, or attempts, or offers so to do, or refuses or neglects to aid and assist any supervisor of election, or the Marshal or his general or special deputies, or either of them, in the performance of his or their duties, when required by him or them, or either of them, to give such aid and assistance, shall be liable to instant arrest without process, and shall be punished by imprisonment not more than two years, or by a fine of not more than $3,000, or by both such fine and imprisonment, and shall pay the cost of the prosecution."

These portions of the Revised Statutes are taken from the Act commonly known as the Enforcement Act, approved May 31, 1870, 16 Stat. at L., 140, and entitled "An Act to Enforce the Right of Citizens of the United States to Vote in the Several States of this Union, and for Other Purposes;" and from the supplement of that Act, approved February 28, 1871, 16 Stat. at L., 433. They relate to elections of members of the House of Representatives, and were an assertion, on the part of Congress, of a power to pass laws for regulating and superintending said elections, and for securing the purity thereof, and the rights of citizens to vote thereat peaceably and without molestation. It must be conceded to be a most important power, and of a fundamental character. In the light of recent history and of the violence, fraud, corruption and irregularity which have frequently prevailed at such elections, it may easily be conceived that the exertion of the power, if it exists, may be necessary to the stability of our frame of government.

The counsel for the petitioners, however, do not deny that Congress may, if it chooses, assume the entire regulation of the elections of Representatives; but they contend that it has no constitutional power to make partial regulations intended to be carried out in conjunction with regulations made by the States.

The general positions contended for by the counsel of the petitioners are thus stated in their brief:

"We shall attempt to establish these propositions:

1. That the power to make regulations as to the times, places and manner of holding elections for Representatives in Congress, granted to Congress by the Constitution, is an exclusive power when exercised by Congress.

2. That this power, when so exercised, being exclusive of all interference therein by the States, must be so exercised as *not to [*383 interfere with or come in collision with regulations presented in that behalf by the States, unless it provides for the complete control over the whole subject over which it is exercised.

3. That, when put in operation by Congress, it must take the place of all state regulations of the subject regulated, which subject must be entirely and completely controlled and provided for by Congress."

We are unable to see why it necessarily follows that, if Congress makes any regulations on the subject, it must assume exclusive control of the whole subject. The Constitution does not say so.

The clause of the Constitution under which the power of Congress, as well as that of the State Legislatures, to regulate the election of Senators and Representatives arises, is as follows: "The times, places, and manner of holding elections for Senators and Representatives shall be prescribed in each State by the Legislature thereof; but the Congress may at any time, by law, make or alter such regulations, except as to the place of choosing Senators."

It seems to us that the natural sense of these words is the contrary of that assumed by the counsel of the petitioners. After first authorizing the States to prescribe the regulations, it is added: "The Congress may at any time, by law, make or alter such regulations." "Make or alter." What is the plain meaning of these words? If not under the prepossession of some abstract theory of the relations between the State and National Governments, we should not have any difficulty in understanding them. There is no declaration that the regulations shall be made either wholly by the State Legislatures or wholly by Congress. If Congress does not interfere, of course they may be made wholly by the State; but if it chooses to interfere, there is nothing in the words to prevent its doing so, either wholly or partially. On the contrary, their necessary implication is that it may do either. It may either make the regulations, or it may alter them. If it only alters, leaving, as manifest convenience requires, the general organization of the polls to the State, there results a necessary co-operation of the two governments in regulating the subject. But no repugnance *in the system of regulations [*384 can arise thence; for the power of Congress over the subject is paramount. It may be exercised as and when Congress sees fit to exercise it. When exercised, the action of Congress, so far as it extends and conflicts with the regulations of

the State, necessarily supersedes them. This is implied in the power to "make or alter."

Suppose the Constitution of a State should say: "The first Legislature elected under this Constitution may, by law, regulate the election of members of the two Houses; but any subsequent Legislature may make or alter such regulations," could not a subsequent Legislature modify the regulations made by the first Legislature without making an entirely new set? Would it be obliged to go over the whole subject anew? Manifestly not; it could alter or modify, add or subtract, in its discretion. The greater power, of making wholly new regulations, would include the lesser, of only altering or modifying the old. The new law, if contrary or repugnant to the old, would, so far and so far only, take its place. If consistent with it, both would stand. The objection, so often repeated, that such an application of congressional regulations to those previously made by a State would produce a clashing of jurisdictions and a conflict of rules, loses sight of the fact that the regulations made by Congress are paramount to those made by the State Legislature; and if they conflict therewith, the latter, so far as the conflict extends, ceases to be operative. No clashing can possibly arise. There is not the slightest difficulty in a harmonious combination into one system of the regulations made by the two sovereignties, any more than there is in the case of prior and subsequent enactments of the same Legislature.

Congress has partially regulated the subject heretofore. In 1842 it passed a law for the election of Representatives by separate districts; and, subsequently, other laws fixing the time of election, and directing that the elections shall be by ballot. No one will pretend, at least at the present day, that these laws were unconstitutional because they only partially covered the subject.

The peculiarity of the case consists in the concurrent authority of the two sovereignties, state [*385] and national, over the same *subject-matter. This, however, is not entirely without a parallel. The regulation of foreign and interstate commerce is conferred by the Constitution upon Congress. It is not expressly taken away from the States. But where the subject-matter is one of a national character, or one that requires a uniform rule, it bas been held that the power of Congress is exclusive. On the contrary, where neither of these circumstances exist, it has been held that state regulations are not unconstitutional. In the absence of congressional regulation, which would be of paramount authority when adopted, they are valid and binding. This subject was largely discussed in the case of Cooley v. Port Wardens, 12 How., 299. That was a case of pilotage. In 1789, 1 Stat. at L., 53, Congress had passed a law declaring that all pilots should continue to be regulated in conformity with the laws of the States respectively wherein they should be. Hence, each State continued to administer its own laws, or passed new laws for the regulation of pilots in its harbors. Pennsylvania passed the law then in question in 1803. Yet the Supreme Court held that this was clearly a regulation of commerce; and that the state laws could not be upheld witbout supposing that, in cases like that of pilotage, not requiring a national and uniform regulation, the power of the States to make regulations of commerce, in the absence of congressional regulation, still remained. The court held that the power did so remain, subject to those qualifications; and the state law was sustained under that view.

Here, then, is a case of concurrent authority of the State and National Governments, in which that of the latter is paramount. In 1837, Congress interfered with the state regulations on the subject of pilotage, so far as to authorize the pilots of adjoining States, separated only by navigable waters, to pilot ships and vessels into the ports of either State located on such waters. It has since made various regulations respecting pilots taking charge of steam vessels, imposing upon them peculiar duties and requiring of them peculiar qualifications. It seems to us that there can be no doubt of the power of Congress to impose any regulations it sees fit upon pilots, and to subject them to such penalties for breach of duty as it may deem *expedient. [*386 The States continue, in the exercise of the power, to regulate pilotage subject to the paramount right of the National Government. If dissatisfied with congressional interference, should such interference at any time be imposed, any State might, if it chose withdraw its regulations altogether, and leave the whole subject to be regulated by Congress. But so long as it continues its pilotage system, it must acquiesce in such additional regulations as Congress may see fit to make.

So in the case of laws for regulating the elections of Representatives to Congress. The State may make regulations on the subject; Congress may make regulations on the same subject, or may alter or add to those already made. The paramount character of those made by Congress has the effect to supersede those made by the State, so far as the two are inconsistent, and no further. There is no such conflict between them as to prevent their forming a harmonious system perfectly capable of being administered and carried out as such.

As to the supposed conflict that may arise between the officers appointed by the State and National Governments for superintending the election, no more insuperable difficulty need arise than in the application of the regulations adopted by each respectively. The regulations of Congress being constitutionally paramount, the duties imposed thereby upon the officers of the United States, so far as they have respect to the same matters, must necessarily be paramount to those to be performed by the officers of the State. If both cannot be performed, the latter are pro tanto superseded and cease to be duties. If the power of Congress over the subject is supervisory and paramount, as we have seen it to be, and if officers or agents are created for carrying out its regulations, it follows as a necessary consequence that such officers and agents must have the requisite authority to act without obstruction or interference from the officers of the State. No greater subordination, in kind or degree, exists in this case than in any other. It exists to the same extent between the different officers appointed by the State, when the State alone regulates the election. One officer cannot interfere with the duties of another, or obstruct or hinder him in the performance of them. Where there is a disposition to act harmoniously, there is no *danger of [*387

disturbance between those who have different duties to perform. When the rightful authority of the General Government is once conceded and acquiesced in, the apprehended difficulties will disappear. Let a spirit of national as well as local patriotism once prevail; let unfounded jealousies cease, and we shall hear no more about the impossibility of harmonious action between the National and State Governments in a matter in which they have a mutual interest.

As to the supposed incompatibility of independent sanctions and punishments imposed by the two governments, for the enforcement of the duties required of the officers of election, and for their protection in the performance of those duties, the same considerations apply. While the State will retain the power of enforcing such of its own regulations as are not superseded by those adopted by Congress, it cannot be disputed that if Congress has power to make regulations it must have the power to enforce them, not only by punishing the delinquency of officers appointed by the United States, but by restraining and punishing those who attempt to interfere with them in the performance of their duties; and if, as we have shown, Congress may revise existing regulations, and add to or alter the same as far as it deems expedient, there can be as little question that it may impose additional penalties for the prevention of frauds committed by the state officers in the elections, or for their violation of any duty relating thereto, whether arising from the common law or from any other law, state or national. Why not? Penalties for fraud and delinquency are part of the regulations belonging to the subject. If Congress, by its power to make or alter the regulations, has a general supervisory power over the whole subject, what is there to preclude it from imposing additional sanctions and penalties to prevent such fraud and delinquency?

It is objected that Congress has no power to enforce state laws or to punish state officers, and especially has no power to punish them for violating the laws of their own State. As a general proposition this is, undoubtedly, true; but when, in the performance of their functions, state officers are called upon to fulfill duties which they owe to the United States as well as to the State, has the former no means of com- *388] pelling such fulfillment? *Yet that is the case here. It is the duty of the States to elect Representatives to Congress. The due and fair election of these Representatives is of vital importance to the United States. The Government of the United States is no less concerned in the transaction than the State Government is. It certainly is not bound to stand by as a passive spectator, when duties are violated and outrageous frauds are committed. It is directly interested in the faithful performance, by the officers of election, of their respective duties. Those duties are owed as well to the United States as to the State. This necessarily follows from the mixed character of the transaction, state and national. A violation of duty is an offense against the United States, for which the offender is justly amenable to that government. No official position can shelter him from this responsibility. In view of the fact that Congress has plenary and paramount jurisdiction over the whole subject, it seems almost absurd to say that an officer who receives or has custody of the ballots given for a Representative owes no duty to the National Government which Congress can enforce; or that an officer who stuffs the ballot-box cannot be made amenable to the United States. If Congress has not, prior to the passage of the present laws, imposed any penalties to prevent and punish frauds and violations of duty committed by officers of election, it has been because the exigency has not been deemed sufficient to require it, and not because Congress had not the requisite power.

The objection that the laws and regulations, the violation of which is made punishable by the Acts of Congress, are state laws and have not been adopted by Congress, is no sufficient answer to the power of Congress to impose punishment. It is true that Congress has not deemed it necessary to interfere with the duties of the ordinary officers of election, but has been content to leave them as prescribed by state laws. It has only created additional sanctions for their performance, and provided means of supervision in order more effectually to secure such performance. The imposition of punishment implies a prohibition of the act punished. The state laws which Congress sees no occasion to alter, but which it allows to stand, are in effect adopted by Congress. It simply demands their *fulfillment. Content to leave the [*389 laws as they are, it is not content with the means provided for their enforcement. It provides additional means for that purpose; and we think it is entirely within its constitutional power to do so. It is simply the exercise of the power to make additional regulations.

That the duties devolved on the officers of election are duties which they owe to the United States as well as to the State, is further evinced by the fact that they have always been so regarded by the House of Representatives itself. In most cases of contested elections, the conduct of these officers is examined and scrutinized by that body as a matter of right; and their failure to perform their duties is often made the ground of decision. Their conduct is justly regarded as subject to the fullest exposure; and the right to examine them personally, and to inspect all their proceedings and papers, has always been maintained. This could not be done, if the officers were amenable only to the supervision of the State Government which appointed them.

Another objection made, is, that if Congress can impose penalties for violation of state laws, the officer will be made liable to double punishment for delinquency, at the suit of the State and at the suit of the United States. But the answer to this is, that each government punishes for violation of duty to itself only. Where a person owes a duty to two sovereigns, he is amenable to both for its performance; and either may call him to account. Whether punishment inflicted by one can be pleaded in bar to a charge by the other for the same identical act, need not now be decided, although considerable discussion bearing upon the subject has taken place in this court, tending to the conclusion that such a plea cannot be sustained.

In reference to a conviction under a state law for passing counterfeit coin, which was sought to be reversed on the ground that Congress had jurisdiction over that subject, and might inflict punishment for the same offense, Mr. Justice

Daniel, speaking for the court, said: "It is almost certain that, in the benignant spirit in which the institutions, both of the state and federal systems, are administered, an offender who should have suffered the penalties denounced by the one would not be subjected *390] *a second time to punishment by the other, for acts essentially the same, unless, indeed, this might occur in instances of peculiar enormity, or where the public safety demanded extraordinary rigor. But, were a contrary course of policy or action either probable or usual, this would by no means justify the conclusion that offenses falling within the competency of different authorities to restrain or punish them would not properly be subjected to the consequences which those authorities might ordain and affix to their perpetration." Fox v. Ohio, 5 How., 410. The same Judge, delivering the opinion of the court in the case of U. S. v. Marigold, 9 How., 569, where a conviction was had under an Act of Congress for bringing counterfeit coin into the country, said, in reference to Fox's Case: "With the view of avoiding conflict between the state and federal jurisdictions, this court, in the case of Fox v. Ohio, have taken care to point out that the same act might, as to its character and tendencies, and the consequences it involved, constitute an offense against both the State and Federal Governments, and might draw to its commission the penalties denounced by either, as appropriate to its character in reference to each. We hold this distinction sound;" and the conviction was sustained. The subject came up again for discussion in the case of Moore v. People of Ill., 14 How., 13, in which the plaintiff in error had been convicted, under a state law, for harboring and secreting a negro slave, which was contended to be properly an offense against the United States under the Fugitive Slave Law of 1793, 1 Stat. at L., 302, and not an offense against the State. The objection of double punishment was again raised. Mr. Justice Grier, for the court, said: "Every citizen of the United States is also a citizen of a State or Territory. He may be said to owe allegiance to two sovereigns, and may be liable to punishment for an infraction of the laws of either. The same act may be an offense or transgression of the laws of both." Substantially the same views are expressed in U. S. v. Cruikshank, 92 U. S., 542, 23 L. ed., 588, referring to these cases; and we do not well see how the doctrine they contain can be controverted. A variety of instances may be readily suggested, in which it would be necessary or proper to apply it. Suppose, for example, a State Judge having power *391] under the naturalization *laws to admit aliens to citizenship should utter false certificates of naturalization, can it be doubted that he could be indicted under the Act of Congress providing penalties for that offense, even though he might also, under the state laws, be indictable for forgery as well as liable to impeachment? So, if Congress, as it might, should pass a law fixing the standard of weights and measures, and imposing a penalty for sealing false weights and false measures, but leaving to the States the matter of inspecting and sealing those used by the people, would not an offender, filling the office of sealer under a state law, be amenable to the United States as well as to the State?

If the officers of election, in elections for Representatives, owe a duty to the United States, and are amenable to that government as well as to the State, as we think they are, then, according to the cases just cited, there is no reason why each should not establish sanctions for the performance of the duty owed to itself, though referring to the same act.

To maintain the contrary proposition, the case of Ky. v. Dennison, 24 How., 66, 16 L. ed., 717, is confidently relied on by the petitioners' counsel. But there, Congress had imposed a duty upon the Governor of the State which it had no authority to impose. The enforcement of the clause in the Constitution, requiring the delivery of fugitives from service, was held to belong to the Government of the United States, to be effected by its own agents; and Congress had no authority to require the Governor of a State to execute this duty.

We have thus gone over the principal reasons of a special character relied on by the petitioners for maintaining the general proposition for which they contend, namely: that in the regulation of elections for representatives the National and State Governments cannot co-operate, but must act exclusively of each other; so that, if Congress assumes to regulate the subject at all, it must assume exclusive control of the whole subject. The more general reason assigned, to wit: that the nature of sovereignty is such as to preclude the joint co-operation of two sovereigns, even in a matter in which they are mutually concerned, is not, in our judgment, of sufficient force to prevent concurrent and harmonious action on the part of the National and State Governments in the election of Representatives. It is at most *an argument ab [*392 inconveniente. There is nothing in the Constitution to forbid such co-operation in this case. On the contrary, as already said, we think it clear that the clause of the Constitution relating to the regulation of such elections contemplates such co-operation whenever Congress deems it expedient to interfere merely to alter or add to existing regulations of the State. If the two governments had an entire equality of jurisdiction, there might be an intrinsic difficulty in such co-operation. Then the adoption by the State Government of a system of regulations might exclude the action of Congress. By first taking jurisdiction of the subject, the State would acquire exclusive jurisdiction in virtue of a well known principle applicable to courts having co-ordinate jurisdiction over the same matter. But no such equality exists in the present case. The power of Congress, as we have seen, is paramount, and may be exercised at any time and to any extent which it deems expedient; and, so far as it is exercised and no further, the regulations effected supersede those of the State which are inconsistent therewith.

As a general rule, it is no doubt expedient and wise that the operations of the State and National Governments should, as far as practicable, be conducted separately, in order to avoid undue jealousies and jars and conflicts of jurisdiction and power. But there is no reason for laying this down as a rule of universal application. It should never be made to override the plain and manifest dictates of the Constitution itself. We cannot yield to such a trans-

cendental view of state sovereignty. The Constitution and laws of the United States are the supreme law of the land, and to these every citizen of every State owes obedience, whether in his individual or official capacity. There are very few subjects, it is true, in which our system of government, complicated as it is, requires or gives room for conjoint action between the state and national sovereignties. Generally, the powers given by the Constitution to the Government of the United States are given over distinct branches of sovereignty from which the State Governments, either expressly or by necessary implication, are excluded. But in this case, expressly, and in some others, by implication, as we have seen in the case of pilotage, a concurrent jurisdiction is contemplated; that *393] of *the State, however, being subordinate to that of the United States, whereby all question of precedency is eliminated.

In what we have said, it must be remembered that we are dealing only with the subject of elections of Representatives to Congress. If for its own convenience a State sees fit to elect state and county officers at the same time and in conjunction with the election of Representatives, Congress will not be thereby deprived of the right to make regulations in reference to the latter. We do not mean to say, however, that for any acts of the officers of election, having exclusive reference to the election of state or county officers, they will be amenable to federal jurisdiction; nor do we understand that the enactments of Congress now under consideration have any application to such acts.

