
ESSAY

JUDICIAL INDEPENDENCE UNDER ATTACK: A THEORY OF NECESSITY

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There is no virtue like necessity.

—WILLIAM SHAKESPEARE, KING RICHARD II act 1, sc. 3.

INTRODUCTION

Did the longest government shutdown in United States history this past winter constitute a severe threat to a functioning and independent federal judiciary? In short, yes.

From the vantage point of a district court’s chambers, we experienced firsthand the uncertainty that almost weakened the federal judiciary when Congress and the President were at odds over the budget, threatening the judicial branch of the government with shrinkage or closure. This Essay asserts a viable legal theory—we call it a “theory of necessity”¹—to prevent any

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¹ A theory of necessity is recognized in several areas of the law, including bankruptcy, taxation, and criminal law. *See, e.g.*, *Manners v. Cannella*, 891 F.3d 959, 972 (11th Cir. 2018) (explaining that a criminal defendant may assert the “doctrine of necessity” as an affirmative defense under Florida state law to challenge a charge of fleeing the police), *cert. denied*, No. 18-6908, 2019 WL 1590272 (U.S. Apr. 15, 2019); *In re United Am., Inc.*, 327 B.R. 776, 781 (Bankr. E.D. Va. 2005) (explaining that, in bankruptcy cases, the equitable “Doctrine of Necessity” aims to balance Chapter 11’s goals of paying pre-petition creditors with treating all creditors equally). A previous law review note proposed that “state courts should invoke inherent power against a legislature only under a standard of *absolute* necessity to perform the duties required by federal and state constitutional law.” Andrew

constitutional crisis caused by a future government shutdown. This theory invokes four building blocks of well-established legal doctrines that, when connected, pave a path to secure the judicial branch's autonomy. The theory of necessity requires the legislative and executive branches to recognize their constitutional obligations to fund the judicial branch, without interruption.

These four building block doctrines are:

1. The inherent power of courts to require the legislative and executive branches of government to provide reasonable and necessary funding;
2. The Take Care Clause of the United States Constitution requiring the President to enforce the laws, which surely include the laws establishing lower federal courts and their jurisdiction;
3. Holding the Antideficiency Act unconstitutional as applied to the judiciary during a government shutdown; and
4. A legislative or mandamus remedy, to apply these principles effectively and appropriately against both Congress and the Executive, if necessary.

In analyzing the constitutional issues presented by a shutdown of the judiciary, these well-established principles are attracted to each other, as how Mozart's Papageno is attracted to Papagena. The concept of the United States' judicial system terminating its operations because of a political dispute between the executive and legislative branches requires adoption of this theory of necessity—that when threatened with a cessation of funds, the judiciary can take action to protect its independence and its continued functioning as a separate branch of government.

Of course, the word “necessary” is found in the text of the Constitution. Under Article I, Section 8, Congress has the power “[t]o make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof.”² In the constitutional law context, “necessity” is often referenced when evaluating

W. Yates, Note, *Using Inherent Judicial Power in a State-Level Budget Dispute*, 62 DUKE L.J. 1463, 1463 (2013) (emphasis added). What we advocate is that the concept of *reasonable* necessity protects the autonomy of *federal* courts in a government shutdown.

² Alexander Hamilton's interpretation of this clause was the subject of Federalist Paper No. 33. THE FEDERALIST NO. 33 (Alexander Hamilton). The concept of necessity was central to the Supreme Court's opinion in *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316 (1819).

the power of the President or Congress to act in the face of a national emergency.³ As Thomas Jefferson explained:

A strict observance of the written laws is doubtless *one* of the high duties of a good citizen, but it is not *the highest*. The laws of necessity, of self-preservation, of saving our country when in danger, are of higher obligation. To lose our country by a scrupulous adherence to written law, would be to lose the law itself, with life, liberty, property and all those who are enjoying them with us; thus absurdly sacrificing the end to the means.⁴

From a federal trial judge's point of view, the concept of a shutdown impacting the judicial branch is utterly inconsistent with what we practice and preach every day in our opinions and courtrooms, whether in a simple personal injury case based on diversity or a complex federal question dispute. Therefore, we see our building block approach as providing the much-desired solution, and one which serves to rightfully insulate the administration of justice from those unnecessary failures of governance.