It must also be remembered that we are dealing with the question of power, not of the expediency of any regulations which Congress has made. That is not within the pale of our jurisdiction. In exercising the power, however, we are bound to presume that Congress has done so in a judicious manner; that it has endeavored to guard as far as possible against any unnecessary interference with state laws and regulations, with the duties of state officers, or with local prejudices. It could not act at all so as to accomplish any beneficial object in preventing frauds and violence, and securing the faithful performance of duty at the elections, without providing for the presence of officers and agents to carry its regulations into effect. It is also difficult to see how it could attain these objects without imposing proper sanctions and penalties against offenders.

The views we have expressed seem to us to be founded on such plain and practical principles as hardly to need any labored argument in their support. We may mystify anything. But if we take a plain view of the words of the Constitution, and give to them a fair and obvious interpretation, we cannot fail in most cases of coming to a clear understanding of its meaning. We shall not have far to seek. We shall find it on the surface, and not in the profound depths of speculation.

The greatest difficulty in coming to a just conclusion arises from mistaken notions with regard *394] to the relations which subsist *between the State and National Governments. It seems to be often overlooked that a National Constitution has been adopted in this country, establishing a real government therein, operating upon persons and territory and things; and which, moreover, is, or should be, as dear to every American citizen as his State Government is. Whenever the true conception of the nature of this Government is once conceded, no real difficulty will arise in the just interpretation of its powers. But if we allow ourselves to regard it as a hostile organization, opposed to the proper sovereignty and dignity of the State Governments, we shall continue to be vexed with difficulties as to its jurisdiction and authority. No greater jealousy is required to be exercised towards this government in reference to the preservation of our liberties, than is proper to be exercised towards the State Governments. Its powers are limited in number, and clearly defined; and its action within the scope of those powers is restrained by a sufficiently rigid bill of rights for the protection of its citizens from oppression. The true interest of the people of this country requires that both the National and State Governments should be allowed, without jealous interference on either side, to exercise all the powers which respectively belong to them according to a fair and practical construction of the Constitution. State rights and the rights of the United States should be equally respected. Both are essential to the preservation of our liberties and the perpetuity of our institutions. But, in endeavoring to vindicate the one, we should not allow our zeal to nullify or impair the other.

Several other questions bearing upon the present controversy have been raised by the counsel of the petitioners. Somewhat akin to the argument which has been considered, is the objection that the deputy-marshals authorized by the Act of Congress to be created and to attend the elections are authorized to keep the peace; and that this is a duty which belongs to the state authorities alone. It is argued that the preservation of peace and good order in society is not within the powers confided to the Government of the United States, but belongs exclusively to the States. Here, again, we are met with the theory that the Government of the United States does not rest upon the soil and territory of the country. We think that this theory is *found- [*395 ed on an entire misconception of the nature and powers of that government. We hold it to be an incontrovertible principle, that the Government of the United States may, by means of physical force, exercised through its official agents, execute on every foot of American soil the powers and functions that belong to it. This, necessarily, involves the power to command obedience to its laws, and hence the power to keep the peace to that extent.

This power to enforce its laws and to execute its functions in all places does not derogate from the power of the State to execute its laws at the same time and in the same places. The one does not exclude the other, except where both cannot be executed at the same time. In that case, the words of the Constitution itself show which is to yield. "This Constitution, and all laws which shall be made in pursuance thereof, * * * shall be the supreme law of the land."

This concurrent jurisdiction which the National Government necessarily possesses to exercise its powers of sovereignty in all parts of the United States is distinct from that exclusive power which, by the first article of the Constitution, it is authorized to exercise over the Dis-

trict of Columbia, and over those places within a State which are purchased by consent of the Legislature thereof. for the erection of forts, magazines, arsenals, dock-yards and other needful buildings. There its jurisdiction is absolutely exclusive of that of the State, unless, as is sometimes stipulated, power is given to the latter to serve the ordinary process of its courts in the precinct acquired.

Without the concurrent sovereignty referred to, the National Government would be nothing but an advisory government. Its executive power would be absolutely nullified.

Why do we have marshals at all, if they cannot physically lay their hands on persons and things in the performance of their proper duties? What functions can they perform, if they cannot use force? In executing the processes of the courts, must they call on the nearest constable for protection? Must they rely on him to use the requisite compulsion, and to keep the peace whilst they are soliciting and entreating the parties and bystanders to allow the law to take [*396] its course? This is the necessary consequence of the positions that are assumed. If we indulge in such impracticable views as these, and keep on refining and re-refining, we shall drive the National Government out of the United States, and relegate it to the District of Columbia, or perhaps to some foreign soil. We shall bring it back to a condition of greater helplessness than that of the old Confederation.

The argument is based on a strained and impracticable view of the nature and powers of the National Government. It must execute its powers, or it is no government. It must execute them on the land as well as on the sea; on things as well as on persons. And, to do this, it must, necessarily, have power to command obedience, preserve order and keep the peace; and no person or power in this land has the right to resist or question its authority, so long as it keeps within the bounds of its jurisdiction. Without specifying other instances in which this power to preserve order and keep the peace unquestionably exists, take the very case in hand. The counsel for the petitioners concede that Congress may, if it sees fit, assume the entire control and regulation of the election of Representatives. This would necessarily involve the appointment of the places for holding the polls, the times of voting, and the officers for holding the election; it would require the regulation of the duties to be performed, the custody of the ballots, the mode of ascertaining the result, and every other matter relating to the subject. Is it possible that Congress could not, in that case, provide for keeping the peace at such elections, and for arresting and punishing those guilty of breaking it? If it could not, its power would be but a shadow and a name. But, if Congress can do this, where is the difference in principle in its making provision for securing the preservation of the peace, so as to give to every citizen his free right to vote without molestation or injury, when it assumes only to supervise the regulations made by the State, and not to supersede them entirely? In our judgment, there is no difference; and if the power exists in the one case, it exists in the other.

The next point raised is, that the Act of Congress proposes to operate on officers or persons authorized by state laws to perform certain duties under them, and to require them to disobey and disregard state laws when they [*397] come in conflict with the Act of Congress; that it thereby of necessity produces collision and is, therefore, void. This point has been already fully considered. We have shown, as we think, that, where the regulations of Congress conflict with those of the State, it is the latter which are void, and not the regulations of Congress; and that the laws of the State, in so far as they are inconsistent with the laws of Congress on the same subject cease to have effect as laws.

Finally; it is objected that the Act of Congress imposes upon the circuit court duties not judicial, in requiring them to appoint the supervisors of election, whose duties, it is alleged, are entirely executive in their character. It is contended that no power can be conferred upon the Courts of the United States to appoint officers whose duties are not connected with the judicial department of the government.

The Constitution declares that "The Congress may, by law, vest the appointment of such inferior officers as they think proper, in the President alone, in the courts of law, or in the heads of departments." It is, no doubt, usual and proper to vest the appointment of inferior officers in that department of the government, executive or judicial, or in that particular executive department to which the duties of such officers appertain. But there is no absolute requirement to this effect in the Constitution; and, if there were, it would be difficult in many cases to determine to which department an office properly belonged. Take that of Marshal, for instance. He is an executive officer, whose appointment, in ordinary cases, is left to the President and Senate. But if Congress should, as it might, vest the appointment elsewhere, it would be questionable whether it should be in the President alone, in the Department of Justice, or in the courts. The Marshal is pre-eminently the officer of the courts; and, in case of a vacancy, Congress has in fact passed a law bestowing the temporary appointment of the Marshal upon the justice of the circuit in which the district where the vacancy occurs is situated.

But as the Constitution stands, the selection of the appointing power, as between the functionaries named, is a matter resting in the [*398] discretion of Congress. And, looking at the subject in a practical light, it is, perhaps, better that it should rest there, than that the country should be harassed by the endless controversies to which a more specific direction on this subject might have given rise. The observation in the case of Hennen, to which reference is made, Ex parte Hennen, 13 Pet., 258, that the appointing power in the clause referred to "Was, no doubt, intended to be exercised by the department of the government to which the official to be appointed most appropriately belonged," was not intended to define the constitutional power of Congress in this regard, but rather to express the law or rule by which it should be governed. The cases in which the courts have declined to exercise certain duties imposed by Congress, stand upon a different consideration from that which applies in the present case. The Law of 1792, 1 Stat. at L., 243, which required the circuit courts to examine claims to revolutionary

pensions, and the Law of 1849, 9 Stat. at L., 414, authorizing the District Judge of Florida to examine and adjudicate upon claims for injuries suffered by the inhabitants of Florida from the American Army in 1812, were rightfully held to impose upon the courts powers not judicial, and were, therefore, void. But the duty to appoint inferior officers, when required thereto by law, is a constitutional duty of the courts; and in the present case there is no such incongruity in the duty required as to excuse the courts from its performance, or to render their acts void. It cannot be affirmed that the appointment of the officers in question could, with any greater propriety, and certainly not with equal regard to convenience, have been assigned to any other depositary of official power capable of exercising it. Neither the President, nor any head of department, could have been equally competent to the task.

In our judgment, Congress had the power to vest the appointment of the supervisors in question in the circuit courts.

The doctrine laid down at the close of counsels' brief, that the State and National Governments are co-ordinate and altogether equal, on which their whole argument, indeed, is based, is only partially true.

The true doctrine, as we conceive, is this, that whilst the States are really sovereign as to all [*399] matters which have not *been granted to the jurisdiction and control of the United States, the Constitution and constitutional laws of the latter are, as we have already said, the supreme law of the land; and, when they conflict with the laws of the States, they are of paramount authority and obligation. This is the fundamental principle on which the authority of the Constitution is based; and unless it be conceded in practice, as well as theory, the fabric of our institutions, as it was contemplated by its founders, cannot stand. The questions involved have respect not more to the autonomy and existence of the States, than to the continued existence of the United States as a government to which every American citizen may look for security and protection in every part of the land.

We think that the cause of commitment in these cases was lawful, and that the application for the writ of habeas corpus must be denied.

The application is denied accordingly.

Mr. Justice **Field**, dissenting:

I cannot assent to the decision of the majority of the court in these cases [Nos. 6 and 7 Orig.], and I will state the reasons of my dissent. One of the six petitioners is a citizen of Ohio, and the other five are citizens of Maryland. They all seek a discharge from imprisonment imposed by judgments of Federal Courts for alleged official misconduct as Judges of Election in their respective States.

At an election held in the First Congressional District of Ohio, in October, 1878, at which a Representative in Congress was voted for, the petitioner from that State was appointed under its laws, and acted as a Judge of Election at a precinct in one of the wards of the City of Cincinnati. At an election held in the Fourth and Fifth Congressional Districts of Maryland, in November, 1878, at which a Representative in Congress was voted for, the petitioners from that State were appointed under its laws, and acted as Judges of Election at different precincts in the wards of the City of Baltimore. For alleged misconduct as such officers of election the petitioners were indicted in the Circuit Courts of the United States for their respective Districts, tried, convicted and sentenced to imprisonment for twelve months and, in some of the cases, also to pay a fine.

In what I have to say I shall confine myself principally to the case of the petitioner from Ohio; the other cases will be incidentally considered. In that case, the petitioner is charged with having violated a law of the State. In the cases from *Maryland, the petitioners [*405 are charged with having prevented federal officers from interfering with them and supervising their action in the execution of the laws of the State. The principle which governs one will dispose of all of them; for if Congress cannot punish an officer of a State for the manner in which he discharges his duties under her laws, it cannot subject him to the supervision and control of others in the performance of such duties, and punish him for resisting their interference. In the cases from Maryland, it appears that the laws of the State, under which the petitioners were appointed Judges of Election, and the registration of voters for the election of 1878 was made, were not in existence when the Act of Congress was passed providing for the appointment of supervisors to examine the registration and scrutinize the lists, and of special deputy-marshals to aid and protect them. The Act of Congress was passed in 1871, 16 Stat. at L., 433, and republished in the Revised Statutes, which are declaratory of the law in force, December 1, 1873, p. 1. The law of Maryland, under which the registration of voters was had, was enacted in 1874, and the law under which the Judges of Election were appointed was enacted in 1876, and these Judges were required to possess different qualifications from those required of Judges of Election in 1871 and 1873.

In all the cases the petitioners are imprisoned under the judgments against them; and each one insisting that the circuit court, in his case, acted without jurisdiction, and that his imprisonment is, therefore, unlawful and subversive of his rights as a citizen, has petitioned this court for a writ of habeas corpus, annexing to his petition a transcript of the record of the proceedings against him; and prays that he may be released from restraint.

It has been settled by this court that the writ of habeas corpus is one of the modes by which its appellate jurisdiction will be exercised, in cases where it is alleged that by the action of an inferior tribunal a citizen of the United States has been unlawfully deprived of his personal liberty; and, if necessary, that a certiorari will be issued with the writ to bring up for examination the record of the proceedings of the inferior tribunal. In such cases, we look into that record to see, not whether the court erred in its rulings, but whether it had *juris- [*406 diction to impose the imprisonment complained of. If it had jurisdiction, our examination ends, and the case must await determination in the ordinary course of procedure on writ of error or appeal, should the case be one which can thus be brought under our review. But if the court below was without jurisdiction of the matter

upon which the judgment of imprisonment was rendered, or if it exceeded its jurisdiction in the extent of the imprisonment imposed, this court will interfere and discharge the petitioner. If, therefore, the Act of Congress, in seeking to impose a punishment upon a state officer in one of these cases for disobeying a law of the State, and in the other cases for resisting the interference of federal officials with the discharge of his duties under such law, is unconstitutional and void, the judgments of the circuit courts are unlawful and the petitioners should be released.

I do not regard the presentation by the petitioner from Ohio of his petition to one of the Justices of the Court in the first instance as a fact at all affecting his case. His petition is addressed to this court, and though the Justice, who allowed the writ, directed that it should be returnable before himself, he afterwards ordered the hearing upon it to be had before this court. The petition may, therefore, with propriety, be treated as if presented to us in the first instance. Irregularities in that regard should not be allowed to defeat its purpose, the writ being designed for the security of the personal liberty of the citizen.

The Act of Congress, upon which the indictment of the petitioner from Ohio was founded, is contained in section 5515 of the Revised Statutes, which declares that "Every officer of an election, at which any representative or delegate in Congress is voted for, whether such officer of election be appointed or created by or under any law or authority of the United States, or by or under any State, territorial, district or municipal law or authority, who neglects or refuses to perform any duty in regard to such election required of him by any law of the United States, or of any State or Territory thereof; or who violates any duty so imposed; or who knowingly does any acts thereby unauthorized with intent to affect any such election or the result thereof, * * * shall be punished as *407] prescribed" in a *previous section; that is, by a fine not exceeding $1,000, or imprisonment not more than one year, or by both.

The indictment contains three counts, the third of which was abandoned. The first count charges unlawful neglect on the part of the accused to perform a duty required of him by the laws of the State, in not carrying to the clerk of the Court of Common Pleas one of the poll-books of the election, covered and sealed by the Judges of Election, with which he was intrusted by them for that purpose. The second count charges the violation of a duty required of him by the laws of the State in permitting one of the poll-books, covered and sealed, intrusted to him by the Judges of Election to carry to the clerk of the Court of Common Pleas, to be broken open before he conveyed it to that officer.

The law of Ohio, to which reference is had in the indictment, provides that after the votes at an election are canvassed "The judges, before they disperse, shall put under cover one of the poll-books, seal the same, and direct it to the clerk of the Court of Common Pleas of the county wherein the return is to be made; and the poll-book, thus sealed and directed, shall be conveyed by one of the judges (to be determined by lot if they cannot agree otherwise), to the clerk of the Court of Common Pleas of the county, at his office, within two days from the day of the election."

The provisions of the Act of Congress relating to the appointment of supervisors of election, the powers with which they are intrusted, and the aid to be rendered them by marshals and special deputy-marshals, for resisting and interfering with whom the petitioners from Maryland have been condemned and are imprisoned, are stated in the opinion of the court. It is sufficient to observe that they authorize the supervisors to supervise the action of the state officers from the registration of voters down to the close of the polls on the day of election; require the marshals to aid and protect them, and provide for the appointment of special deputy-marshals in towns and cities of over twenty thousand inhabitants; and they invest those federal officers with a power, to arrest and take into custody persons without process, more extended than has ever before in our country in time of peace been intrusted to any one.

*In what I have to say I shall endeav- [*408 or to show: 1. That it is not competent for Congress to punish a state officer for the manner in which he discharges duties imposed upon him by the laws of the State, or to subject him in the performance of such duties to the supervision and control of others, and punish him for resisting their interference; and, 2. That it is not competent for Congress to make the exercise of its punitive power dependent upon the legislation of the States.

There is no doubt that Congress may adopt a law of a State, but in that case the adopted law must be enforced as a law of the United States. Here there is no pretense of such adoption. In the case from Ohio it is for the violation of a state law, not a law of the United States that the indictment was found. The judicial power of the United States does not extend to a case of that kind. The Constitution defines and limits that power. It declares that it shall extend to cases in law and equity arising under the Constitution, the laws of the United States, and treaties made under their authority; to cases affecting ambassadors, other public ministers and consuls; to cases of admiralty and maritime jurisdiction, and to various controversies to which the United States or a State is a party; or between citizens of different States or citizens of the same State claiming lands under grants of different States; or between citizens of a State and any foreign State, citizens or subjects. The term "controversies," as here used, refers to such only as are of a civil as distinguished from those of a criminal nature. The judicial power thus defined may be applied to new cases as they arise under the Constitution and laws of the United States, but it cannot be enlarged by Congress so as to embrace cases not enumerated in the Constitution. It has been so held by this court from the earliest period. It was so adjudged in 1803 in Marbury v. Madison [1 Cranch, 137], and the adjudication has been affirmed in numerous instances since. This limitation upon Congress would seem to be conclusive of the case from Ohio. To authorize a criminal prosecution in the Federal Courts for an offense against a law of a State is to extend the judicial power of the United States to a case not arising under the Constitution or laws of the United States.

*409] *But there is another view of this subject which is equally conclusive against the jurisdiction of the Federal Court. The Act of Congress asserts a power inconsistent with and destructive of the independence of the States. The right to control their own officers, to prescribe the duties they shall perform, without the supervision or interference of any other authority, and the penalties to which they shall be subjected for a violation of duty is essential to that independence. If the Federal Government can punish a violation of the laws of the State, it may punish obedience to them, and graduate the punishment according to its own judgment of their propriety and wisdom. It may thus exercise a control over the legislation of the States subversive of all their reserved rights. However large the powers conferred upon the government formed by the Constitution, and however numerous its restraints, the right to enforce their own laws by such sanctions as they may deem appropriate is left, where it was originally, with the States. It is a right which has never been surrendered. Indeed, a State could not be considered as independent in any matter, with respect to which its officers, in the discharge of their duties, could be subjected to punishment by any external authority; nor in which its officers, in the execution of its laws, could be subject to the supervision and interference of others.

The invalidity of coercive measures by the United States, to compel an officer of a State to perform a duty imposed upon him by a law of Congress, is asserted, in explicit terms, in the case of Ky. v. Dennison, 24 How., 66, 16 L. ed., 717. The Constitution declares that "A person charged in any State with treason, felony or other crime, who shall flee from justice, and be found in another State, shall, on demand of the executive authority of the State from which he fled, be delivered up to be removed to the State having jurisdiction of the crime." And the Act of Congress of 1793, 1 Stat. at L., 302, to give effect to this clause, made it the duty of the executive authority of the State, upon the demand mentioned, and the production of a properly authenticated copy of the indictment or affidavit charging the person demanded with the commission of treason, felony or other crime, to surrender the fugitive. The Governor of Ohio having refused, upon a proper demand, *410] to surrender *a fugitive from justice from Kentucky, the Governor of the latter State applied to this court for a mandamus to compel the performance of that duty. But the court, after observing that, though the words, "It shall be the duty," in ordinary legislation implied the assertion of the power to command and to cause obedience, said, that, looking to the subject-matter of the law and "The relations which the United States and the several States bear to each other," it was of opinion that the words were not used as mandatory and compulsory, but as declaratory of the moral duty created, when Congress had provided the mode of carrying the provision into execution. "The Act does not provide," the court added, "any means to compel the execution of this duty, nor inflict any punishment for neglect or refusal on the part of the Executive of the State; nor is there any clause or provision in the Constitution which arms the Government of the United States with this power. Indeed, such a power would place every State under the control and dominion of the General Government, even in the administration of its internal concerns and reserved rights. And we think it clear that the Federal Government, under the Constitution, has no power to impose on a state officer, as such, any duty whatever, and compel him to perform it; for if it possessed this power it might overload the officer with duties which would fill up all his time and disable him from performing his obligations to the State, and might impose on him duties of a character incompatible with the rank and dignity to which he was elevated by the State. It is true that Congress may authorize a particular state officer to perform a particular duty; but if he declines to do so, it does not follow that he may be coerced or punished for his refusal. And we are very far from supposing that, in using this word 'duty,' the statesmen who framed and passed the law, or the President who approved and signed it, intended to exercise a coercive power over state officers not warranted by the Constitution." And again: "If the Governor of Ohio refuses to discharge this duty, there is no power delegated to the General Government, either through the judicial department or any other department, to use any coercive means to compel him."

*If it be incompetent for the Federal [*411 Government to enforce by coercive measures the performance of a plain duty, imposed by a law of Congress upon the executive officer of a State, it would seem to be equally incompetent for it to enforce by similar measures the performance of a duty imposed upon him by a law of a State. If Congress cannot impose upon a state officer, as such, the performance of any duty, it would seem logically to follow that it cannot subject him to punishment for the neglect of such duties as the State may impose. It cannot punish for the non-performance of a duty which it cannot prescribe. It is a contradiction in terms to say that it can inflict punishment for disobedience to an Act the performance of which it has no constitutional power to command.

I am not aware that the doctrine of this case, which is so essential to the harmonious working of the State and Federal Governments, has ever been qualified or departed from by this court, until the recent decisions in the Virginia cases, of which I shall presently speak. It is true that, at an early period in the history of the government, laws were passed by Congress, authorizing State Courts to entertain jurisdiction of proceedings by the United States to enforce penalties and forfeitures under the revenue laws, and to hear allegations and take proofs, if application were made for their remission. To these laws reference is made in the Kentucky case; and the court observes that the powers which they conferred were for some years exercised by the state tribunals, without objection, until, in some of the States, their exercise was declined because it interfered with and retarded the performance of duties which properly belonged to them as State Courts; and in other States because doubts arose as to the power of State Courts to inflict penalties and forfeitures for offenses against the General Government, unless specially authorized to do so by

the States; and that the co-operation of the States in those cases was a matter of comity which the several sovereignties extended to one another for their mutual benefit, and was not regarded by either party as an obligation imposed by the Constitution.

It is to be observed that, by the Constitution, the demand for the surrender of a fugitive is to be made by the executive authority of the State *412] from which he has fled; but it is not *declared upon whom the demand shall be made. That was left to be determined by Congress; and it provided that the demand should be made upon the Executive of the State where the fugitive was found. It might have employed its own agents, as in the enforcement of the Fugitive Slave Law, and compelled them to act. But, in both cases, if it employed the officers of the State, it could not restrain nor coerce them.

Whenever, therefore, the Federal Government, instead of acting through its own officers, seeks to accomplish its purposes through the agency of officers of the States, it must accept the agency with the conditions upon which the officers are permitted to act. For example, the Constitution invests Congress with the "power to establish a uniform rule of naturalization;" and this power, from its nature, is exclusive. A concurrent power in the States would prevent the uniformity of regulations required on the subject. Chirac v. Chirac, 2. Wheat., 259; The Federalist, No. 42. Yet Congress, in legislating under this power, has authorized courts of record of the States to receive declarations under oath, by aliens, of their intention to become citizens, and to admit them to citizenship, after a limited period of residence, upon satisfactory proof as to character and attachment to the Constitution. But, when Congress prescribed the conditions and proof upon which aliens might, by the action of the state courts, become citizens, its power ended. It could not coerce the State Courts to hold sessions for such applications, nor fix the time when they should hear the applicants, nor the manner in which they should administer the required oaths, nor regulate in any way their procedure. It could not compel them to act by mandamus from its own tribunals, nor subject their judges to criminal prosecution for their non-action. It could accept the agency of those courts only upon such terms as the States should prescribe. The same thing is true in all cases where the agency of state officers is used; and this doctrine applies with special force to Judges of Elections, at which numerous state officers are chosen at the same time with Representatives to Congress. So far as the election of state officers and the registration of voters for their election are concerned, the Federal Government has confessedly no authority to *413] interfere. And yet the supervision *of and interference with the state regulations, sanctioned by the Act of Congress, when Representatives to Congress are voted for, amount practically, to a supervision of and an interference with the election of state officers, and constitute a plain encroachment upon the rights of the States, which is well calculated to create irritation towards the Federal Government, and disturb the harmony that all good and patriotic men should desire to exist between it and the State Governments.

It was the purpose of the framers of the Constitution to create a government which could enforce its own laws, through its own officers and tribunals, without reliance upon those of the States, and thus avoid the principal defect of the Government of the Confederation; and they fully accomplished their purpose, for, as said by Chief Justice Marshall, in the McCullough Case, "No trace is to be found in the Constitution of an intention to create a dependence of the Federal Government on the governments of the States for the execution of the great powers assigned to it. Its means are adequate to its ends; and on those means alone was it expected to rely for the accomplishment of its ends." When, therefore, the Federal Government desires to compel, by coercive measures and punitive sanctions, the performance of any duties devolved upon it by the Constitution, it must appoint its own officers and agents, upon whom its power can be exerted. If it sees fit to intrust the performance of such duties to officers of a State, it must take their agency, as already stated, upon the conditions which the State may impose. The co-operative scheme to which the majority of the court give their sanction, by which the General Government may create one condition and the States another, and each make up for and supplement the omissions or defects in the legislation of the other, touching the same subject, with its separate penalties for the same offense, and thus produce a harmonious mosaic of statutory regulation, does not appear to have struck the great jurist as a feature in our system of government or one that had been sanctioned by its founders.

It is true that, since the recent Amendments of the Constitution, there has been legislation by Congress asserting, as in the instance before us, a direct control over state officers, which *previously was never supposed to be [*414 compatible with the independent existence of the States in their reserved powers. Much of that legislation has yet to be brought to the test of judicial examination; and, until the recent decisions in the Virginia cases, I could not have believed that the former carefully considered and repeated judgments of this court upon provisions of the Constitution, and upon the general character and purposes of that instrument, would have been disregarded and overruled. These decisions do, indeed, in my judgment, constitute a new departure. They give to the Federal Government the power to strip the States of the right to vindicate their authority in their own courts against a violator of their laws, when the transgressor happens to be an officer of the United States, or alleges that he is denied or cannot enforce some right under their laws. And they assert, for the Federal Government, a power to subject a judicial officer of a State to punishment for the manner in which he discharges his duties under her laws. The power to punish at all existing, the nature and extent of the punishment must depend upon the will of Congress, and may be carried to a removal from office. In my judgment, and I say it without intending any disrespect to my associates, no such advance has ever before been made toward the conversion of our federal system into a consolidated and centralized government. I cannot think that those who framed and advocated, and the States which adopted

the Amendments, contemplated any such fundamental change in our theory of government as those decisions indicate. Prohibitions against legislation on particular subjects previously existed, as, for instance, against passing a bill of attainder and an ex post facto law, or a law impairing the obligation of contracts; and, in enforcing those prohibitions, it was never supposed that criminal prosecutions could be authorized against members of the State Legislature for passing the prohibited laws, or against members of the state judiciary for sustaining them, or against executive officers for enforcing the judicial determinations. Enactments prescribing such prosecutions would have given a fatal blow to the independence and autonomy of the States. So, of all or nearly all the prohibitions of the recent amendments, the same *415] doctrine may be *asserted. In few instances could legislation by Congress be deemed appropriate for their enforcement, which should provide for the annulment of prohibited laws in any other way than through the instrumentality of an appeal to the judiciary, when they impinged upon the rights of parties. If in any instance there could be such legislation authorizing a criminal prosecution for disregarding a prohibition that legislation should define the offense and declare the punishment, and not invade the independent action of the different departments of the State Goverments within their appropriate spheres. Legislation by Congress can neither be necessary nor appropriate which would subject to criminal prosecution state officers, for the performance of duties prescribed by state laws, not having for their object the forcible subversion of the government.

The clause of the Constitution, upon which reliance was placed by counsel on the argument, for the legislation in question, does not, as it seems to me, give the slightest support to it. That clause declares that "The times, places and manner of holding elections for Senators and Representatives shall be prescribed in each State by the Legislature thereof; but the Congress may, at any time, by law, make or alter such regulations, except as to the places of choosing Senators." The power of Congress thus conferred is either to alter the regulations prescribed by the State or to make new ones; the alteration or new creation embracing every particular of time, place and manner, except the place of choosing Senators. But in neither mode nor in any respect has Congress interfered with the regulations prescribed by the Legislature of Ohio, or with those prescribed by the Legislature of Maryland. It has not altered them nor made new ones. It has simply provided for the appointment of officers to supervise the execution of the state laws, and of marshals to aid and protect them in such supervision, and has added a new penalty for disobeying those laws. This is not enforcing an altered or a new regulation. Whatever Congress may properly do touching the regulations, one of two things must follow: either the altered or the new regulation remains a state law, or it becomes a law of Congress. If it remain a state law, it must, like other laws of the State, *416] *be enforced, through its instrumentalities and agencies, and with the penalties which it may see fit to prescribe, and without the supervision or interference of federal officials. If, on the other hand, it become a law of Congress, it must be carried into execution by such officers and with such sanctions as Congress may designate. But as Congress has not altered the regulations for the election of Representatives prescribed by the Legislature of Ohio or of Maryland, either as to time, place or manner, nor adopted any regulations of its own, there is nothing for the Federal Government to enforce on the subject. The general authority of Congress to pass all laws necessary to carry into execution its granted powers, supposes some attempt to exercise those powers. There must, therefore, be some regulations made by Congress, either by altering those prescribed by the State or by adopting entirely new ones, as to the times, places and manner of holding elections for Representatives, before any incidental powers can be invoked to compel obedience to them. In other words, the implied power cannot be invoked until some exercise of the express power is attempted, and then only to aid its execution. There is no express power in Congress to enforce state laws by impcsing penalties for disobedience to them; its punitive power is only implied as a necessary or proper means of enforcing its own laws; nor is there any power delegated to it to supervise the execution, by state officers, of state laws.

If this view be correct, there is no power in Congress, independently of all other considerations, to authorize the appointment of supervisors and other officers to superintend and interfere with the election of Representatives under the laws of Ohio and Maryland, or to annex a penalty to the violation of those laws, and the action of the circuit courts was without jurisdiction and void. The Act of Congress in question was passed, as it seems to me, in disregard of the object of the constitutional provision. That was designed simply to give to the general government the means of its own preservation against a possible dissolution, from the hostility of the States to the election of Representatives or from their neglect to provide suitable means for holding such elections. This is evident from the language of its advocates, some of them members of the Convention, when *the Constitution was presented to the [*417 country for adoption. In commenting upon it in his report of the debates, Mr. Madison said that it was meant "To give the National Legislature a power not only to alter the provisions of the States, but to make regulations, in case the States should fail or refuse altogether." Elliott, Deb., 402. And in the Virginia Convention, called to consider the Constitution, he observed that "It was found impossible to fix the time, place and manner of the election of Representatives in the Constitution. It was found necessary to leave the regulation of these, in the first place, to the State Governments, as being best acquainted with the situation of the people, subject to the control of the General Government, in order to enable it to produce uniformity and prevent its own dissolution." 3 Elliott, Deb., 367. And in the Federalist, Hamilton said that the propriety of the clause in question rested "Upon the evidence of the plain proposition that every government should contain in itself the means of its own preservation."

Similar language is found in the debates in

the conventions of the other States and in the writings of jurists and statesmen of the period. The conduct of Rhode Island was referred to as illustrative of the evils to be avoided. That State was not represented by delegates in Congress for years, owing to the character and views of the prevailing party; and Congress was often embarrassed by their absence. The same evil, it was urged, might result from a similar cause, and Congress should, therefore, possess the power to give the People an opportunity of electing Representatives if the States should neglect or refuse to make the necessary regulations.

In the conventions of several States which ratified the Constitution, an amendment was proposed to limit in express terms the action of Congress to cases of neglect or refusal of a State to make proper provisions for congressional elections, and was supported by a majority of the thirteen States; but it was finally abandoned upon the ground of the great improbability of congressional interference, so long as the States performed their duty. When Congress does interfere and provide regulations, the duty of rendering them effectual, so far as they may require affirmative action, will devolve solely upon the Federal Government. It will then be *418] federal power which is *to be exercised, and its enforcement, if promoted by punitive sanctions, must be through federal officers and agents; for, as said by Mr. Justice Story in Prigg v. Pa., 16 Pet., 539, "The National Government, in the absence of all positive provisions to the contrary, is bound, through its own proper department, Legislative, Judicial or Executive, as the case may require, to carry into effect all the rights and duties imposed upon it by the Constitution." If state officers and state agents are employed, they must be taken, as already said, with the conditions upon which the States may permit them to act, and without responsibility to the federal authorities. The power vested in Congress is to alter the regulations prescribed by the Legislatures of the States, or to make new ones, as to the times, places and manner of holding the elections. Those which relate to the times and places will seldom require any affirmative action beyond their designation. And regulations as to the manner of holding them cannot extend beyond the designation of the mode in which the will of the voters shall be expressed and ascertained. The power does not authorize Congress to determine who shall participate in the election, or what shall be the qualification of voters. These are matters not pertaining to or involved in the manner of holding the election, and their regulation rests exclusively with the States. The only restriction upon them with respect to these matters is found in the provision that the electors of Representatives in Congress shall have the qualifications required for electors of the most numerous branch of the State Legislature, and the provision relating to the suffrage of the colored race. And whatever regulations Congress may prescribe as to the manner of holding the election for Representatives must be so framed as to leave the election of state officers free, otherwise they cannot be maintained. In one of the numbers of the Federalist, Mr. Hamilton, in defending the adoption of the clause in the Constitution, uses this language: "Suppose an article had been introduced into the Constitution empowering the United States to regulate the elections for the particular States, would any man have hesitated to condemn it, both as an unwarrantable transposition of power, and as a premeditated engine for the destruction of the State Governments? The violation of principle in this case would *have required no comment." By the [*419 Act of Congress sustained by the court, an interference with state elections is authorized, almost as destructive of their control by the States as the direct regulation which he thought no man would hesitate to condemn.

The views expressed derive further support from the fact that the constitutional provision applies equally to the election of Senators, except as to the place of choosing them, as it does to the election of Representatives. It will not be pretended that Congress could authorize the appointment of supervisors to examine the roll of members of State Legislatures and pass upon the validity of their titles, or to scrutinize the balloting for Senators; or could delegate to special deputy-marshals the power to arrest any member resisting and repeling the interference of the supervisors. But if Congress can authorize such officers to interfere with the Judges of Election appointed under state laws in the discharge of their duties when Representatives are voted for, it can authorize such officers to interfere with members of the State Legislatures when Senators are voted for. The language of the Constitution conferring power upon Congress to alter the regulations of the States or to make new regulations on the subject, is as applicable in the one case as in the other. The objection to such legislation in both cases is that state officers are not responsible to the Federal Government for the manner in which they perform their duties, nor subject to its control. Penal sanctions and coercive measures by federal law cannot be enforced against them. Whenever, as in some instances is the case, a state officer is required by the Constitution to perform a duty, the manner of which may be prescribed by Congress, as in the election of Senators by members of State Legislatures, those officers are responsible only to their States for their official conduct. The Federal Government cannot touch them. There are remedies for their disregard of its regulations, which can be applied without interfering with their official character as state officers. Thus if its regulations for the election of Senators should not be followed, the election had in disregard of them might be invalidated; but no one, however extreme in his views, would contend that in such a case the members of the Legislature *could be subjected to crim- [*420 inal prosecution for their action. With respect to the election of Representatives, so long as Congress does not adopt regulations of its own and enforce them through federal officers, but permits the regulations of the States to remain, it must depend for a compliance with them upon the fidelity of the state officers and their responsibility to their own government. All the provisions of the law, therefore, authorizing supervisors and marshals to interfere with those officers in the discharge of their duties, and providing for criminal prosecutions against them in the Federal Courts, are, in my judgment,

clearly in conflict with the Constitution. The law was adopted, no doubt, with the object of preventing frauds at elections for members of Congress, but it does not seem to have occurred to its authors that the States are as much interested as the General Government in guarding against frauds at those elections and in maintaining their purity, and, if possible, more so, as their principal officers are elected at the same time. If fraud be successfully perpetrated in any case, they will be the first and the greatest sufferers. They are invested with the sole power to regulate domestic affairs of the highest moment to the prosperity and happiness of their people, affecting the acquisition, enjoyment, transfer and descent of property; the marriage relation, and the education of children; and if such momentous and vital concerns may be wisely and safely intrusted to them, I do not think that any apprehension need be felt if the supervision of all elections in their respective States should also be left to them.

Much has been said in argument of the power of the General Government to enforce its own laws, and in so doing to preserve the peace, though it is not very apparent what pertinency the observations have to the questions involved in the cases before us. No one will deny that in the powers granted to it, the General Government is supreme, and that, upon all subjects within their scope, it can make its authority respected and obeyed throughout the limits of the Republic; and that it can repress all disorders and disturbance which interfere with the enforcement of its laws. But I am unable to perceive in this fact, which all sensible men acknowledge, any cause for the exercise of ungranted power. The greater its lawful power, *421] the greater *the reason for not usurping more. Unrest, disquiet and disturbance will always arise among a People, jealous of their rights, from the exercise by the General Government of powers which they have reserved to themselves or to the States.