I. BACKGROUND: THE 2019 SHUTDOWN

On December 22, 2018, President Donald J. Trump announced a partial government shutdown in response to disagreements with Congress over the 2019 appropriations bill. The shutdown affected over 800,000 federal employees and lasted for thirty-five days, making it the longest shutdown in United States history.⁵ During the funding lapse, the work of many government agencies came to a halt. The federal judiciary was threatened by the impasse but was able to use nonappropriated funds—comprised mainly of court fees—to continue most judicial functions from December 22, 2018 through February 1, 2019.⁶ Similar shutdowns of varying lengths have occurred

³ See, e.g., Robert J. Delahunty & John C. Yoo, *Dream on: The Obama Administration's Nonenforcement of Immigration Laws, the DREAM Act, and the Take Care Clause*, 91 TEX. L. REV. 781, 781-87 (2013) (describing the Obama administration's decision not to enforce removal provisions of an immigration law and arguing that the "Take Care Clause imposes on the President a duty to enforce *all* constitutionally valid acts of Congress in *all* situations and cases").

⁴ *Id.* at 817 (quoting Letter from Thomas Jefferson to J.B. Colvin (Sept. 20, 1810), in 12 THE WRITINGS OF THOMAS JEFFERSON 418 (Albert Ellery Bergh ed., 1907)).

⁵ Lisa Rein, Tracy Jan & Kimberly Kindy, *Federal Employees Return to Backlog of Work After 35-Day Shutdown*, WASH. POST (Jan. 28, 2019), https://www.washingtonpost.com/politics/federal-employees-return-to-backlog-of-work-after-35-day-shutdown/2019/01/28/10030766-231c-11e9-81fd-b7b05d5bed90_story.html?utm_term=.abf9970eddf5 [<https://perma.cc/A268-RRML>].

⁶ Through a series of eleven memoranda, James Duff, Director of the Administrative Office of the United States Courts (AO), updated judges, court staff, and federal defender offices about the ability of the judiciary to function during the partial government shutdown. Duff communicated that funding would extend only through February 1, 2019, but that essential court operations could continue thereafter. See *Judiciary Has Funds to Operate Through Jan. 31*, UNITED STATES COURTS

since 1980; most notably, a 1995–96 shutdown that lasted twenty-one days under President Clinton and a 2013 shutdown that lasted seventeen days under President Obama. No shutdown in history, however, has come so close to threatening the continued functioning of the federal judiciary as the most recent shutdown. The chambers of the authors of this Essay, Judge Michael Baylson and his law clerks, experienced the effects of the shutdown first-hand. In *United States v. Hoover*, a complex, nine-defendant narcotics conspiracy case, several defense counsel insisted on a trial within the time limits of the Speedy Trial Act (STA).⁷ The Assistant United States Attorney represented on the record that the Government was unable to comply with the court’s discovery deadlines because of the shutdown.⁸ As a result, the court had no choice but to delay the deadline for production of important discovery material to all defense counsel. If the shutdown had continued, the consequences, like the proverbial tumbling domino blocks, may have required dismissal of the charges because of the Government’s failure to produce discovery.⁹

II. TOWARD A THEORY OF NECESSITY

The shutdown ended on January 25, 2019, just days before the judicial branch would have depleted the funds necessary to perform its constitutionally-mandated duties. That a political battle between the executive and legislative branches could cripple the judicial branch’s ability to adjudicate disputes constitutes a breach of the principle of separation of powers that is fundamental to the United States Constitution and echoed in state constitutions. This Essay argues that the executive and legislative branches not only have the power, *but also the duty*, to ensure that the judicial branch has reasonable and necessary funds. This theory of necessity compels judges to advocate for funds, through litigation if necessary, to ensure continued operations in the face of future threats to annual appropriations.

A. *Under Common Law Principles, Courts Have Inherent Power to Ensure Their Continued Operations*

The judicial branch has the inherent power to require the legislative and executive branches to provide reasonable and necessary funds to function as a separate and independent branch of government. This inherent power—the

(Jan. 22, 2019), <https://www.uscourts.gov/news/2019/01/22/judiciary-has-funds-operate-through-jan-31> [<https://perma.cc/DF7A-B7MU>].

⁷ No. 18-249 (E.D. Pa. filed Oct. 17, 2018).

⁸ Transcript of Record at 18-25, *United States v. West*, No. 18-249-2 (E.D. Pa. Jan. 17, 2019) (“Your Honor, the Government . . . ha[s] not been able to meet the . . . deadline [O]ur litigation support staff and IT people have been furloughed, and we cannot . . . process [cellphone evidence] without them.”).