My second proposition is, that it is not competent for Congress to make the exercise of its punitive power dependent upon the legislation of the States. The Act, upon which the indictment of the petitioner from Ohio is founded, makes the neglect or violation of a duty prescribed by a law of the State, in regard to an election at which a Representative in Congress is voted for, a criminal offense. It does not say that the neglect or disregard of a duty prescribed by any existing law shall constitute such an offense. It is the neglect or disregard of any duty prescribed by any law of the State present or future. The Act of Congress is not changed in terms with the changing laws of the State; but its penalty is to be shifted with the shifting humors of the State Legislatures. I cannot think that such punitive legislation is valid, which varies, not by direction of the federal legislators, upon new knowledge or larger experience, but by the direction of some external authority which makes the same act lawful in one State and criminal in another, not according to the views of Congress as to its propriety, but to those of another body. The Constitution vests all the legislative power of the Federal Government in Congress; and from its nature this power cannot be delegated to others, except as its delegation may be involved by the creation of an inferior local government or department. Congress can endow territorial governments and municipal corporations with legislative powers, as the possession of such powers for certain purposes of local administration is indispensable to their existence. So, also, it can invest the heads of departments and of the army and navy with power to prescribe regulations to enforce discipline, order and efficiency. Its possession is implied in their creation; but legislative power over subjects which come under the immediate control of Congress, such as defining offenses against the United States, and prescribing punishment for them cannot be delegated to any other government or authority. Congress cannot, for example, leave to the States the enactment of laws and restrict the United States to their enforcement. There are many [*422 citizens of the United States in foreign countries, in Japan, China, India and Africa. Could Congress enact that a crime against one of those States should be punished as a crime against the United States? Can Congress abdicate its functions and depute foreign countries to act for it? If Congress cannot do this with respect to offenses against those States, how can it enforce penalties for offenses against any other States, though they be of our own Union? If Congress could depute its authority in this way; if it could say that it will punish as an offense what another power enacts as such, it might do the same thing with respect to the commands of any other authority, as, for example, of the President or the head of a department. It could enact that what the President proclaims shall be law; that what he declares to be offenses shall be punished as such. Surely no one will go so far as this, and yet I am unable to see the distinction in principle between the existing law and the one I suppose, which seems so extravagant and absurd.

I will not pursue the subject further, but those who deem this question at all doubtful or difficult, may find something worthy of thought in the opinions of the Court of Appeals of New York and of the Supreme Courts of several other States, where this subject is treated with a fullness and learning which leaves nothing to be improved and nothing to be added.

I am of opinion that the Act of Congress was unauthorized and invalid; that the indictment of the petitioner from Ohio, and also the indictments of the petitioners from Maryland and their imprisonment are illegal, and that, therefore, they should all be set at liberty; and I am authorized to say that Mr. Justice **Clifford** concurs with me.

UNITED STATES, ex rel. Allen C. Phillips et al., Plffs.,

v.

JAMES L. GAINES, Comptroller of the State of Tennessee.

Costs in criminal proceedings—Tennessee law—mandamus.

1. Costs in criminal proceedings are a creature of statute and a court has no power to award them unless some statute has conferred it. By the common law the State pays no costs.

2. In Tennessee, by statute, defendant's costs in

UNITED STATES of America ex rel. Emilio MARTINEZ-ANGOSTO, Relator-Appellant,

v.

Redfield MASON, Rear Admiral and Commandant, Third United States Naval District, 90 Church Street, New York, New York, Respondent-Appellee.

No. 269, Docket 29223.

United States Court of Appeals
Second Circuit.

Argued Dec. 16, 1964.

Decided April 7, 1965.

Habeas corpus proceeding brought by Spanish seaman who had been arrested and ordered deported. From an order of the District Court for the Southern District of New York, David N. Edelstein, J., 232 F.Supp. 102, dismissing the petition, the petitioner appealed. The Court of Appeals, Marshall, Circuit Judge, held, inter alia, that the imprisonment of alleged deserter from Spanish warship by Immigration and Naturalization Service agents and the Navy constituted a deprivation of liberty without due process of law even if he admitted all facts required by 1903 Treaty with Spain respecting deserting seaman and there were no legal issues to be resolved in determining whether the Treaty was operative.

Reversed.

1. Habeas Corpus ⇐23

Habeas corpus was the appropriate means of testing legality of detention of Spanish seaman who had been arrested and ordered deported.

2. Seamen ⇐4

Strong evidence in legislative history that Congress intended to repeal only so much of statute as related to arrest and imprisonment of deserters from merchant vessels because Congress directed the President to terminate all deserting seamen treaty provisions in respect to merchant seamen was not sufficient to overcome the unambiguous statutory language which repealed the statute in toto including provision for deserters from ships of war. Act, Mar. 4, 1915, §§ 16, 17, 38 Stat. 1164; Rev.St. § 5280 as amended; Treaty of General Relations and Friendship with Spain, art. 24, 33 Stat. 2105.

3. Aliens ⇐53.7
Seamen ⇐6
Treaties ⇐13

The Navy and Immigration and Naturalization Service agents and investigator who furnished all assistance for pursuit, arrest and detention of alleged deserter from Spanish warship were not "competent national or local authorities" for performing such acts nor for making determinations of law and fact upon which detention was predicated pursuant to 1903 Treaty with Spain respecting deserting seamen. Treaty of General Relations and Friendship with Spain, art. 24, 33 Stat. 2105.

See publication Words and Phrases for other judicial constructions and definitions.

4. Aliens ⇐53.7

The Immigration and Naturalization Service is the enforcement agency of the Immigration and Nationality Act, and limits of its authority were transgressed by arresting and imprisoning alleged deserter from Spanish warship under color of enforcing the 1903 Treaty with Spain respecting deserting seamen. Treaty of General Relations and Friendship with Spain, art. 24, 33 Stat. 2105; Immigration and Nationality Act, §§ 101(a) (3), 242, 287(a) (1, 2), 8 U.S.C.A. §§ 1101 (a) (3), 1252, 1357(a) (1, 2).

5. Aliens ⇐53.8

Arrest of alleged deserter from Spanish warship by Immigration and Naturalization Service agents could not be justified under statute authorizing arrest of alien without an arrest warrant since such authority is conditioned, at a minimum, upon a reasonable determination that alien is likely to escape before warrant can be obtained and upon initiation of deportation proceedings, and there was no risk of alleged deserter's

escaping during time needed to get a warrant, and arrest was not made with a view to commencing deportation proceedings. Treaty of General Relations and Friendship with Spain, art. 24, 33 Stat. 2105; Immigration and Nationality Act, §§ 101(a) (3), 242, 287(a) (1, 2), 8 U.S.C.A. §§ 1101(a) (3), 1252, 1357(a) (1, 2).

6. Aliens ⇐53.8
Seamen ⇐6

Neither the Immigration and Naturalization Service nor the Navy had lawful authority to arrest alleged deserter from Spanish warship under color of enforcing 1903 Treaty with Spain respecting deserting seamen, and such defect was not cured by admissions as to deserter's identity and desertion. Treaty of General Relations and Friendship with Spain, art. 24, 33 Stat. 2105.

7. Constitutional Law ⇐255

The imprisonment of alleged deserter from Spanish warship by Immigration and Naturalization Service agents and the Navy constituted a deprivation of liberty without due process of law even if he admitted all facts required by 1903 Treaty with Spain respecting deserting seamen, and there were no legal issues to be resolved in determining whether the Treaty was operative. Treaty of General Relations and Friendship with Spain, art. 24, 33 Stat. 2105; U.S.C.A.Const. Amend. 5.

8. Aliens ⇐53.8
Seamen ⇐6

Arrest of alleged deserter from Spanish warship by Immigration and Naturalization Service agents and Navy could not be justified on ground that they acted in accordance with their duty to uphold the laws of the United States. Treaty of General Relations and Friendship with Spain, art. 24, 33 Stat. 2105.

9. Treaties ⇐13

The proposition that the President is competent to execute a treaty when treaty fails to confer such competence on any particular officer, and Congress has not filled such void by an appropriate grant of authority could not legitimate the Navy's or the Immigration and Naturalization Service's apprehension and detention of alleged deserter from Spanish warship for purpose of executing the deserting seamen provision of the 1903 Treaty with Spain. Treaty of General Relations and Friendship with Spain, art. 24, 33 Stat. 2105; U.S.C.A.Const. art. 2, §§ 1, 3.

10. Treaties ⇐13

Even if it could be maintained that the constitutional grant of executive power to the President empowers the President to execute the deserting seamen provision of the 1903 Treaty with Spain, making him a "competent national authority" within meaning of the Treaty, such competence did not automatically devolve on the Navy or the Immigration and Naturalization Service. Treaty of General Relations and Friendship with Spain, art. 24, 33 Stat. 2105; U.S.C.A. Const. art. 2, §§ 1, 3.

11. Treaties ⇐13

The legitimate diplomatic and strategic interests served by Treaty with Spain respecting deserting seamen can only be satisfied within limits of constitutional scheme which requires that all governmental action resulting in deprivation of a person's liberty be authorized by law. Treaty of General Relations and Friendship with Spain, art. 24, 33 Stat. 2105.

12. Treaties ⇐8, 11

The procedures of the Immigration and Nationality Act relating to alien crewmen may be viewed as an alternative to Treaty with Spain respecting deserting seamen; the act and its precursors did not have effect of "nullifying" the Treaty but neither did continued adherence to the Treaty preclude Congress from legislating on naval deserters. Treaty of General Relations and Friendship with Spain, art. 24, 33 Stat. 2105; Immigration and Nationality Act, §§ 101 (a) (10), 251–257, 8 U.S.C.A. §§ 1101(a) (10), 1281–1287.

13. Aliens ⇐53.7

The statutory definition of "crewman" within Immigration and Nationality Act relating to alien crewmen as "a

person serving in any capacity on board a vessel or aircraft" does not limit it in any way so as to exclude sailors on foreign ships of war. Immigration and Nationality Act, § 101(a) (10, 15) (D), 8 U.S.C.A. § 1101(a) (10, 15) (D).

See publication Words and Phrases for other judicial constructions and definitions.

14. International Law ⇐10.23

No principle of international law precludes American immigration laws, including Immigration and Nationality Act of 1952, from being applied to a deserter from foreign ship of war who has become economically and socially integrated within a local community three years prior to his apprehension. Immigration and Nationality Act, § 101(a) (10, 15) (D), 8 U.S.C.A. § 1101(a) (10, 15) (D).

Edward Q. Carr, Jr., New York City (Edith Lowenstein, New York City, of counsel), for relator-appellant.

Roy Babitt, Sp. Asst. U. S. Atty. (Robert M. Morgenthau, U. S. Atty., for the So. Dist. of New York), for respondent-appellee.

Before FRIENDLY, HAYS and MARSHALL, Circuit Judges.

MARSHALL, Circuit Judge:

On the morning of December 6, 1963 two men confronted Emilio Martinez-Angosto at the factory where he worked. They identified themselves as agents of the Immigration and Naturalization Service [INS] and asked his name and for his papers. He gave his name, and informed the agents that his papers were at home. He was then taken to his home and there he produced a marriage certificate, the birth certificates of his children, and a Spanish seamen's card. The agents then took him to the INS offices where he was interviewed, with the aid of a Spanish interpreter, given lunch, confined to a room until the evening, then removed to the INS detention quarters and kept there for three days. On December 9, he was taken from these quarters by uniformed guards to the Office of Naval Intelligence and interviewed by a Naval Foreign Liaison Officer. At the conclusion of the interview, Martinez-Angosto was imprisoned in the Third Naval District Brig. Three days later he was interviewed again, this time by two naval officers. The custody was continued with a view of turning him over to the captain of a Spanish cruiser on December 27, to be returned to Spain.

[1] Through the aid of his wife, his family priest, and the Legal Aid Society, on December 20 a petition for a writ of habeas corpus was filed in the Southern District of New York to test the legality of his detention. In a decision dated July 15, 1964 and reported at 232 F.Supp. 102, Judge Edelstein dismissed the petition.[1] We reverse. The imprisonment of Martinez-Angosto constitutes a deprivation of liberty without due process of law in violation of the Fifth Amendment. His arrest and imprisonment by the INS agents were unlawful, and the Navy does not have the lawful authority to imprison him.

In 1903 the United States adhered to a Treaty of General Relations and Friendship with Spain, 33 Stat. 2105. Article XXIV [2] of that Treaty dealt with the re-

1. At the hearing on the petition, the district court, with respondent's consent, released Martinez-Angosto to the custody of his wife and the local parish priest, pending a final decision on his petition, and on condition that he surrender himself to respondent within three days following the decision, if so required. Apparently Martinez-Angosto is still in the custody of his wife and priest; but there is no doubt that habeas corpus is the appropriate means of testing the legality of his detention by the Navy, see generally, Jones v. Cunningham, 371 U.S. 236, 83 S.Ct. 373, 9 L.Ed.2d 285 (1963).

2. ARTICLE XXIV: "The Consuls-General, Consuls, Vice-Consuls and Consular-Agents of the two countries may respectively cause to be arrested and sent on board or cause to be returned to their own country, such officers, seamen or other persons forming part of the crew

turn of naval deserters, and it resembled, in essential outline, provisions appearing in a great number of other treaties the United States had entered into with other nations during the nineteenth century, listed in Tucker v. Alexandroff, 183 U.S. 424, 430, 461, 22 S.Ct. 195, 198, 209, 46 L.Ed. 264, 267, 279 (1902); 5 Hackworth, Digest of International Law, 310 (1943). As the Treaty is presently binding on the United States, Treaties in Force, January 1, 1965, p. 174, n. 2, Spanish consular officers have the right to "cause to be arrested" and "cause to be returned to their own country" seamen forming part of the crew of ships of war who have deserted in one of the ports of the other. However, the consular officers were not given the power to arrest, to detain and to put on board those claimed as naval deserters; instead this power was reserved by the treaty to "competent national or local authorities." These authorities were entrusted with the responsibility and power to arrest and imprison a deserter, with a view to surrendering him to Spanish authorities for return to Spain. The exercise of this power was predicated on the following determinations by the "competent national or local authorities": (1) the individual sought by the Spanish authorities had deserted from a Spanish ship of war in a United States port; (2) the individual actually arrested and detained is the deserter sought; (3) this individual is not a citizen of the United States; and (4) this individual had not previously been arrested for the same cause and set at liberty because he had been detained for more than three months from the day of his arrest without the Spanish authorities having found an opportunity to send him home. These competent authorities also have the responsibility of setting the deserter free if his detention endures for more than three months without the Spanish authorities having found an opportunity to send him home. Although the treaty requires that these determinations be made by "competent national or local authorities," and that the arrest and detention be made by such authorities, it does not clothe any individuals or officers of the federal government, or state and municipal government, with the competence or lawful authority to do these things. It relies upon the internal laws of the United States to provide the lawful authority.

When the United States entered this Treaty with Spain, a federal law, Rev. Stat. § 5280 (1875),[3] originally enacted

of ships of war or merchant vessels of their Nation, who may have deserted in one of the ports of the other.

"To this end they shall respectively address the competent national or local authorities in writing, and make request for the return of the deserter and furnish evidence by exhibiting the register, crew list or official documents of the vessel, or a copy or extract therefrom, duly certified, that the persons claimed belonged to said ship's company. On such application being made, all assistance shall be furnished for the pursuit and arrest of such deserters, who shall even be detained and guarded in the gaols of the country pursuant to the requisition and at the expense of the Consuls-General, Consuls, Vice-Consuls or Consular Agents, until they find an opportunity to send the deserters home.

"If, however, no such opportunity shall be had for the space of three months from the day of the arrest, the deserters shall be set at liberty, and shall not again be arrested for the same cause. It is understood that persons who are citizens or subjects of the country within which the demand is made shall be exempted from the provisions of this article.

"If the deserter shall have committed any crime or offense in the country within which he is found, he shall not be placed at the disposal of the Consul until after the proper Tribunal having jurisdiction in the case shall have pronounced sentence, and such sentence shall have been executed."

3. Section 5280: "On application of a consul or vice-consul of any foreign government having a treaty with the United States stipulating for the restoration of seamen deserting, made in writing, stating that the person therein named has deserted from a vessel of any such government, while in any port of the United States, and on proof by the exhibition of the register of the vessel, ship's roll, or other official document, that the person named belonged, at the

as the Act of March 2, 1829, 4 Stat. 359, as amended by the Act of February 24, 1855, 10 Stat. 614, existed, which authorized certain federal officers to enforce this treaty provision.[4] Specifically, "any court, judge, commissioner of any circuit court, justice, or other magistrate, having competent power"[5] was clothed with the authority to issue warrants to cause the arrest of the individual sought as a deserter. These authorities were to make the above critical determinations, conduct "an examination" for those purposes, and, being satisfied that the conditions of the Treaty were satisfied, to detain the deserter pending his surrender to the foreign authorities. The Treaty with Spain provided that the deserter would be set at liberty and never to be arrested for the same cause if he were detained for more than three months without the Spanish authorities having found an opportunity to send him home; in Rev.Stat. § 5280 the period was two rather than three months. Because of this discrepancy the Treaty could be viewed, not as impliedly abrogating Rev. Stat. § 5280 as it applied to seamen deserting from Spanish ships, but perhaps modifying it as it so applied; cf. Cook v. United States, 288 U.S. 102, 118–119, 53 S.Ct. 305, 77 L.Ed. 641 (1933); 13 Ops. Atty.Gen. 354, 358 (1870).

[2] In 1915 Congress enacted a Seamen's Act, 38 Stat. 1164, to "promote the welfare of American seamen in the merchant marine of the United States; to abolish arrest and imprisonment as a penalty for desertion and to secure the abrogation of treaty provisions in relation thereto; and to promote safety at sea." Section 16 [6] of the Act "requested

time of desertion, to the crew of such vessel, it shall be the duty of any court, judge, commissioner of any circuit court, justice, or other magistrate, having competent power, to issue warrants to cause such person to be arrested for examination. If, on examination, the facts stated are found to be true, the person arrested not being a citizen of the United States, shall be delivered up to the consul or vice-consul, to be sent back to the dominions of any such government, or, on the request and at the expense of the consul or vice-consul, shall be detained until the consul or vice-consul finds an opportunity to send him back to the dominions of any such government. No person so arrested shall be detained more than two months after his arrest; but at the end of that time shall be set at liberty, and shall not be again molested for the same cause. If any such deserter shall be found to have committed any crime or offense, his surrender may be delayed until the tribunal before which the case shall be depending, or may be cognizable, shall have pronounced its sentence, and such sentence shall have been carried into effect."

4. The court below held that even if Rev. Stat. § 5280 was not repealed by section 17 of the Seamen's Act "it would not govern the procedures under the 1903 Treaty" because the Treaty set "forth its own procedural scheme" and the procedures of the Treaty and statute are "different" and "inconsisteut." 232 F. Supp. at 108. In our view, however, the procedures are complementary, not inconsistent, for the statute determined who were the competent authorities referred to in the Treaty. The analogous provision in the Russian Treaty of 1832 set out in Tucker v. Alexandroff, 183 U.S. at 429, 22 S.Ct. at 197, also contained an elementary procedural scheme and even went one step beyond the Spanish Treaty, and delegated responsibility for enforcing the treaty to "the competent tribunals, judges, and officers" rather than merely to "competent national or local authorities." But the courts in Tucker v. Alexandroff, which were much closer to that phase of our history, viewed § 5280 as the basis of the commissioner's authority even though the Treaty referred to "competent * * * officers." See also 103 F. 198, 199 (Dist. Ct.E.D.Pa.1900); 107 F. 437 (3 Cir. 1901).

5. The words "having competent power" did not await a further authorization by the internal laws of the United States and thereby created an endless circle; instead they appeared to pertain to such ordinary restrictions of power as, for example, those restricting the power of district judges to the judicial districts of their appointment. Cf. United States v. Kelly, 108 F. 538 (Dist.Ct.Or.1901).

6. Section 16: "That in the judgment of Congress articles in treaties and conventions of the United States, in so far as

and directed" the President to terminate all deserting seamen treaty provisions in respect to merchant seamen; and section 17 [7] repealed Rev.Stat. § 5280. It would have made more sense for Congress to repeal only so much of § 5280 as related to the arrest and imprisonment of deserters from merchant vessels, saving it for deserters from ships of war, because section 16 only directed the abrogation of treaty provisions dealing with deserters from merchant vessels. There is strong evidence in the legislative history that Congress only intended this *pro tanto* repeal of § 5280.[8] But this evidence is not sufficient to overcome the unambiguous statutory language, compare Markham v. Cabell, 326 U.S. 404, 66 S.Ct. 193, 90 L.Ed. 165 (1945), Cawley v. United States, 272 F.2d 443, 445 (2 Cir. 1959), and this language repeals § 5280 *in toto*. The practical consequences of this seeming overextended repeal of § 5280 were minimized by the actual response to the

they provide for the arrest and imprisonment of officers and seamen deserting or charged with desertion from merchant vessels of the United States in foreign countries, and for the arrest and imprisonment of officers and seamen deserting or charged with desertion from merchant vessels of foreign nations in the United States and the Territories and possessions thereof, and for the cooperation, aid, and protection of competent legal authorities in effecting such arrest or imprisonment and any other treaty provision in conflict with the provisions of this Act, ought to be terminated, and to this end the President be, and he is hereby, requested and directed, within ninety days after the passage of this Act, to give notice to the several Governments, respectively, that so much as hereinbefore described of all such treaties and conventions between the United States and foreign Governments will terminate on the expiration of such periods after notices have been given as may be required in such treaties and conventions."

7. Section 17: "That upon the expiration after notice of the periods required, respectively, by said treaties and conventions and of one year in the case of the independent State of the Kongo, so much as hereinbefore described in each and every one of said articles shall be deemed and held to have expired and to be of no force and effect, and thereupon section fifty-two hundred and eighty and so much of section four thousand and eighty-one of the Revised Statutes as relates to the arrest or imprisonment of officers and seamen deserting or charged with desertion from merchant vessels of foreign nations in the United States and Territories and possessions thereof, and for the cooperation, aid, and protection of competent legal authorities in effecting such arrest or imprisonment, shall be, and is hereby, repealed."

8. Some of the various bills that eventually culminated in the Seamen's Act of 1915 and which received the approval of Congress, specifically repealed "so much of sections 4081 and 5280 of the Revised Statutes as relates to the arrest or imprisonment of officers and seamen deserting or charged with desertion from merchant vessels. * * *" 50 Cong.Rec. 5668, 5670 (1913). One bill contained a section that repealed only so much of § 5280 as it applied to merchant seamen and at the same time contained a closing sentence: "Section 5280, Revised Statutes, repealed." 49 Cong.Rec. 4565 (1913). Another version also contained a section repealing only so much of § 5280 as applied to merchant seamen and contained a final provision: "That section 5280, Revised Statutes, except as hereinbefore provided, be, and the same is hereby, repealed." 50 Cong.Rec. 5714 (1913). These catch-all provisions just quoted, caused some concern and discussion, even on the floor of Congress, 49 Cong.Rec. 4583 (1913); 50 Cong.Rec. 5750, 5791 (1913). Although amendments seeking the elimination of these provisions were withdrawn, two things seemed as clear as these matters could ever be: no one, including the sponsors of the bills, had any specific idea as to the content of § 5280 and there was no consideration of the effect of a total repeal of § 5280 on the enforcement of deserting seamen treaty provisions as they related to sailors on ships of war. (Section 5280 did not explicitly embody the dichotomy between merchant and naval seamen, as the 1903 Treaty did.) The language of section 17 of the 1915 Act relating to the repeal of § 5280 can most immediately be traced back to a bill introduced by Representative Alexander at 51 Cong.Rec. 14245 (1914); H.R.Rep. 852, 63 Cong.2d Sess.; in that bill the

mandate of section 16. Within several years following the enactment of the Seamen's Act of 1915 all deserting seamen treaty provisions, except those with Spain and Greece, were terminated in respect to both merchant and naval seamen, although section 16 of the Act only called for the termination of such provisions in respect to merchant seamen. With Greece and Spain the response was more measured; and the relevant articles were abrogated only so far as they applied to merchant seamen. See generally, 5 Hackworth, Digest of International Law, 309–12 (1943); Treaties in Force, January 1, 1965, p. 79, n. 1, p. 174, n. 2; cf. Van Der Weyde v. Ocean Trans. Co., Ltd., 297 U.S. 114, 117, 56 S.Ct. 392, 80 L.Ed. 515 (1936).

The net outcome of these less than coordinated efforts of the executive and legislative branches was to leave Article XXIV of the 1903 Treaty with Spain binding on the United States insofar as it applied to deserters from ships of war, and, at the same time, to dismantle the domestic enforcement machinery previously established in Rev.Stat. § 5280, which had been in existence for almost a century and which was presumably within the contemplation of those drafting Article XXIV. To this day, the void created by the repeal of § 5280 has not been filled with a similar general grant of authority, even though the Treaty relies upon the domestic law for the determination of which of its officers would be competent to arrest and imprison the alleged deserter and to make the determinations of law and fact requisite to his continued detention and surrender to the Spanish authorities.

In this instance, the Spanish authorities improvised and the American officers responded. What evolved, in an *ad hoc* fashion, was a network of cooperation between the INS and the Navy, which was not authorized in law and which, incidentally, would not even have satisfied the previously repealed Rev.Stat. § 5280. The commanding officer of the Spanish ship from which Martinez-Angosto allegedly deserted first notified the Commandant of the Fourth Naval District of the desertion. The Commandant notified the United States Naval Intelligence, and the information was relayed to the INS. This occurred in the last two months of 1960. Three years later, after receiving an anonymously furnished lead, INS agents questioned and then arrested Martinez-Angosto. After the arrest, he was interviewed by an INS "investigator," who, on the basis of this interview, and the papers Martinez-Angosto surrendered to the arresting agents, decided that Martinez-Angosto was the deserter sought. Martinez-Angosto was then imprisoned, and the Office of Naval Intelligence and the Spanish authorities were informed. The Spanish Consul General then wrote to Rear Admiral Redfield Mason, Commandant of the Third Naval District, informing him of Martinez-Angosto's detention by the INS. The 1903 Treaty was invoked; the letter stated that "the detained sailor" would be "sent back to Spain" on December 27, 1963 and concluded: "In the meantime, it would be appreciated if you could arrange for this sailor to be picked up at Immigration and transferred to your Navy Brig, where he is requested to be held until the date of his departure." The Navy immediately took custody of Martinez-Angosto. He was interviewed by a Naval Foreign Liaison Officer and three days later was interviewed again, this time by two liaison officers. These Naval officers were satisfied as to the prisoner's identity and his desertion, and that the 1903 Treaty was applicable, and filed reports to this effect several days later. Martinez-Angosto's imprisonment was continued in the Third Naval District Brig, with the view to surrendering him in several weeks to the Spanish authorities for return to Spain.

[3–5] The Navy and the INS agents and investigator furnished all assistance for the pursuit, arrest and detention of the alleged deserter, but they were not

language effecting a *pro tanto* repeal of § 5280 was dropped, and the language of section 17 substituted without explanation.

"competent national or local authorities" for performing these acts nor for making the determinations of law and fact upon which this action must be predicated. There is no statute, nor even a Presidential authorization that gives the Navy any competence in these affairs. The INS is the enforcement agency of the Immigration and Nationality Act of 1952, 8 U.S.C. § 1101, and the limits of its authority were transgressed by arresting and imprisoning Martinez-Angosto under color of enforcing the 1903 Treaty. Section 287(a) (1) of the Immigration and Nationality Act, 8 U.S.C. § 1357(a) (1), gives the INS agents authority to interrogate any "alien," and apparently Martinez-Angosto fell within the statutory definition of "alien," 8 U.S.C. § 1101(a) (3), even though the agents were attempting to enforce the Treaty rather than the Act. However, the INS agents had the authority to arrest and imprison an individual residing within the United States, as Martinez-Angosto clearly had been for the previous three years, only if this action were a prelude to deportation proceedings under section 242 of the Act, 8 U.S.C. § 1252. See 8 C.F.R. § 242.2. Martinez-Angosto was arrested without a warrant; and appellee seeks to justify that on the basis of section 287(a) (2), 8 U.S.C. § 1357(a) (2), which authorizes an INS agent to arrest an alien without an arrest warrant. But this authority is conditioned, at a minimum, upon a reasonable determination that the alien is likely to escape before an arrest warrant can be obtained, upon a prompt arraignment "before an officer of the Service having authority to examine aliens as to their right to enter or remain in the United States" (Section 287(a) (2), 8 U.S.C. § 1357(a) (2)), and upon the initiation of Section 242 deportation proceedings if "the examining officer is satisfied that there is prima facie evidence establishing that the arrested alien is in the United States in violation of the immigration laws," 8 C.F.R. § 287.3. There was no risk of Martinez-Angosto escaping during the time needed to get a warrant, and more fundamentally this arrest was not made, nor was the confinement imposed with a view to enforcing the Immigration and Nationality Act by conducting Section 242 deportation proceedings. Instead Martinez-Angosto was turned over to the Navy; and Naval Foreign Liaison Officers assumed the ultimate responsibility of determining whether the Treaty applied and for returning him to the Spanish authorities.[9]

[6] Neither the INS nor the Navy had the lawful authority to do what they did, and this defect was not cured by the fact that there was virtually no dispute as to Martinez-Angosto's identity and his desertion. The interview reports filed by the INS investigator and Naval Officers stated that Martinez-Angosto admitted the following account: He was born in Spain of Spanish parents and was conscripted into the Spanish Navy. An American naval ship brought him to the United States [10] as part of a crew to man a destroyer being transferred to Spain by the United States. Some weeks after the transfer took place and after the crew had manned the ship, which was in Philadelphia, Martinez-Angosto traveled to upstate New York with another sailor, with an intention to desert, and overstayed his shore leave. Within several months he moved to Brooklyn, New York, where he has worked as a general helper in a fac-

9. We have not been unmindful of Nishimura Ekiu v. United States, 142 U.S. 651, 662, 12 S.Ct. 336, 339, 35 L.Ed. 1146 (1892): "A writ of habeas corpus is not like an action to recover damages for an unlawful arrest or commitment, but its object is to ascertain whether the prisoner can lawfully be detained in custody; and, if sufficient ground for his detention by the government is shown, he is not to be discharged for defects in the original arrest or commitment."

10. Appellee, in its brief to this court, states that "all visa requirements and other documentation required by the immigration statutes of the United States" were "waived." See 22 C.F.R. §§ 41.36, 41.62; see also 22 C.F.R. § 41.22(e) and Gordon & Rosenfield, Immigration Law and Procedure 109 n. 73a (1964), for NATO countries.

tory since June 1961 and where he was married, in August 1962, to an American citizen. Although there is some question as to whether Martinez-Angosto fully understood the situation he was in and whether he had an adequate opportunity to seek the assistance of counsel,[11] the interview reports claim that he "freely" made those admissions to his investigators, and neither this claim nor the content of these alleged admissions has been contested in these proceedings. However, these admissions as to his identity and desertion are not sufficient to clothe either the INS or the Navy with the authority to arrest and imprison him.

[7] Even though Martinez-Angosto admitted his identity and the fact of desertion, there were legal issues, which are not entirely free from difficulty, that had to be resolved in determining whether the 1903 Treaty was applicable to him. There is his claim, which there is no need to assess here, that his marriage entitled him to American citizenship, see section 319 of the Immigration and Nationality Act, 8 U.S.C. § 1430 (see also section 245, 8 U.S.C. § 1255), rendering the 1903 Treaty inapplicable to him since it explicitly excluded American citizens from its coverage. There is also the question, which we leave unresolved, whether Martinez-Angosto could be considered to "have deserted in one of the ports" of the United States within the meaning of the 1903 Treaty, in light of the stringent interpretation given those words in Medina-Fernandez v. Hartman, 260 F.2d 569 (9 Cir. 1958) and the claim that the desertion occurred in upstate New York, where Martinez-Angosto supposedly was when his shore leave expired. Further, there is also the problem of determining whether the Treaty would apply to a situation where the sailors had arrived in the United States on an American ship, not on a Spanish ship of war, and the ship of war had not yet been put in the active service of Spain, although the formal transfer of the ship to Spain had been completed several weeks before the alleged desertion and the Spanish crew had since then manned it. In other cases there may be a substantial factual controversy as to the identity and desertion of the individual sought by the Spanish authorities, and if the INS or Navy would be without lawful authority or legal competence to resolve that dispute, as it certainly would be, then it is difficult to see how the INS or Navy had lawful authority or legal competence to resolve the issues presented in Martinez-Angosto's case. But more fundamentally, even if an individual admitted all the facts required by the Treaty, and no legal issues were present in determining whether the Treaty was operative, this would not clothe the INS or the Navy with legal competence to execute the Treaty by arresting and imprisoning the individual. The constitutional guarantee of due process of law requires that all coercive action of federal officials be authorized in law, and this authority cannot be stitched out of an individual's admission of certain facts that would, according to a treaty, entitle "competent national or local authorities" to take such action.

11. Petitioner claims that he was not told why he was being taken to INS headquarters, that the INS agents assured his wife that he would be back soon, and that he was not told the reason for his detention at the headquarters. In the evening of his first day of detention, ten hours after the initial confrontation, he was allowed to call his wife, informing her that he would not come home that night and that he was uncertain as to his future. The interview report filed by the INS investigator states: "SUBJECT'S wife has filed no application for her husband, and he has no lawyer." The Naval Foreign Liaison Officer's interview report with Martinez-Angosto stated: "I emphasized to Martinez that he was entitled to legal council [sic] and that he should have his wife obtain a lawyer to advise him and represent him. He was advised that a lawyer appearing on his behalf would be allowed to visit him at any time." This interview took place three days after his initial arrest, after he was interrogated by the INS investigator and there is no way of determining at what stage of the interview with the naval officer Martinez-Angosto was so advised.

Competence to enforce that treaty must be conferred on the federal officials by law, and no such competence has been conferred on either the INS or Navy.

[8] Appellee insists that there was "a rational basis" for the Spanish consul to seek the assistance of the Navy and for the Navy to oblige, since Martinez-Angosto came to the United States on an American naval vessel as part of the crew to man a destroyer that was to be turned over to Spain by the United States; and further, that "it was logical" for the INS investigators to imprison Martinez-Angosto, to notify the Navy, and to surrender him to the Navy once they had learned of his identity and status. The question is not, however, whether the conduct of the INS and Navy is understandable but whether it is lawful. The naturalness of the action does not compensate for the lack of authority. Appellee also insists that the agencies acted in accordance with their duty to uphold the laws of the United States, which, of course, includes it treaties. But since the Treaty only requires and permits "competent national or local authorities" to arrest and imprison deserters covered by the Treaty, it is difficult to see how either the Navy or INS personnel were obliged, not to mention authorized, because of their general duty to uphold the law of the United States, to take the action they did. The spectre of having every government official who takes an oath to uphold the laws of the United States competent, because of that oath, to arrest and imprison individuals claimed by Spanish authorities as deserters would indeed be alarming, to say the least.

Not surprisingly, the case law has been scant and unhelpful on the issue whether the Navy or the INS are "competent national or local authorities" to execute Article XXIV of the 1903 Treaty. We have been able to discover only two cases that deal with the deserting seamen provision of the Spanish treaty (see 49 Cong.Rec. 4566 (1913) (remarks of Senator Burton) commenting on the decline in actual practice of enforcing such provisions even by that time). In Medina-Fernandez v. Hartman, 260 F.2d 569 (9 Cir. 1958), the Spanish authorities employed the American Navy (with an assist from Mexican officials) to effectuate the return of the deserters; and in United States ex rel. Perez-Varella v. Esperdy, 285 F.2d 723 (2 Cir. 1960), cert. denied, 366 U.S. 925, 81 S.Ct. 1352, 6 L.Ed.2d 384 (1961), the Spanish authorities, in revealing the fundamental ambiguity in the phrase "competent national or local authorities," turned to the INS. Our case emerges as a hybrid. Neither Medina-Fernandez nor Perez-Varella explicitly dealt with the specific question we have confronted, and upon which we dispose of this case; and in Medina-Fernandez, where, as in our case, the Navy had custody of the deserters and assumed the ultimate power and responsibility for determining the applicability of the Treaty, the habeas writ was granted, though on a different ground.

Oddly enough, however, the issue that has given us pause, arose in different though analogous context, and in fact led to one of the first constitutional crises in our history as a nation. In 1794 the United States entered a Treaty of Amity, Commerce and Navigation with Great Britain, 8 Stat. 116, known as the Jay Treaty; and Article XXVII [12] of that

12. ARTICLE XXVII: "It is further agreed, that his Majesty and the United States, on mutual requisitions, by them respectively, or by their respective ministers or officers authorized to make the same, will deliver up to justice all persons, who, being charged with murder or forgery, committed within the jurisdiction of either, shall seek an asylum within any of the countries of the other, provided that this shall only be done on such evidence of criminality, as, according to the laws of the place, where the fugitive or person so charged shall be found, would justify his apprehension and commitment for trial, if the offence had there been committed. The expence of such apprehension and delivery shall be borne and defrayed, by those who make the requisition and receive the fugitive."