⁹ See *infra* note 22 (describing the STA and cases where it was used to vacate convictions).

first of our four building blocks—is a function of the separation of powers doctrine fundamental to our system of government and embodied in both the United States Constitution and state constitutions.

The idea that the judiciary has the inherent power to maintain its existence is an established legal doctrine. Several state supreme courts have strongly endorsed this principle by requiring the legislative and executive bodies of state governments to provide “reasonable and necessary” funds for the operation of their state court systems. In the following pages, we refer to litigation in state supreme courts which precipitated from stubborn interbranch conflict and which required a judicial resolution. These state court decisions have clearly and consistently enforced the principles that state appropriating bodies have an obligation to provide the judiciary with “reasonable and necessary” funds as opposed to a blank check; that depriving courts of such funds for their proper functioning is contrary to the doctrine of separation of powers; and, most importantly, that courts have inherent power to compel governing bodies to appropriate those funds.

Again, we draw on the personal experience of the lead author of this Essay, Judge Michael Baylson, who, as a young lawyer with the Philadelphia firm of Duane, Morris & Heckscher in 1970, drafted the complaint in a successful mandamus action brought by the President Judge of Philadelphia’s Common Pleas Court against the Mayor and City Council of Philadelphia.¹⁰ This action has played a key role in the development of this theory of necessity.

In *Carroll v. Tate*, the City Council’s failure to appropriate necessary funds prompted the filing. After a non-jury trial, Judge Harry A. Montgomery, sitting by designation, issued a writ of mandamus. The Supreme Court of Pennsylvania affirmed, and stated:

Unless the Legislature can be compelled by the Courts to provide the money which is reasonably necessary for the proper functioning and administration of the Courts, our entire Judicial system could be extirpated, and the Legislature could make a mockery of our form of Government with its three co-equal branches—the Executive, the Legislative and the Judicial.¹¹

Following remand by the state supreme court, the City entered into a settlement agreement supplying additional funds for court operations, demonstrating that the judiciary’s inherent power to enforce the separation of powers can be an effective legal tool to secure reasonable and necessary funding for the federal judiciary.¹²

¹⁰ See *Commonwealth ex rel. Carroll v. Tate*, 274 A.2d 193 (Pa. 1971).

¹¹ *Id.* at 199 (quoting *McCulloch*, 17 U.S. (4 Wheat.) at 431).

¹² Pennsylvania state courts, following *Carroll*, have emphasized that legislative action that impairs the independence of the judiciary would be contrary to the doctrine of separation of powers.

More recently, a Michigan trial court sought to compel two county funding units to appropriate funds for enhanced pension and retiree health plans, as necessary to recruit and maintain staff to carry out the court's essential functions.¹³ The lower court found in favor of the plaintiff Trial Court in part because the funds were "reasonable and necessary" to its ability to perform its constitutional duties; the appellate court affirmed.¹⁴ Under this "reasonable and necessary" doctrine, as outlined by the court, "in those rare instances in which the legislature's allocation of resources impacts the ability of the judicial branch to carry out its constitutional responsibilities, what is otherwise exclusively a part of the legislative power becomes, to that extent, a part of the judicial power."¹⁵ In support of this proposition, the court referenced a relevant observation by James Madison, connecting the state court's power to compel reasonable and necessary funds to the federal government:

[M]embers of each department should be as little dependent as possible on those of the others, for the emoluments annexed to their offices

As the legislat[ure] . . . alone has access to the pockets of the people, and has in some constitutions full discretion, and in all a prevailing influence over the pecuniary rewards of those who will fill the other departments, a dependence is thus created in the latter, which gives still greater facility to encroachments of the former.¹⁶

Although ultimately upholding the principle in crafting its judicial test, the court determined that the plaintiff had failed to establish that the benefits requested were "reasonable and necessary" to the "serviceability" of the court.¹⁷

New York and Ohio state courts have similarly recognized that in failing to allocate sufficient funds for the judiciary to carry out its functions, the legislature or appropriating body violates the constitutional principle of separation

See, e.g., Pa. State Ass'n of Cty. Comm'rs v. Commonwealth, 681 A.2d 699, 703 (Pa. 1996) (per curiam) (quoting *McCulloch* and holding that a writ of mandamus to require the General Assembly to enact a funding scheme that would provide necessary financial support for state courts was warranted); *Beckert v. Warren*, 439 A.2d 638, 642 (Pa. 1982) (citing *Carroll* and requiring county commissioners to provide funding for court staff and salary increases for court-related personnel and noting "the judiciary's inherent power to compel expenditures necessary to prevent the impairment of its exercise of the judicial power or of the proper administration of justice").