Treaty, provided for the extradition of those charged with murder and forgery. The article obliged "the United States" to "deliver up to justice" all those so charged on condition that "this shall only be done" on sufficient "evidence of criminality." The article was silent, however, as to which officers of the United States had the power and responsibility to execute the Treaty, that is, to determine whether charges of murder or forgery were properly lodged against the individual sought and apprehended, and to assess the sufficiency of the evidence. This void in the Treaty was revealed when one Jonathan Robbins, alias Thomas Nash, was arrested and imprisoned in February, 1799, under a warrant of the District Judge for South Carolina, Judge Bee, "on suspicion of having been concerned in a mutiny on board" a British frigate in the high seas "which ended in the murder of the principal officers, and carrying the frigate into a Spanish port." Some six months later Judge Bee received a letter from the Secretary of State stating that the British consul had made an application to President Adams for the delivery of Robbins according to Article XXVII of the Treaty and concluding: "The president has, in consequence thereof, authorized me to communicate to you 'his advice and request,' that Thomas Nash may be delivered up to the consul or other agent of Great Britain who shall appear to receive him." Judge Bee brought on a habeas corpus proceeding, and after a hearing, ordered the marshal to surrender Robbins to the British consul. United States v. Robbins, 27 Fed.Cas. 825 No. 16175 (Dist.Ct.S.C. 1799).

In this way, the extradition provision of the Jay Treaty was executed, although, to a more glaring degree than that of the deserting seamen provision of the Treaty with Spain, this treaty failed to designate any officer to effectuate it, and no statute filled this void. Judge Bee's opinion gives the appearance that he, purportedly exercising an inherent power of the federal judiciary derived from Article III of the Constitution, assumed the duty of executing the treaty, 27 Fed.Cas. at 833, and discharged this duty in a habeas corpus proceeding. It was generally thought, however, that this position was indefensible in the absence of a grant of jurisdiction by statute, or a treaty; and that Judge Bee's order, though not his opinion, could only be defended, if at all, if it were viewed as effectuating the "advice and request" of the President, which in turn was justified as an exercise of the executive power (Article II, section 1 of the Constitution) and a discharge of the President's obligation to "take Care that the Laws be faithfully executed" (Article II, section 3). See the statements of Mr. (later Chief Justice) John Marshall and Mr. Charles Pinckney, collected at 27 Fed. Cas. 833–837; but see In re Metzger, 17 Fed.Cas. 232, No. 9511 (Dist.Ct.S.D. N.Y.). It came to be understood that in the case of Jonathan Robbins it was the President who executed Article XXVII of the Jay Treaty, making the requisite determinations of law and fact. "That the Judge acted by order of the President, and in aid of the executive department, was never disputed; and the then administration was defended on the ground that the treaty was a compact between nations, and might be executed by the President throughout; and must be thus executed by him, until Congress vested the courts or judges with power to act in the matter; which had not been done in that instance," In re Kaine, 55 U.S. (14 How.) 103, 112, 14 L.Ed. 345 (1852). See also 4 Ops. Att'yGen. 201, 209–210 (1843); 13 Ops. Att'yGen. 354, 358–359 (1870); Ex parte Toscano, 208 F. 938, 942–943 (Dist.Ct. S.D.Cal. 1913); letter of July 1, 1799, from Judge Bee to the Secretary of State, 27 Fed.Cas. 842; and other materials collected in 27 Fed.Cas. 833–870 and 18 U.S. (5 Wheat.) 201 (Appendix), 5 L.Ed. 129 (1820).

[9] The extradition of Jonathan Robbins was soon to become a cause célèbre, and it has been looked upon as authority for the proposition that the President, in virtue of his constitutional grant of exec-

utive power, is competent to execute a treaty, when, as in our case, the treaty fails to confer such competence on any particular officer, and Congress has not filled this void by an appropriate grant of authority. We do not believe, however, that this proposition could or should be used, or extended, to legitimate the Navy's or the INS's apprehension and detention of Martinez-Angosto for the purpose of executing the deserting seamen provision of the 1903 Treaty.

Although there is a considerable similarity between an extradition treaty-provision and a deserting seamen treaty-provision, and although the principle of the case of Jonathan Robbins has been extended by one district court (Ex parte Toscano, 208 F. 938 (Dist.Ct.Cal. 1913); but see Ex parte Orozco, 201 F. 106 (Dist. Ct.W.D.Tex. 1912)) to a treaty-provision [13] providing for the apprehension and internment of troops of belligerent armies escaping into the territory of a neutral, a treaty-provision which bears even a greater similarity to the deserting seamen treaty-provision, it is not entirely clear that the principle can be extended to a deserting seamen treaty-provision. The analogy between the extradition and deserting seamen treaty-provisions may well break down. Mr. Justice Woodbury, sitting on circuit, remarked by way of dictum in In re Sheazle, 21 Fed.Cas. 1214, 1217, No. 12734, (C.C.Mass. 1845): "A case, where an act of congress has been deemed necessary to aid the executive in enforcing treaties, is one passed 2 March, 1829, c. 41 (4 Stat. 359) [later to become Rev.Stat. § 5280], for imprisoning deserters from foreign vessels, drawn up by myself."

[10] Furthermore, unlike the case of Jonathan Robbins, and its progeny, neither the Navy nor the INS claim to have acted under the authority of a directive from the President ordering the arrest, detention and eventual return of Martinez-Angosto. Even if it could be maintained that the constitutional grant of executive power to the President empowers the President to execute Article XXIV of the 1903 Treaty, making him a "competent national authority" within the meaning of that article, it could not be maintained that this competence automatically devolves on the Navy or the INS.

There is no need for us to assess here the validity of the principle derived from the extradition of Jonathan Robbins and the execution of the Jay Treaty, for the President has not assumed the power and responsibility of executing the deserting seamen provision of the 1903 Treaty in the case of Martinez-Angosto, and it seems unlikely that he will. It may be, nevertheless, important to note that the Jonathan Robbins extradition caused great public concern at the time, and, aside from the fact John Marshall, not yet a Justice, came to the defense of President Adams, the validity of the principle derived from that case has not been finally determined. A controversy in part over this principle, raged outside the courts, and a resolution censuring President Adams for his role in this extradition was introduced into the House of Representatives. The resolution was defeated by a vote of 61 to 35 on March 7, 1800, but this did not quell the discontent, and this incident played a prominent role in the fall election, 27 Fed.Cas. 870, and had a considerable impact upon future treaties and legislation. The Act of 1829, establishing the enforcement machinery for deserting seamen treaty-provisions, could be viewed as a product of this evolving constitutional understanding, and in time it was reflected in extra-

13. Hague Convention of 1907 Respecting the Rights and Duties of Neutral Powers (ratified 1909), Chapter 2, Article 11: "A neutral Power which receives on its territory troops belonging to the belligerent armies shall intern them, as far as possible, at a distance from the theatre of war.

"It may keep them in camps and even confine them in fortresses or in places set apart for this purpose.

"It shall decide whether officers can be left at liberty on giving their parole not to leave the neutral territory without permission." 36 Stat. 2310, 2324.

dition treaty-provisions. The 1842 Treaty with Great Britain, see In re Sheazle, supra, and the 1843 treaty with France, see In re Metzger, supra, remedied the void of the Jay Treaty by specifically designating certain judicial officers as having the competence to execute the extradition provisions. And then Congress passed the Act of August 12, 1848, 9 Stat. 302, the source of Rev.Stat. § 5270 (1875), and later of 18 U.S.C. § 3184, presumably designed to reinforce, or to establish beyond peradventure, the authority of the designated judicial officers to execute the extradition provisions. "Public opinion had settled down to a firm resolve, long before the treaty of 1842 was made, that so dangerous an engine of oppression as secret proceedings before the executive, and the issuing of secret warrants of arrest, founded on them, and long imprisonments inflicted under such warrants, and then, an extradition without an unbiased hearing before an independent judiciary, were highly dangerous to liberty, and ought never to be allowed in this country," In re Kaine, supra, 14 How. p. 112, 14 L.Ed. 345. In sum, although we do not have to determine here whether the President would have the power to execute the 1903 Treaty, and to order the arrest and imprisonment of Martinez-Angosto, it would be wrong to uncritically assume that this power has been established beyond any doubt by the Jonathan Robbins incident.

[11] In holding that neither the INS nor the Navy had the lawful authority to arrest and imprison Martinez-Angosto, even though they were seeking to enforce the 1903 Treaty, we have not been unmindful of the legitimate diplomatic and strategic interests served by the Treaty. However, these interests can only be satisfied within the limits of our constitutional scheme, which requires that all governmental action resulting in the deprivation of a person's liberty be authorized by law. See Ex parte Merryman, 17 Fed.Cas. 144, 147, No. 9487 (C.C.Maryland 1861) (Taney, C. J.); Ex parte Orozco, 201 F. 106 (Dist.Ct.W.D.Tex. 1912); cf. Reid v. Covert, 354 U.S. 1, 77 S.Ct. 1222, 1 L.Ed.2d 1148 (1957). Furthermore, for the following three reasons, we do not understand our holding to seriously compromise these interests.

First, it should be noted that the strategic interests at stake in this case are of no tremendous moment. The problem of preventing and deterring desertion is generally confided to the laws of Spain, to be enforced by Spanish authorities. We are merely dealing with the return of the deserter. Two strategic interests may be furthered by the return of a deserter: (a) the foreign laws designed to deter other desertions by punishing a known deserter can be applied only if a deserter is returned; and (b) the return may be needed in order to enable a ship of war, crippled by the desertion, to resume its operations. It is only this latter type of interest that urges the most summary, and, if need be, *ad hoc* procedures for the return of the naval deserter, see U. S. ex rel. Perez-Varella v. Esperdy, 285 F.2d 723, 725 (2 Cir. 1960), cert. denied, 366 U.S. 925, 81 S.Ct. 1352, 6 L.Ed.2d 384 (1961), and that type of interest is not present in our case. The arrest and imprisonment of Martinez-Angosto took place some three years after the Spanish ship of war had left the United States and, in such a situation the return of the deserter is not required with the same urgency as could possibly obtain if the ship were still in port. Compare the Immigration and Nationality Act, section 252(b), 8 U.S.C. 1282(b), 8 C.F.R. § 252.2, which provides for a summary procedure for the return of a seaman when the ship is still in port; after the ship has left port, a deserting seaman being expelled under the Act is entitled to the deportation procedure prescribed in section 242. We note the difference between these two situations, and refer to the dichotomy in the Immigration and Nationality Act's treatment of deserting seamen to illustrate that the distinction is intelligible, but we do not decide what conduct by American officials would be constitutionally permissible in the situation not before us.

Secondly, we have only dealt with the question whether the INS and Navy are competent authorities for executing the Treaty. Conceivably other government officials may be empowered under present law to determine whether the individual sought by the Spanish authorities must be returned under the terms of the Treaty, and to arrest and imprison the individual pending his return to Spain, cf. e. g., 18 U.S.C. §§ 3041, 3043, 3052, 3053; cf. In re Mineau, 45 F. 188, 189 (C.C.Vt.1891). We make no pretense of having reached that question. Moreover, nothing we have said is intended to suggest that Congress or perhaps even the President (see supra pp. 682–685,) cannot confer competence on certain officials to execute the Treaty, and in that sense fill the gap created by the repeal of Rev.Stat. § 5280. Only then might it become necessary to consider some of the propositions urged upon us by appellant, namely, that the ultimate determination as to the applicability of the Treaty must be entrusted to judicial rather than administrative officers, that an individual sought under the Treaty would be entitled to a full hearing, attendant with many of the constitutional safeguards present in criminal trials, and that the availability of habeas corpus proceedings does not constitutionally compensate for the inadequacies of a summary and *ad hoc* procedure implemented by administrative officers. The flaw we have perceived, the absence of any lawful authority on the part of the INS agents and investigators or the Navy to determine that the Treaty is applicable to Martinez-Angosto, and to arrest and imprison him for purposes of returning him to Spanish authorities, is far more elementary.

[12] Thirdly, we see no reason why the diplomatic and strategic needs sought to be furthered by the Treaty could not be adequately satisfied by utilizing the procedures of the Immigration and Nationality Act of 1952 relating to alien crewmen, see generally subchapter II, part VI, sections 251–257, 8 U.S.C. §§ 1281–1287. We view these provisions of the Act as an alternative to the Treaty; the enactment of these provisions, and its precursors did not have the effect of "nullifying" the Treaty but neither did our continued adherence to the Treaty preclude Congress from legislating on naval deserters. In United States ex rel. Perez-Varella v. Esperdy, 285 F.2d 723 (2 Cir. 1960), cert. denied, 366 U.S. 925, 81 S.Ct. 1352, 6 L.Ed.2d 384 (1961), the court held that neither the Seamen's Act of 1915 nor the Immigration Acts of 1917 (39 Stat. 874), 1924 (43 Stat. 153) and 1952 "repealed" the 1903 Treaty as it applied to the crews of ships of war. With this we take no issue and we are in full accord. However, the court in *Perez-Varella* also stated (285 F.2d at 725), in what could perhaps be technically classified as a dictum, that although the Immigration Act of 1917 covered "any alien seamen" it was not "applicable to sailors on foreign ships of war." One could infer that the *Perez-Varella* court was of the opinion that, although the 1952 Act covers alien crewmen, it would not be "applicable to sailors on foreign ships of war." With this we would take sharp issue.

[13] The statutory definition of "crewman," section 101(a) (10), 8 U.S.C. § 1101(a) (10), as "a person serving in any capacity on board a vessel or aircraft," is not limited in any way so as to exclude sailors on foreign ships of war. See also the definition of "alien crewman," section 101(a) (15) (D), 8 U.S.C. § 1101(a) (15) (D); and see 22 C.F.R. §§ 41.36, 41.62, for the documentation provisions of the Act being applied to military crewmen. The Immigration and Nationality Act of 1952 was thought of as a comprehensive legislative scheme and there is no manifest reason why this narrow class of aliens should have been excluded. Of course, a desertion from a ship of war may pose a graver threat to the national interest of the state to which the ship belongs than would a desertion from a merchant ship. But there is no reason to believe that these strategic interests could not be accommodated within the Act. See supra p. 685. These strategic interests could also be safeguarded by

having a treaty supplement the immigration laws and thus provide an alternative means of dealing with the naval deserters. To be sure, these strategic interests are furthered rather than jeopardized, by having the Act apply to alien crewmen, without distinction to whether the vessel or aircraft was in the military service of the foreign state. In the absence of such coverage under the Act, and without a treaty between the United States and the foreign state there would be no means of having the deserters arrested and detained for return. Tucker v. Alexandroff, 183 U.S. 424, 22 S.Ct. 195, 46 L.Ed. 264 (1902). The 1903 Treaty between Spain and the United States does not cover deserters from Spanish military aircraft, and it is difficult to believe that "an alien crewman" includes crews on merchant vessels and crews on both military and merchant aircraft but excludes crews on military vessels. Hence, for Spain alone, an interpretation of the Act which excluded military crews, would leave Spanish and American authorities without any means of returning deserters from Spanish military aircraft. The consequences of such an interpretation for other nations of the world community would be far more critical. Out of the more than a hundred nations in the world, only Greece and Spain have a treaty covering naval deserters with the United States. It would be difficult to believe that naval deserters from Spanish and Greek ships are not covered by the Act while naval deserters of all the other nations are covered; and it would be calamitous, both for the foreign country and our immigration policy if all deserters from military vessels and aircraft belonging to all countries without a special treaty with the United States, were beyond the reach of the Immigration and Nationality Act.

In suggesting that the domestic immigration laws do not apply to naval deserters, the *Perez-Varella* court apparently invoked the Seamen's Act of 1915 and principles of international law relating to the immunity of foreign troops to local jurisdiction. Neither ground is persuasive.

The Seamen's Act of 1915 sought the termination of deserting seamen treaties only insofar as they applied to merchant seamen. It does not follow from this, however, that an exemption must be carved out of the statutory category of crewmen for naval crewmen. It is possible that the 1903 Treaty and the national immigration laws are alternative procedures to attain the same end, especially since the treaty-alternative is unavailable for desertions from the military vessels of most nations and desertions from military aircraft of all nations.

[14] There is a passage in the *Perez-Varella* opinion where principles of international law are invoked and the "situation of a seaman on a ship of war in a foreign port" is analogized "to that of a soldier in troops that have been given leave to pass through the territory of another friendly state." The court premised that under principles of international law the soldier remains "subject to the same controls that apply while the regiment is in its own territory" and that he is immune from the local jurisdiction, and concluded, seeking support from a statement of Chief Justice Marshall in the Exchange, 11 U.S. (7 Cranch) 116, 143, 3 L.Ed. 287 (1812), that the same would be true of a seaman on a ship of war. The significance the court attaches to this supposed immunity is not free from doubt; but the development of this point could perhaps be viewed as support for the position that a naval deserter is not covered by—or is immune from—the domestic immigration laws. It does not, however, furnish the requisite support. Without attempting to assess the validity of the general proposition that a foreign troop passing through the territory of another nation, or a crew on a ship of war in a foreign port, is immune from local jurisdiction, see Restatement, Foreign Relations Law of the United States, §§ 54–63, it is clear from Tucker v. Alexandroff, supra, 183 U.S. at 433–434, 458–459, 22 S.Ct. 195, that this proposition has no applicability to the situation be-

fore us, where the sailor has deserted from the ship of war, has become economically and socially integrated within a local community, and has done all this three years prior to his apprehension. Cf. also the last paragraph of the 1903 Treaty quoted in footnote 2. The question is whether this deserter can be deported under the domestic immigration laws, and it is difficult to see how an affirmative answer to this question could seriously interfere with the internal discipline of the long departed Spanish ship of war. No principle of international law precludes American immigration laws, including the Immigration and Nationality Act of 1952, from being applied to a deserter from a foreign ship of war under the conditions present in this case, and any suggestion in *Perez-Varella* to the contrary appears to be based on views of international law that are in sharp conflict with those expressed by the Supreme Court in *Tucker v. Alexandroff*.

It seems therefore that the Immigration and Nationality Act of 1952 contains an established and orderly procedure for dealing with naval deserters, that Congress and perhaps the President could easily establish a domestic enforcement machinery for the 1903 Treaty, but that, under the presently existing law, neither the INS nor the Navy has the legal competence to determine whether Martinez-Angosto, or any other alleged naval deserter, must be returned to Spanish authorities under the terms of the 1903 Treaty, or to arrest and imprison him for that purpose. The Navy's detention of Martinez-Angosto is unlawful and the petition for the writ of habeas corpus be granted and relator set at liberty, unless within a reasonable time the INS institutes appropriate deportation proceedings under the Immigration and Nationality Act of 1952, or some agency demonstrating to the District Court that it has competence to execute Article XXIV of the 1903 Treaty with Spain takes over the conduct of relator's case.

Reversed.