¹³ 46th Cir. Trial Court v. Crawford Cty., 719 N.W.2d 553, 555-56 (Mich. 2006).

¹⁴ *Id.* at 558.

¹⁵ *Id.* at 560.

¹⁶ *Id.* (citations omitted) (quoting THE FEDERALIST Nos. 51, 48 (James Madison)).

¹⁷ *Id.* at 569.

of powers.¹⁸ Notably, New York's highest court has suggested that the judiciary has the authority to require appropriations for court-appointed counsel.¹⁹

These principles have not yet been applied in the context of a federal government shutdown, but in this increasingly divisive political climate, they should be. The strategies employed by litigants in state courts provide just a few examples of how federal courts could preserve their autonomy in the face of a future executive–legislative tug-of-war. The common law doctrine of courts' inherent power to secure funding is fundamental to the building blocks for which we advocate to insulate the federal judiciary from the detrimental effects of a shutdown.

Indeed, Chief Justice Rehnquist recognized these same concerns during the 1995 shutdown, when he requested that Congress “separate the judiciary’s budget from the comprehensive appropriation for Commerce, Justice, State, and the Judiciary, of which it is traditionally a part.”²⁰ Chief Justice Rehnquist recognized that

the judiciary is not part of the law-making process, and nothing in the judiciary’s budget involves any dispute of principle between Congress and the President There is simply no reason for depriving the public of any part of the function which the judicial branch performs because of disputes between the executive and legislative branches with respect to other agencies included in the larger appropriation bill.²¹

We agree.

The concept of separation of powers warrants application of a theory of necessity to protect the federal judiciary from legislative curtailment.²² The

¹⁸ *Ascione v. City of New York*, 379 N.Y.S.2d 599, 606 (N.Y. Sup. Ct. 1975) (“Included in this concept [of separation of powers] is the obvious caveat that the ‘appropriating body’ *must* appropriate sufficient funds for all three branches of government to carry out its functions.”); *State ex rel. Rudes v. Rofkar*, Nos. OT-83-14, OT-83-15, OT-83-16, 1983 WL 6971, at *4 (Ohio Ct. App. Oct. 14, 1983) (“Because an independent court system is the mainstay of the rule of law in a free society, co-ordinate branches of the government may not fiscally restrain or hamper the courts in effectively discharging their sundry judicial responsibilities.”); *see, e.g., Kelch v. Town Bd. of Davenport*, 829 N.Y.S.2d 250, 252-53 (N.Y. App. Div. 2007) (holding that town’s legislative action in setting a justice’s salary at \$500 per year violated the principles of separation of powers and judicial independence embodied in the New York and United States constitutions).

¹⁹ *Hurrell-Herring v. State*, 930 N.E.2d 217, 227 (N.Y. 2010) (reversing a lower court ruling that the state’s requirement that counties fund indigent defense with county resources was non-justiciable and noting that “[i]t [was], of course, possible that a remedy . . . would necessitate the appropriation of funds and perhaps, particularly in a time of scarcity, some reordering of legislative priorities”).

²⁰ *See* William H. Rehnquist, *1995 Year-End Report on the Federal Judiciary*, 19 AM. J. TRIAL ADVOC. 491, 492 (1996).

²¹ *Id.*

²² The STA provides one example of federal courts recognizing that the concept of separation of powers may act to limit legislative action. *See, e.g., United States v. Howard*, 440 F. Supp. 1106, 1109-11 (D. Md. 1977)(citing *Carroll* and relying on the Federalist Papers and the court’s “inherent

judicial branch must be able to function effectively as a check on its counterparts while fulfilling its role as adjudicator. With this foundation, when courts are threatened with loss of reasonably necessary funding for their continued operations, they have the right—if not the obligation—to exercise their inherent power to require that funds be provided. These cases, and Chief Justice Rehnquist’s petition to Congress, establish the first building block of our theory—that federal courts have the inherent authority to do what is necessary (i.e., seek mandamus, demand funds from Congress, etc.) to maintain their existence.²³