FRIENDLY, Circuit Judge (concurring):

As I read my brother Marshall's learned and comprehensive opinion, we decide only that Article XXIV of the Treaty of Friendship and General Relations with Spain, 33 Stat. 2117, cannot be enforced against a Spanish naval deserter in the absence of lawful designation of "the competent national or local authorities." Whether or not, by virtue of his position as "the sole organ of the nation in its external relations, and its sole representative with foreign nations" (John Marshall's statement of March 7, 1800, Annals 6th Cong., vol. 613) and his constitutional duty to "take Care that the Laws be faithfully executed," Art. II, § 3, the President would have inherent power to designate "the competent national or local authorities," cf. McNair, The Law of Treaties 80 (1961), it is a fair inference that when Congress repealed Rev.Stat. § 5280, it understood he would have power to make that designation to the limited extent that the treaties with respect to the return of deserters were to remain effective. Cf. Cook v. United States, 288 U.S. 102, 118–119, 53 S.Ct. 305, 77 L.Ed. 641 (1913). If the point on which we decide had been squarely raised in relator's petition to the district court, action might well have been taken by the chief executive to fill what we now find to be a procedural void that prevents the United States from discharging its obligations to Spain. Thus our order of reversal will allow the District Court to postpone relator's release for a reasonable time to permit a suitable executive order to be issued if the President be so advised, as well as the alternative of an appropriate deportation proceeding under the Immigration and Nationality Act of 1952. Cf. In re Medley, Petitioner, 134 U.S. 160, 173–175, 10 S.Ct. 384, 33 L.Ed. 835 (1890). On that basis I concur in the judgment.

basically furthers a private commercial, and not the general public, interest. This finding of little public benefit from disclosure of the manual is supported by the record.

III.

Having weighed all the criteria, *see Nationwide Building Maintenance, Inc. v. Sampson,* 182 U.S.App.D.C. 83, 559 F.2d 704 (D.C.Cir.1977), Judge Hart properly exercised his discretion under section 552(a)(4)(E) in refusing appellant's request for attorneys' fees. Appellant succeeded in his original goal of obtaining release of the manual. That is compensation enough. The judgment is

Affirmed.

Gholamreza NARENJI, Behzad Vahedi, Cyrus Vahidnia

v.

Benjamin CIVILETTI, Attorney General, et al., Appellants.

CONFEDERATION OF IRANIAN STUDENTS

v.

Benjamin R. CIVILETTI, Appellant.

Nos. 79-2460, 79-2461.

United States Court of Appeals, District of Columbia Circuit.

Argued Dec. 20, 1979.

Decided Dec. 27, 1979.

As Amended Jan. 2, 1980.

Rehearing En Banc Denied Jan. 31, 1980.

The United States District Court for the District of Columbia, 481 F.Supp. 1132, declared unconstitutional a regulation which required all immigrant alien postsecondary school students who are natives or citizens of Iran to provide information as to residence and maintenance of nonimmigrant status, and appeal was taken. The Court of Appeals, Robb, Circuit Judge, held that: (1) regulation, which provides that failure to comply with reporting requirement will subject nonimmigrant to deportation proceedings, was within authority delegated by Congress to the Attorney General under the Immigration and Nationality Act; (2) distinctions on basis of nationality may be drawn in the immigration field by Congress or the executive and, so long as such distinctions are not wholly irrational, they must be sustained; and (3) since regulation had rational purpose, regulation did not violate Iranian students' right to equal protection.

Reversed with directions.

MacKinnon, Circuit Judge, filed a concurring opinion, and also filed an opinion setting forth his reasons for voting against rehearing.

Wright, Chief Judge, Robinson, Wald and Mikva, Circuit Judges, filed a joint statement in support of rehearing en banc.

1. Aliens ⇐44

Regulation, which required all nonimmigrant alien postsecondary school students who are natives or citizens of Iran to report and provide information as to residence or maintenance of nonimmigrant status, was within authority delegated by Congress to the Attorney General under the Immigration and Nationality Act. Immigration and Nationality Act, §§ 103(a), 214(a), 241(a)(9), 8 U.S.C.A. §§ 1103(a), 1184(a), 1251(a)(9).

2. Aliens ⇐44

The Immigration and Nationality Act need not specifically authorize each and every action taken by the Attorney General, so long as his action is reasonably related to the duties imposed upon him by the Act. Immigration and Nationality Act, § 103(a), 8 U.S.C.A. § 1103(a).

3. Aliens ⇐44

Promulgation of regulation, which required all nonimmigrant alien postsecondary school students who are natives or citizens of Iran to report and provide information as to residence and maintenance of nonimmigrant status, and which provided that failure to comply with reporting requirement would subject nonimmigrant to deportation proceedings, was directly and reasonably related to the Attorney General's duties and authority under the Immigration and Nationality Act. Immigration and Nationality Act, §§ 103(a), 214(a), 241(a)(9), 8 U.S.C.A. §§ 1103(a), 1184(a), 1251(a)(9).

4. Constitutional Law ⇐250.5, 274.3

Distinctions on basis of nationality may be drawn in the immigration field by Congress or the executive and, so long as such distinctions are not wholly irrational, they must be sustained as against due process and equal protection challenges. U.S.C.A. Const. Amends. 5, 14.

5. Constitutional Law ⇐250.5

Regulation, which required all nonimmigrant alien postsecondary school students who are natives or citizens of Iran to report and provide information as to residence and maintenance of nonimmigrant status, and which provided that failure to comply with reporting requirement would subject nonimmigrant to deportation proceedings, was supported by rational basis inasmuch as controversy involving Iranian students in the United States lay in field of country's foreign affairs and implicated matters over which the president has direct constitutional authority, and thus regulation did not violate Iranian students' right to equal protection. U.S.C.A.Const. Amend. 5.

Appeal from the United States District Court for the District of Columbia (D.C. Civil Nos. 79–3189 & 79–3210).

Robert E. Kopp, Atty., Dept. of Justice, Washington, D. C., with whom Carl S. Rauh,* U. S. Atty., Ronald R. Glancz, Anthony J. Steinmeyer, Michael Jay Singer, Elizabeth Gere Whitaker, Brook Hedge, John F. Cordes, Attys., Dept. of Justice, Washington, D. C., were on the brief, for appellants.

Eric M. Lieberman, New York City, with whom Alan Dranitzke, Washington, D. C., was on the brief, for appellees, Narenji et al.

Charles Gordon, Washington, D. C., for appellee, Confederation of Iranian Students.

Dale F. Swartz, Washington, D. C., was on the brief for amicus curiae, Lawyers Committee for International Human Rights, urging affirmance.

Jordan J. Paust, Houston, Tex., was on the brief for amicus curiae, Human Rights Advocates (U.S.A.), urging affirmance.

Before TAMM, MacKINNON and ROBB, Circuit Judges.

Opinion for the Court filed by Circuit Judge ROBB.

Concurring opinion filed by Circuit Judge MacKINNON.

ROBB, Circuit Judge:

This is an appeal from a judgment of the District Court declaring unconstitutional a regulation promulgated by the Attorney General at the direction of the President. In the circumstances of this case the court has concluded that the challenged regulation, 8 C.F.R. § 214.5, issued November 13, 1979, must be sustained.

Regulation 214.5 requires all nonimmigrant alien post-secondary school students who are natives or citizens of Iran to report to a local INS office or campus representative to "provide information as to residence and maintenance of nonimmigrant status." At the time of reporting each student must present his passport and evidence of his school enrollment, of payment of fees, of the number of course hours in which he is enrolled, of his good standing, and his current address in the United States. The

* Carl S. Rauh was United States Attorney at the time briefs were filed.

regulation provides that failure to comply with the reporting requirement will be considered a violation of the conditions of the nonimmigrant's stay in the United States and will subject him to deportation proceedings under section 241(a)(9) of the Act.

[1] The regulation is within the authority delegated by Congress to the Attorney General under the Immigration and Nationality Act. That statute charges the Attorney General with "the administration and enforcement" of the Act, 8 U.S.C. § 1103(a), and directs him to "establish such regulations . . . and perform such other acts as he deems necessary for carrying out his authority under the provisions of" the Act. *Id.* He is directed to prescribe by regulation the time for which any nonimmigrant alien is admitted to the United States, and the conditions of such an admission. 8 U.S.C. § 1184(a). Finally, the Act authorizes the Attorney General to order the deportation of any nonimmigrant alien who fails to maintain his nonimmigrant status or to comply with the conditions of such status. 8 U.S.C. § 1251(a)(9). These statutory provisions plainly encompass authority to promulgate regulation 214.5.

[2, 3] Recognizing the broad authority conferred upon the Attorney General by the Immigration and Nationality Act the District Court nevertheless thought that the Act does not empower him to draw distinctions among nonimmigrant alien students on the basis of nationality. We do not accept this conclusion. The statute need not specifically authorize [redacted] every action taken by the Attorney General, so long as his action is reasonably related to the duties [redacted] imposed by the statute. *Jay v. United States*, 480 F.2d 531 (2d Cir. 1973); *Pilapil v. INS*, 424 F.2d 6, 11 (10th Cir.), *cert. denied*, 400 U.S. 908, 91 S.Ct. 752, 27 L.Ed.2d 147 (1970); *Unification Church v. Attorney General*, 189 U.S.App.D.C. 92, 99–100, 581 F.2d 870, 877–78, *cert. denied*, 439 U.S. 828, 99 S.Ct. 102, 58 L.Ed.2d 122 (1978); *Mak v. INS*, 435 F.2d 728, 730 (2d Cir. 1970). Furthermore, we note that the Act, 8 U.S.C. § 1303(a), does specifically authorize the Attorney General "to prescribe special regulations and forms for the registration and fingerprinting of . . . (5) aliens of any other class not lawfully admitted to the United States for permanent residence." Finally, failure to maintain nonimmigrant status or to comply with the conditions of such status is specified as a ground for deportation. 8 U.S.C. § 1251(a)(9). We conclude that promulgation of regulation 214.5 is directly and reasonably related to the Attorney General's duties and authority under the Act.

[4] The District Court concluded that even if authorized by statute regulation 214.5 is unconstitutional because it violates the Iranian students' right to equal protection of the laws. The court found no basis for the "discriminatory classification" of the students established by the regulation. Here again we must differ. Distinctions on the basis of nationality may be drawn in the immigration field by the Congress or the Executive. *See Saxbe v. Bustos*, 419 U.S. 65, 95 S.Ct. 272, 42 L.Ed.2d 231 (1974); *Mathews v. Diaz*, 426 U.S. 67, 81–82, 96 S.Ct. 1883, 48 L.Ed.2d 478 (1970); *Fiallo v. Bell*, 430 U.S. 787, 97 S.Ct. 1473, 52 L.Ed.2d 50 (1977); L. Henkin, *Foreign Affairs and the Constitution*, 258 (1972); Maltz, *Alienage Classifications*, 31 Okla.L.Rev. 671, 684–91 (1978). So long as such distinctions are not wholly irrational they must be sustained.

[5] By way of an affidavit from the Attorney General we are informed that his regulation was issued "as an element of the language of diplomacy by which international courtesies are granted or withdrawn in response to actions by foreign countries. The action implemented by these regulations is therefore a fundamental element of the President's efforts to resolve the Iranian crisis and to maintain the safety of the American hostages in Tehran." The Attorney General refers of course to the lawless seizure of the United States Embassy in Tehran and the imprisonment of the embassy personnel as hostages. Those actions denied to our embassy and citizens the protection to which they are entitled under the Amity Treaty in force between the United

States and Iran (284 United Nations Treaty Series 93), and under international law. The lawlessness of this conduct of the Iranian government was recognized by the decision of the World Court on December 15, 1979. *United States v. Iran*, General List No. 64 (Int'l Ct. Justice, Dec. 15, 1979). Thus the present controversy involving Iranian students in the United States lies in the **field of our country's foreign affairs** and implicates matters over which the President has direct constitutional authority. *Mathews v. Diaz, supra.*

The District Court perceived no "overriding national interest" justifying the Attorney General's regulation: it found that "although defendants' regulation is an understandable effort designed to somehow reply to the Iranian attack upon this nation's sovereignty and the seizure of its citizens, it is one that does not support a legitimate national interest". In this we think the District Court erred.

As we have said, classifications among aliens based upon nationality are consistent with due process and equal protection if supported by a rational basis. *Mathews v. Diaz, supra*; *Fiallo v. Bell, supra.* The Attorney General's regulation 214.5 meets that test; it has a rational basis. To reach a contrary conclusion the District Court undertook to evaluate the policy reasons upon which the regulation is based. In doing this the court went beyond an acceptable judicial role. Certainly in a case such as the one presented here it is not the business of courts to pass judgment on the decisions of the President in the field of foreign policy. Judges are not expert in that field and they lack the information necessary for the formation of an opinion. The President on the other hand has the opportunity of knowing the conditions which prevail in foreign countries, he has his confidential sources of information and his agents in the form of diplomatic, consular and other officials. *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304, 320, 57 S.Ct. 216, 81 L.Ed. 255 (1936). As the Supreme Court said in *Mathews v. Diaz, supra*, 426 U.S. at 81, 82, 96 S.Ct. at 1892:

> For reasons long recognized as valid, the **responsibility for regulating the relationship between the United States and our alien visitors has been committed to** the political branches of the Federal Government. Since decisions in these matters may implicate our relations with foreign powers, and since a wide variety of classifications must be defined in the light of changing political and economic circumstances, such decisions are frequently of a character more appropriate to either the Legislature or the Executive than to the Judiciary. This very case illustrates the need for flexibility in policy choices rather than the rigidity often characteristic of constitutional adjudication. . . . Any rule of constitutional law that would inhibit the flexibility of the political branches of government to respond to changing world conditions should be adopted only with the greatest caution. The reasons that preclude judicial review of political questions also dictate a narrow standard of review of decisions made by the Congress or the President in the area of immigration and naturalization. [Footnotes omitted]

And in *Harisiades v. Shaughnessy*, 342 U.S. 580, 588–89, 72 S.Ct. 512, 519, 96 L.Ed. 586 (1952), Mr. Justice Jackson wrote for the Court:

> It is pertinent to observe that any policy toward aliens is vitally and intricately **interwoven with contemporaneous policies in regard to** the conduct of foreign relations, the war power, and the maintenance of a republican **form of government.** Such matters are so exclusively **entrusted to the political branches** of government as to be largely immune from **judicial** inquiry or interference. [Footnote omitted]

This court is not in a position to say what effect the required reporting by several thousand Iranian students, who may be in this country illegally, will have on the attitude and conduct of the Iranian government. That is a judgment to be made by the President and it is not for us to overrule him, in the absence of acts that are clearly in excess of his authority.

In view of the foregoing the judgment of the District Court is reversed with directions to dismiss the complaints and enter judgment for the defendants.

So ordered.

MacKINNON, Circuit Judge (concurring):

I concur completely in the court's opinion but write separately to add additional support for its ruling.

First, to indicate that this is not an isolated act of diplomacy in the international crisis that faces the United States I would stress that the record also reflects that, as part of the same diplomatic effort, the President by order prohibited "crude oil produced in Iran [from entering] the . . United States" (Defendant's Ex. 3) and blocked all property and interests of the Government of Iran subject to United States jurisdiction (Defendant's Ex. 4). I also take judicial notice of the reports that substantial forces of the United States Navy have been moved to the Indian Ocean and the President has ordered the Iranian Embassy and consulate to return approximately 85% of its diplomatic staff to Iran.

It is also significant that Regulation 214.5 seeks "to identify Iranian students in the United States who are not maintaining status and to take immediate steps to commence deportation proceedings against such persons" (44 F.Reg. 65727) "*in accordance with constitutional due process requirements.*" (Defendant's Ex. 3).

The disparity in treatment afforded the appellee nonimmigrant alien students who are in violation of our immigration laws is based upon the fact that the Government of their home country has committed, and is committing, a number of violent lawless acts against the United States and its citizens. That unlawful conduct against the United States places appellees, and others similarly situated who owe their allegiance to that country, in a different class for immigration purposes from the nonimmigrants of any other country. Therefore, since their government has made appellees part of a distinctly separate class, the United States under our Constitution may treat them differently because of the reasons that separate them from other aliens in the United States. The different treatment they may receive under subject regulation is directly related to the reasons for their different classification.

The status of Iranian aliens cannot be disassociated from their connection with their mother country since the alien "leaves outstanding a foreign call on his loyalties which international law not only permits our Government to recognize but commands it to respect." *Harisiades v. Shaughnessy*, 342 U.S. 580, 585–586, 72 S.Ct. 512, 517, 96 L.Ed. 586 (1951). The connection with the home country also means that the power of the United States Government to terminate the alien's stay is a necessary corollary to that observation:

> Under our law, the alien in several respects stands on an equal footing with citizens, but in others has never been conceded legal parity with the citizen. Most importantly, to protract this ambiguous status within the country is not his right but is a matter of permission and tolerance. The Government's power to terminate its hospitality has been asserted and sustained by this Court since the question first arose.
>
> War, of course, is the most usual occasion for extensive resort to the power. Though the resident alien may be personally loyal to the United States, if his nation becomes our enemy his allegiance prevails over his personal preference and makes him also our enemy, liable to expulsion or internment, and his property becomes subject to seizure and perhaps confiscation. But it does not require war to bring the power of deportation into existence or to authorize its exercise. Congressional apprehension of foreign or internal dangers short of war may lead to its use. So long as the alien elects to continue the ambiguity of his allegiance his domicile here is held by a precarious tenure.
>
> That aliens remain vulnerable to expulsion after long residence is a practice that

bristles with severities. But it is a weapon of defense and reprisal confirmed by international law as a power inherent in every sovereign state. Such is the traditional power of the Nation over the alien and we leave the law on the subject as we find it.

342 U.S. at 586–88, 72 S.Ct. at 517–518. (Footnotes omitted)

It is thus my conclusion that the actions of the President and the Attorney General here questioned do "bear [a] reasonable relation to protection of the legitimate interests of the United States," *Harisiades v. Shaughnessy*, 342 U.S. 580, 584, 72 S.Ct. 512, 516, 96 L.Ed. 586 (1951) and conform to due process requirements. *Id.* 588–591, 72 S.Ct. 512.

On Suggestions for Rehearing En Banc (D.C.Civil Nos. 79–3189 & 79–3210).

Opinion filed by Circuit Judge MacKINNON setting forth his reasons for voting against rehearing.

Joint statement of Chief Judge J. SKELLY WRIGHT and of Circuit Judges SPOTTSWOOD W. ROBINSON, III, WALD and MIKVA setting forth their reasons for voting to rehear these cases en banc.

Before WRIGHT, Chief Judge, and McGOWAN, TAMM, ROBINSON, MacKINNON, ROBB, WILKEY, WALD, and MIKVA, Circuit Judges.

ORDER

PER CURIAM.

The suggestions for rehearing *en banc* filed by appellees (Narenji, et al., and Confederation of Iranian Students) and the brief in support thereof filed by amicus curiae (Assoc. of Arab American University Graduates) having been transmitted to the full Court and a majority of judges not having voted in favor thereof, it is

ORDERED, by the Court, *en banc*, that appellees' aforesaid suggestions for rehearing *en banc* are denied.

MacKINNON, Circuit Judge:

The following individual opinion responds to the petition for rehearing and the *amicus* brief.