B. *The Take Care Clause Requires the President to
Protect Judicial Functioning*

Article II, Section 3 of the U.S. Constitution, which requires that the President “shall take Care that the Laws be faithfully executed,” creates “the Chief Executive’s most important constitutional duty.”²⁴ This clause, known as the Take Care Clause, is the second building block in our theory of necessity. We argue that the Take Care Clause requires the President, in the event of a government shutdown, to ensure the continued functioning of the judicial system. Surely, the laws establishing lower federal courts are among the “Laws” that fall within the President’s duty if and when the Legislature fails to provide sufficient funds. The absence of any federal precedent in so holding is not, in light of the common law principles discussed in Section II.A, a bar to invoking the Take Care Clause in advocating for a theory of

power to preserve the efficient and expeditious administration of justice and protect it from being impaired or destroyed” in concluding that Congress’s imposition of a time limit in the STA offended the doctrine of separation of powers), *aff’d*, 590 F.2d 564 (4th Cir. 1979); *see also* United States v. Martinez, 538 F.2d 921, 923 (2d Cir. 1976) (noting that there was a question under the doctrine of separation of powers of whether Congress could “exercise judicial authority” to the extent covered by the STA). The Fourth Circuit has since upheld the STA, but the doctrine of separation of powers articulated in both *Howard* and *Martinez* remains fundamental. *See* United States v. Brainer, 691 F.2d 691, 699 (4th Cir. 1982) (holding that the STA was constitutional because the possibility that the STA would prevent the judicial branch from accomplishing its constitutionally assigned functions “would appear to be remote”); *see also* United States v. Williams, 917 F.3d 195, 205 (3d Cir. 2019) (applying the STA to vacate convictions); United States v. Reese, 917 F.3d 177, 184 (3d Cir. 2019) (same).

²³ Prior scholarship has addressed the idea that courts, particularly state courts, have inherent powers to ensure their own funding. *E.g.*, G. Gregg Webb & Keith E. Whittington, *Judicial Independence, the Power of the Purse, and Inherent Judicial Powers*, 88 JUDICATURE 12 (2004); William S. Ferguson, Note, *Judicial Financial Autonomy and Inherent Power*, 57 CORNELL L. REV. 975 (1972); Note, *supra* note 1. All three articles cite *Carroll v. Tate*. We draw from similar precedent as well as our own experience in a federal trial judge’s chambers to apply the doctrine of inherent power in the context of a federal shutdown.

²⁴ *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 577 (1992).

necessity to ensure the continued functioning of the judicial branch despite a shutdown of the legislative and executive branches.²⁵

The Take Care Clause is an untapped resource that can and should be called upon to restore the constitutional balance emphasized by the Founders in the event of a future shutdown. For example, Alexander Hamilton recognized that the judiciary

will always be the least dangerous to the political rights of the Constitution . . . [because it] has no influence over either the sword or the purse; no direction either of the strength or of the wealth of the society; and can take no active resolution whatever. It may truly be said to have neither FORCE nor WILL, but merely judgment; and must ultimately depend upon the aid of the executive arm even for the efficacy of its judgments.²⁶

Alexis de Tocqueville appropriately observed during this country's infancy that the power of the President, unlike a monarch, "is also the executive of laws; but he does not really co-operate in making them, since the refusal of his assent does not prevent their passage. He is not, therefore, a part of the sovereign power, but only its agent."²⁷ De Tocqueville's view of the President as an "agent" may not be his most perceptive prediction of the future given the President's executive powers. However, as there are very few Supreme Court decisions examining how the Take Care Clause limits the President's autonomy, the notion that the President is an agent whose role, at least as to the judiciary, is to "take Care that the [separation of powers principle] be faithfully executed" remains a viable path toward preserving judicial autonomy.²⁸

Indeed, the limits of a President's authority to ignore the wishes of the Legislature to further his or her own political agenda has recently been challenged. President Trump's February 2019 declaration of a national emergency to secure border wall funding has spurred a flurry of lawsuits

²⁵ At least one federal court has explained that a violation of the Take Care Clause may unconstitutionally interfere with separation of powers principles, acknowledging, to a degree, the interplay between the first and second building blocks. *See* *Pequignot v. Solo Cup Co.*, 640 F. Supp. 2d 714, 715, 724, 726 (E.D. Va. 2009) (citations omitted) (noting in a false patent marking action that if 31 U.S.C. § 292(b), which provides *qui tam* relator standing, violated the Take Care Clause by failing to grant the executive branch sufficient control over litigation, "disrupt[ing] the proper balance between the coordinate branches," the Supreme Court would strike the law as unconstitutional).

²⁶ THE FEDERALIST NO. 78 (Alexander Hamilton).

²⁷ ALEXIS DE TOCQUEVILLE, 1 DEMOCRACY IN AMERICA 124 (P. Bradley ed., Vintage Books 1990) (1835).

²⁸ *See, e.g.*, *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 588-89 (1952) (holding that President Truman had no constitutional authority to direct the Secretary of Commerce to take possession of and operate the nation's steel mills to avoid a "national emergency"); *Ex parte Milligan*, 71 U.S. (4 Wall.) 2, 139 (1866) ("The power to make the necessary laws is in Congress; the power to execute in the President . . . Both are servants of the people, whose will is expressed in the fundamental law.").

challenging the President's designation of funds to build a wall between the United States and Mexico as violating the Constitution.²⁹ The President has some authority to determine the use of funds in the possession of the United States Treasury for emergency measures, functioning of the military, law enforcement, and public safety purposes, etc.³⁰ However, the Spending Power is exclusively vested with Congress,³¹ and the President may not write statutes or alter those written by Congress.³²

Court decisions have thus played an important role in adjudicating disputes over presidential power. Just as there are precedents demonstrating the courts' ability to restrict unlimited presidential power, there have also been instances where the President has enforced the authority of the

²⁹ See, e.g., Complaint at 15-16, *Sierra Club v. Trump*, No. 19-0892 (N.D. Cal. Feb. 19, 2019) (alleging that temporary appropriations reinforce Congress's constitutional duty to act as a check upon the executive branch and that the Appropriations and Presentment Clauses prohibit the President from modifying appropriations bills or drawing money from the Treasury in a manner that undermines congressional appropriations). Demonstrating the constitutional limits on the President's autonomy, the Senate vetoed the President's emergency declaration for the first time in history. Emily Cochrane & Glenn Thrush, *Senate Rejects Trump's Border Emergency Declaration, Setting Up First Veto*, N.Y. TIMES (Mar. 14, 2019), <https://www.nytimes.com/2019/03/14/us/politics/senate-vote-trump-national-emergency.html> [<https://perma.cc/AAS7-TMK7>].

The question of whether the President's directives to executive branch agencies to further his or her own policy objectives violates the Take Care Clause has recently been raised. See *Ariz. DREAM Act Coal. v. Brewer*, 855 F.3d 957, 959, 975-76, 984 (9th Cir. 2017) (affirming the injunction against enforcement of Arizona's policy of denying drivers' licenses to Deferred Action for Childhood Arrivals (DACA) recipients on the basis of preemption but noting that DACA did not amount to a suspension of the Immigration and Naturalization Act in violation of the Take Care Clause); *Texas v. United States*, 809 F.3d 135, 146 & n.3 (5th Cir. 2015) (affirming injunction against enforcement of Deferred Action for Parents of Americans and Lawful Permanent Residents (DAPA) based on a violation of the Administrative Procedure Act but declining to address whether the Department of Homeland Security guidance implementing DAPA violated the Take Care Clause), *aff'd mem. by an equally divided Court sub nom.* *United States v. Texas*, 136 S. Ct. 2271 (2016). No court has ruled on this issue, leaving open the question of the scope of the President's regulatory power.

³⁰ The President's power to use emergency funds derives from several sources. See, e.g., 10 U.S.C. § 2808 (2012) (allowing the President to redirect federal appropriations in response to an emergency declaration); 50 U.S.C. §§ 1601, 1621-1622 (2012) (authorizing the President to declare a national emergency).

³¹ Congress has very broad and exclusive powers under the Spending Clause. U.S. CONST. art. I, § 8, cl. 1. See generally *City of Phila. v. Sessions*, 309 F. Supp. 3d 289 (E.D. Pa. 2018) (citing *City of Phila. v. Sessions*, 280 F. Supp. 3d 579, 639-47 (E.D. Pa. 2017)) (acknowledging that the Supreme Court has yet to define the outer bounds of the "relatedness" limit on Spending Clause legislation but issuing a preliminary injunction preventing the Attorney General from enforcing Byrne JAG grant conditions), *aff'd in part and vacated in part sub nom.* *City of Phila. v. Att'y Gen.*, 916 F.3d 276 (3d Cir. 2019).