The principal point raised by Appellees' petition for rehearing *en banc* points out that the court's opinion does not discuss the Supreme Court's decision in *Kent v. Dulles*, 357 U.S. 116, 78 S.Ct. 1113, 2 L.Ed.2d 1204 (1958) which Appellees' assert is the "leading case" on the issues here involved. In claimed reliance thereon Petitioners contend that the "statute vests no greater discretionary authority in the Attorney General" than the passport statute which was involved in *Kent*. That argument involves such a gross distortion of the facts and the holding in both *Kent* and this case, that it should be answered.

Kent arose under the passport statute and involved *American citizens* who were not in violation of the laws of this country but who were denied passports because they refused to sign non-communist affidavits. Whereas this case primarily involves non-immigrant *aliens* who *are in violation* of our immigration laws.[1] To say that the Constitution and Immigration Laws vest the President and the Attorney General with no greater rights over *illegal aliens* than they do over *law abiding citizens* of the United States is a contention that answers itself. The court's opinion did not discuss *Kent* because *Kent* on its facts was substantially distinguishable from the facts of this case.

In this country we have given aliens very substantial rights, and the courts have been zealous in protecting those rights, *Hampton v. Mow Sun Wong*, 426 U.S. 88, 96 S.Ct. 1895, 48 L.Ed.2d 495 (1976), but we have never held that aliens who are in this nation in violation of our laws have all the rights of law abiding citizens of the United States. The difference in the legal status of the individual involved in *Kent* and *Narenji* with respect to their citizenship and compliance with United States laws, thus places

1. To the extent that aliens covered by the Regulations are in compliance with our laws the regulation only has a minimal effect upon them and they are *not* subject to deportation.

them in different classes and supports a difference in treatment. This difference in status and the effect of that difference on one's rights under the Immigration Laws was pointed to directly by Justice Douglas, in *Kent, supra*, when he remarked:

> "We must remember that we are dealing here with citizens who have neither been accused of crimes nor found guilty. [357 U.S. at 129, 78 S.Ct. at 1119–1120] . . The grounds for refusal asserted here do not relate to citizenship or allegiance on the one hand or to criminal or unlawful conduct on the other. [357 U.S. at 128, 78 S.Ct. at 1119] . . . *If we were dealing with political questions entrusted to the Chief Executive by the Constitution we would have a different case.*

357 U.S. at 130, 78 S.Ct. at 1120 (Emphasis added). The sentence in italics foreshadowed the President's exercise of his power in foreign affairs in the instant crisis.

Moreover, Congress by statute clearly authorized the Attorney General to prescribe regulations with respect to "nonimmigrants", such as Appellees, who do not properly maintain their status and are required to depart the United States. Congress in 8 U.S.C. § 1184(a) has provided that:

> "admission of . . . nonimmigrant [aliens] shall be for such time and under such conditions as the Attorney General may by regulations prescribe, including . . . such conditions as the Attorney General shall prescribe, to insure that at the expiration of such time, or *upon failure to maintain the status under which he was admitted, or to maintain any status subsequently acquired under Section 248*, such alien will depart from the United States."

8 U.S.C. § 1184(a) (Emphasis added). The regulation here in question is so clearly authorized by this statute, and the other statutes referred to in the majority opinion, that petitioners do not present any substantial question by its argument in this case.

Petitioners real objection is to the manner in which the Attorney General through the Regulation has chosen to determine whether those in petitioners' class have maintained their status. The Regulation requires petitioners and others similarly situated to report and only those in violation of law are subject to being sent home. There is nothing novel or illegal about requiring aliens to report. That is the usual requirement which is applied to aliens of all classes. 8 U.S.C. § 1305. The major difference here is one in slightly accelerated timing which is necessitated by the urgency of the present emergency involving Iran. Such regulation is well within the prosecutorial discretion vested in the Attorney General under his duty to *enforce* the Immigration Laws. Those statutes charge, "The Attorney General shall be charged with the administration and *enforcement* of this [Immigration and Nationality] Act . . . He shall *establish such regulations*; *prescribe such . . . reports*; . . . and perform such other acts *as he deems necessary for carrying out his authority under the provisions of this Act.*" 8 U.S.C. § 1103(a). (Emphasis added)

Additional authority, previously referred to, for the Regulation promulgated by the Attorney General stems from 8 U.S.C. § 1303 which provides:

> "(a) . . . the Attorney General is authorized to prescribe *special regulations* and forms for the *registration* and fingerprinting *of . . . (5) aliens of any . . . class not lawfully admitted to the United States for permanent residence.*" (Emphasis added).

Petitioners here are not admitted for permanent residence and have definitely been made a special "class" separate from nonimmigrants of other nations by virtue of the violent and lawless acts which their Government has allowed to be committed against the United States and its envoys duly accredited to Iran. These facts clearly bring the Attorney General's Regulation within the statutory power vested in him by the statutes cited above.

Petitioners also assert that the court's opinion "nowhere indicates how the national identity of non-immigrant students is 'reasonably related' to the obligation of the Attorney General to assure that non-immigrant students are maintaining the lawful-

ness of their status in the United States and will depart this country when required. (Page 748). This statement, which professes to state the issue here, chooses to ignore the principal fact in the problem, i. e., that the Regulation is confined to *Iranian* students whose government in violation of all international law, 1 Oppenheim, *International Law*, § 386, p. 789, has violently infringed in Iran upon the inviolability of over 50 of our diplomatic envoys in that country by countenancing their arrest by so-called "students" and imprisonment as hostages to demands that are beyond the constitutional power of this nation to fulfill. If under such strained circumstances between Iran and the United States, the reasonable relationship of the regulation to the departure of illegal *non-immigrant aliens* who owe their allegiance to Iran, and to the determination of the location of other non-immigrant Iranian nationals, is not self evident, petitioners are being opaque. The international crisis and confrontation in Iran is of such severity that those who are illegally in this country create a clear and present danger because of their allegiance and illegal status. Under the circumstances it is reasonable even as to those aliens who are legally here but profess their allegiance to Iran, that they should be located in case the international crisis worsens, so that the Government may immediately take proper security measures to protect against the dangers which all aliens of such a foreign nation potentially create under such circumstances.

Petitioners also contend that the Regulation amounts to a "discriminatory classification" of those in their class. The basis for the separate classification and its reasonableness is set forth in the concurring opinion and petitioners have not even attempted to attack or answer that explanation. To repeat, the classification of non-immigrants from Iran, and particularly those who are here illegally, is valid and reasonable because they owe allegiance to Iran and Iran at the present time is the *only* nation that has with force and violence transgressed upon American property and imprisoned our diplomatic envoys as hostages in violation of our treaty and international law. I will not further point out the status of such acts under international law except to state that they justify more extreme action than is called for by the Regulation.

Petitioners argue, in effect, that non-immigrant Iranians must be treated the same as all other non-immigrants in the United States. The argument is absurd. In view of the acts of the Iranian Government against the United States and our accredited diplomats, non-immigrant Iranians in the United States at this time, and particularly those who are here illegally, are no more entitled to be treated the same as other non-immigrants than non-immigrants of any other nation would be entitled after their country has committed hostile acts against the United States.

It should also be recognized that prior to the issuance of the Regulation in question the President by Executive Order 12170 of November 14, 1979 did "declare a national emergency to deal with . . . . the situation in Iran [which] *constitutes an unusual and extraordinary threat to the national security*, foreign policy and economy of the United States." Authority: International Emergency Economics Powers Act, 50 U.S. C.A. Sec. 1701 et seq., the National Emergencies Act, 50 U.S.C. Sec. 1601 et seq., and 3 U.S.C. Sec. 301. 44 Fed.Reg. No. 222 Thursday, November 15, 1979. (Deft's. Ex. 4). (Emphasis added)

The argument is advanced that the Regulation deals improperly with Iranian *students*. The sympathy implicit in that characterization is misplaced. Those who are primarily affected and might be subject to deportation (unless they asked for asylum, delay for valid reasons, or raised compassionate considerations) would be sent home precisely because they are *not* students. As with the so-called *students* in Iran, that are blamed for all the mob action that the Government of Iran does not oppose, these *students* appear to be of the non-studying kind. How they continue to be students eludes me. A student by definition is one who is enrolled and attends educational classes. Those who are the object of this regulation, were admitted for that purpose, but they have not maintained their status as *students*. Hence, having ceased to be

valid students, if they ever acquired that status, the basis upon which they were allowed to enter this country has ceased to exist and they are required to return home. This is not punishment, but merely carrying out the understanding to which they agreed when they were allowed to enter the United States. If the illegal Iranian non-immigrants who are the principal focus of this Regulation are still referred to as *students*, even though they do not attend classes, then the term student is being misused.[2]

In closing I wish to state that because of the authorities I have set forth previously, I disagree with the dissent which suggests that the President's action should be subjected to further "close scrutiny". In the circumstances this is tantamount to seriously questioning the President's action. It should be pointed out, however, that the question has already received full consideration and more than sufficient time has passed to give the questions full consideration. It is also incorrect to say "that the President has taken this action without express authorization from Congress." (Dissent, n. 4). In the situation with which we are here dealing, the President's power is at its zenith—right up to the brink of war and he does act pursuant to the "express authorization" of Congress. The relevant statute provides that whenever "any citizen of the United States has been unjustly deprived of his liberty by or under the authority of any foreign government . . . if [their] release is unreasonably delayed or refused, the President *shall* use such means, not amounting to acts of war, as he may think necessary and proper to obtain or effectuate the release . . .". This expressly covers the holding of United States citizens as hostages.

The foregoing Presidential authority has been in existence since the Act of July 27, 1868, R.S. 2001, 15 Stat. 224 which presently appears as Title 22, U.S.C. § 1732. In its entirety it provides:

> Whenever it is made known to the President that any citizen of the United States has been unjustly deprived of his liberty by or under the authority of any foreign government, it shall be the duty of the President forthwith to demand of that government the reasons of such imprisonment; and if it appears to be wrongful and in violation of the rights of American citizenship, the President shall forthwith demand the release of such citizen, and if the release so demanded is unreasonably delayed or refused, the President shall use such means, not amounting to acts of war, as he may think necessary and proper to obtain or effectuate the release; and all the facts and proceedings relative thereto shall as soon as practicable be communicated by the President to Congress.

This direction to the President by Congress is unequivocal. It completely supports every act and order that he has taken to free the United States hostages. No further scrutiny of his acts is required or necessary.

I therefore vote to deny rehearing.

Joint statement of Chief Judge J. SKELLY WRIGHT and of Circuit Judges SPOTTSWOOD W. ROBINSON, III, WALD and MIKVA setting forth their reasons for voting to rehear these cases en banc.

Under challenge in these cases is an *executive decision* to enforce an immigration

2. In reply to the amicus brief it should merely be added that it places too much reliance on dissenting opinions. It also incorrectly assumes that non-immigrant aliens who are illegally in the country have some right to remain here without being subject to due process deportation hearings, which is all the subject regulation requires them to face.

The assertion that the presence of subject illegal aliens does not "in some way [constitute] a clear and present danger to the welfare of the United States or its citizens" is controverted by the ruling of this court on November 19, 1979, in No. 79-2359, *Jackalone v. Andrus*, "that a demonstration at Lafayette Park has an unacceptable potential for danger to the hostages now being held in the American Embassy in Tehran." Their allegiance to their mother country implicitly creates such hazard. Notice can also be taken of other instances elsewhere in the country where aliens with such allegiance have resorted to mob action in support of the policies being presently carried on in their mother country. Federal Rules of Evidence, Rule 201(b).

statute selectively against a group of aliens because of the conduct of their parent country, thus affecting them solely on the basis of their nationality.[1] Such selective law enforcement poses a novel and serious question implicating an equal protection component of Fifth Amendment due process.[2] Because we believe the question is of exceptional importance,[3] we have voted in favor of *en banc* reconsideration.

There can be no doubt but that Congress has broad authority,[4] which it may vest in the Executive, to limit immigration on a variety of bases, including nationality.[5] But once an alien has taken up residence in the United States, even temporarily, he or she derives substantial protection from the Constitution and laws of this land.[6] It may be that the President, in these troubled days, has the power to decide that our deep aversion to selective law enforcement against a group solely on the basis of their country of origin must give way to some other imperative.[7] The Supreme Court has

1. *Narenji v. Civilleti*, No. 79-2460 (D.C. Cir. Dec. 27, 1979), at 2-3.

2. See *Bolling v. Sharpe*, 347 U.S. 497, 74 S.Ct. 693, 98 L.Ed. 884 (1954).

3. Rehearing *en banc* "is not favored and ordinarily will not be ordered except (1) when consideration by the full court is necessary to secure or maintain uniformity of its decisions, or (2) when the proceeding involves a question of exceptional importance." Fed.R.App.P. 35(a). There is no serious claim of decisional conflict within the circuit.

4. The fact that the President has taken this action without express authorization from Congress is a significant factor in the Constitutional balance. Even the cases upholding the right of the Executive, acting pursuant to congressional authorization, to exercise virtually unfettered discretion in expelling "undesirable aliens from the United States have approved expulsion only upon a specific claim that the alien has acted in a manner contrary to the interests of the United States. See, *e. g.*, *Shaughnessy v. Mezei*, 345 U.S. 206, 73 S.Ct. 625, 97 L.Ed. 956 (1953). By way of contrast, in *Kent v. Dulles*, 357 U.S. 116, 78 S.Ct. 1113, 2 L.Ed.2d 1204 (1958), the Court refused to sanction the withholding of a passport—a power usually deemed discretionary—absent a state of war or a showing that the individual denied the passport was actually engaged in illegal conduct.

5. As the Court stated in *Yamataya v. Fisher* (*The Japanese Immigrant case*), 189 U.S. 86, 97, 23 S.Ct. 611, 613, 47 L.Ed. 721 (1903):

> That Congress may exclude aliens of a particular race from the United States; prescribe the terms and conditions upon which certain classes of aliens may come to this country; establish regulations for sending out of the country such aliens as come here in violation of law; and commit the enforcement of such provisions, conditions, and regulations exclusively to executive officers, without judicial intervention,—are principles firmly established by the decisions of this court.

6. Thus the Court has said that immigration statutes may have "the effect of precluding judicial intervention in deportation cases *except insofar as . . . required by the Constitution.*" *Heikkila v. Barber*, 345 U.S. 229, 234-235, 73 S.Ct. 603, 606, 97 L.Ed. 972 (1953) (emphasis added). The Court recently observed that the cases "generally reflect a close scrutiny of restraints imposed by States on aliens," and that although "we have never suggested that such legislation is inherently invalid, . . . the Court has treated certain restrictions on aliens with 'heightened solicitude,' . . . a treatment deemed necessary since aliens . . . have no direct voice in the political processes." *Foley v. Connelie*, 435 U.S. 291, 294, 98 S.Ct. 1067, 1070, 55 L.Ed.2d 287 (1978). The Court has reminded us that in the immigration field, as elsewhere, "[i]t is clear, of course, that no Act of Congress can authorize a violation of the Constitution." *Almeida-Sanchez v. United States*, 413 U.S. 266, 272, 93 S.Ct. 2535, 2539, 37 L.Ed.2d 596 (1973).

7. In *Hirabayashi v. United States*, 320 U.S. 81, 63 S.Ct. 1375, 87 L.Ed. 1774 (1943), the Court upheld a curfew for citizens of Japanese descent but cautioned:

> Distinctions between citizens solely because of their ancestry are by their very nature odious to a free people whose institutions are founded upon the doctrine of equality. For that reason, legislative classification or discrimination based on race alone has often been held to be a denial of equal protection. . . . *We may assume that these considerations would be controlling here were it not for the fact that the danger of espionage and sabotage, in time of war and of threatened invasion, calls upon the military authorities to scrutinize every relevant fact bearing on the loyalty of populations in the danger areas.*

Id. at 100, 63 S.Ct. at 1385 (emphasis added). In *Korematsu v. United States*, 323 U.S. 214, 65 S.Ct. 193, 89 L.Ed. 194 (1944), the Court emphasized that "[n]othing short of apprehension by the proper military authorities of the *gravest*

certainly suggested that Congress has that power.[8] Nevertheless, the question requires close scrutiny, and our answer must reflect careful consideration of "fine, and often difficult, questions of values."[9]

We presently have no settled opinion on the propriety of the action attacked here. These cases do, however, raise a grave constitutional issue. When the rule of law is being compromised by expediency in many places in the world, it is crucial for our courts to make certain that the United States does not retaliate in kind. We think rehearing by the full court is appropriate and necessary.

Mohammad SAMI, Appellant,

v.

UNITED STATES of America et al.

No. 78-1975.

United States Court of Appeals,
District of Columbia Circuit.

Argued Sept. 19, 1979.

Decided Dec. 28, 1979.

Plaintiff, who had been wrongfully detained by German officials as result of a communique sent by Chief of the United States National Central Bureau, United States' liaison with Interpol, brought suit against the Government, Interpol and the Bureau Chief alleging, inter alia, false arrest, false imprisonment, defamation and various constitutional claims. The United States District Court for the District of Columbia, Oliver Gasch, J., dismissed the actions against all defendants, and plaintiff appealed. The Court of Appeals, Wald, Circuit Judge, held that: (1) Bureau did not act as agent of Interpol in sending and receiving law enforcement messages and Interpol was not "doing business" in District of Columbia for jurisdictional purposes; (2) genuine issues of material fact existed as to whether Chief's actions in sending inaccurate message which resulted in plaintiff's wrongful detention by German officials were "discretionary" within meaning of Federal Tort Claims Act's discretionary function exemption, precluding summary judgment for United States on plaintiff's false imprisonment claim; (3) absolute immunity barred defamation, false arrest and false imprisonment claims against Chief; and (4) plaintiff failed to present a valid constitutional claim.

Affirmed in part; reversed and remanded in part.

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International Criminal Police Organization, which conveyed a message from its United States liaison, United States National Central Bureau, to German official re-

imminent danger to the public safety can constitutionally justify" such restrictions. *Id.* at 218, 65 S.Ct. at 195 (emphasis added). And see *Ex parte Endo*, 323 U.S. 283, 65 S.Ct. 208, 89 L.Ed. 243 (1944).

8. In *Harisiades v. Shaughnessy*, 342 U.S. 580, 72 S.Ct. 512, 96 L.Ed. 586 (1952) the Supreme Court discussed the ambiguity of the position of aliens, pointing out that the alien brings with him

> a foreign call on his loyalties which international law not only permits our government to recognize but commands it to respect. . . . Though the resident alien may be personally loyal to the United States, if his nation becomes our enemy his allegiance prevails over his personal preference and makes him also our enemy, liable to expulsion or internment, and his property becomes subject to seizure and perhaps confiscation. But it does not require war to bring the power of deportation into existence or to authorize its exercise. Congressional apprehension of foreign or internal dangers short of war may lead to its use. So long as the alien elects to continue the ambiguity of his allegiance his domicile here is held by a precarious tenure.

9. *Foley v. Connelie*, 435 U.S. 291, 244, 98 S.Ct. 1067, 55 L.Ed.2d 287 (1978) (upholding New York State's exclusion of aliens from the police force).