³² For instance, the Supreme Court held that the Line Item Veto Act was unconstitutional. *Clinton v. City of New York*, 524 U.S. 417, 420, 438, 447-48 (1998) (writing for a 6-3 majority, Justice Stevens explained that the President, unlike Congress, has no power "to enact, to amend, or to repeal statutes," and so the Act was unconstitutional because it gave "the President the unilateral power to change the text of duly enacted statutes" in violation of Article I, § 7).

judiciary. For example, President Eisenhower issued an Executive Order³³ requiring troops to facilitate desegregation in the Little Rock School District pursuant to an order by the District Court for the Eastern District of Arkansas after the Supreme Court's decision in *Brown v. Board of Education*.³⁴

In the same vein, although litigation challenging a shutdown as a violation of the Take Care Clause is a new legal frontier, federal courts have invoked the Take Care Clause when requiring the President to comply with court orders, demonstrating the judiciary's ability to protect its own authority while enforcing the separation of powers doctrine. In *Nixon v. Sirica*, the President argued that certain items requested in a grand jury subpoena, including communications between him and his closest advisors related to his duties under the Take Care Clause, were privileged.³⁵ The district court ordered the President to produce these items for in camera inspection, and a majority of the D.C. Circuit affirmed.³⁶ In a later, related case, the Supreme Court rejected the President's argument that the independence of the executive branch insulated him from a judicial subpoena issued during an ongoing criminal prosecution.³⁷ Such an absolute executive privilege, the Court held, "would upset the constitutional balance of 'a workable government' and gravely impair the role of the courts under Art. III."³⁸

These various precedents reflect substantial authority entrusted to the judiciary to serve as a guiding force through uncharted terrain in the area of separation of powers. They also suggest significant power for self-preservation of that authority. Vindicating such power would warrant a court to require the President to continue funding the federal judiciary by ruling that the judiciary is not to be affected by any shutdown order.

Case law and pending litigation emphasizing the limits on the President's autonomy open the door to challenges that the President's failure to sign an appropriations bill would violate his or her duty to "take Care that the [Constitution and the separation of powers principles therein] are faithfully executed." This is particularly true when the President uses that autonomy to encroach upon the power of the courts. This embodies our second building

³³ Initially, President Eisenhower issued a proclamation commanding that persons in Arkansas cease and desist from willfully obstructing the enforcement of orders of the district court. Proclamation No. 3204, 3 C.F.R. § 132 (1954–1958). When the proclamation was not obeyed, the President authorized and directed the Secretary of Defense "to take all appropriate steps to enforce any orders of the United States District Court of the Eastern District of Arkansas" for the removal of obstruction of justice. Exec. Order No. 10,730, 3 C.F.R. § 389 (1954–1958).

³⁴ *Brown v. Bd. of Educ. (Brown I)*, 347 U.S. 483 (1954); see also *Brown v. Bd. of Educ. (Brown II)*, 349 U.S. 294 (1955).

³⁵ 487 F.2d 700, 754 (D.C. Cir. 1973) (per curiam).

³⁶ *Id.* at 704.

³⁷ *United States v. Nixon*, 418 U.S. 683, 686–88, 706 (1974).

³⁸ *Id.* at 707 (quoting *Youngstown*, 343 U.S. at 635 (Jackson, J., concurring)).

block. While the checks and balances fundamental to the Constitution have remained steadfast over time, the development of federal precedent and acts of Congress has resulted in the creation of a strong executive branch over which the President presides. But the President is not Wagner's Wotan leading his fellow gods, and the White House is not Valhalla.

C. The Antideficiency Act is Unconstitutional as Applied to the Judiciary

The authority requiring federal agencies to “shut down” during a lapse in appropriations derives from the Antideficiency Act,³⁹ and administrative guidance interpreting its text. Although the language of the Act arguably applies to the federal government as a whole, the modern understanding of how it should be applied during an appropriations impasse is limited almost entirely to agencies within the executive branch. The Administrative Office of the United States Courts (AO) has, in the past, chosen to follow that agency guidance. However, if the judiciary is meant to be a separate and independent branch of government, the Antideficiency Act cannot be applied to constrain the courts in the same way it constrains executive agencies. This is the third building block in our theory of necessity.

The Act specifies, among other things, that “an officer or employee of the United States Government or of the District of Columbia government may not . . . make or authorize an expenditure or obligation exceeding an amount available in an appropriation or fund for the expenditure or obligation.”⁴⁰ The government “may not accept voluntary services . . . or employ personal services exceeding that authorized by law except for emergencies involving the safety of human life or the protection of property.”⁴¹ In 1980 and 1981, Attorney General Benjamin Civiletti issued two opinions addressing the implications of the Act during a lapse in appropriations.⁴² These opinions, particularly the 1981 Opinion, form the basis for executive branch decisions on how the federal government may operate—or not operate—when a budget has not been enacted.⁴³

³⁹ 31 U.S.C. §§ 1341–1342 (2012).

⁴⁰ *Id.* § 1341(a)(1)(A).

⁴¹ *Id.* § 1342.

⁴² Authority for the Continuance of Government Functions During a Temporary Lapse in Appropriations, 5 Op. O.L.C. 1, 11–12 (1981) [hereinafter 1981 Opinion]; Applicability of the Antideficiency Act Upon a Lapse in an Agency's Appropriations, 4A Op. O.L.C. 16, 16 (1980) [hereinafter 1980 Opinion].

⁴³ The 1980 Opinion explains that the previous practice of working as if on credit during a lapse in appropriations was unlawful under the Antideficiency Act, and the 1981 Opinion lessened the blow by instructing that certain “essential” government services may continue to operate during a shutdown. 1981 Opinion, *supra* note 42, at 11–12; 1980 Opinion, *supra* note 42, at 16. Civiletti's statement that “[t]he Constitution and the Antideficiency Act itself leave the Executive leeway to perform essential functions and make the government ‘workable’” is the source from which the government draws its distinctions between “essential” and “nonessential” workers during a

Neither the Antideficiency Act nor the opinions of the Attorney General expressly address or exempt the judiciary, and all of the official guidance on how the Act should be applied is directed exclusively at the executive branch.⁴⁴ Although the judiciary was able to operate for the duration of the 2013 and 2018–19 shutdowns using nonappropriated funds, the AO recently issued guidelines for all federal judges that would curtail operations under the terms of the Antideficiency Act if a shutdown were to continue beyond the availability of such funds. In that situation, each court would be responsible for determining how to proceed and how to decide which staff are essential or nonessential.⁴⁵

The resulting funding shortfall would be of concern not just to the judiciary but assuredly to citizens and litigants as well. In June 1986, a budgetary crisis, albeit not a “shutdown” as we use the term, prompted the AO and the Executive Committee of the Judicial Conference to issue a memorandum to all district court judges requiring that they suspend civil jury trials under the Antideficiency Act until necessary funds could be reinstated.⁴⁶ Following suits for emergency writs of mandamus by plaintiffs in pending civil cases, the Ninth Circuit held in *Armster v. District Court* that the wholesale suspension of the civil jury trial system was unconstitutional but ultimately denied the petitions for mandamus relief.⁴⁷ In light of its reasoning on the unconstitutional nature of the suspension, the Ninth Circuit expressed its “confiden[ce]” that the district court judges would “follow their normal procedures and exercise their customary and reasonable judicial discretion in scheduling and holding civil jury trials, and that they will do so

shutdown. See 1981 Opinion, *supra* note 42, at 11–12. Despite the fact that the 1980 and 1981 Opinions do not officially apply to the judiciary, the federal courts have since operated during shutdowns in the spirit of Civiletti’s guidance.

⁴⁴ The Congressional Research Service has noted:

The DOJ opinions were written to guide actions in the executive branch. The legislative and judicial branches are not guided officially by executive branch documents regarding the Antideficiency Act. However, the two branches continue to be guided by the Constitution and the act itself and may look to executive branch guidelines as a point of reference.

CONG. RESEARCH SERV., RL34680, SHUTDOWN OF THE FEDERAL GOVERNMENT: CAUSES, PROCESSES, AND EFFECTS 4 n.21 (2018).

⁴⁵ Memorandum from James Duff, Dir., Admin. Office of the U.S. Courts to All U.S. Judges et al. (January 11, 2019). In its periodic memoranda on the availability of nonappropriated funds through the 2018–19 shutdown, the AO also provided guidance about how courts should continue to operate after funds became wholly unavailable. The AO explained that some staff would be required to report for work without pay, juries would be empaneled without pay, and court-appointed attorneys would be required to represent their clients without pay. *Id.*; see also 13 Guide to Judiciary Policy, ch. 2, §§ 220.25–220.30.55 (2014).

During the 2018–19 shutdown, when the courts were able to operate on nonappropriated funds, the lapse in appropriations had significant effects on the judiciary’s ability to function.

⁴⁶ See *Armster v. Dist. Court*, 792 F.2d 1423, 1425–26 (9th Cir. 1986).

⁴⁷ *Id.* at 1430–31.

without regard to the availability or unavailability of appropriated funds for the payment of juror fees.”⁴⁸

Such a proposition is easier said than done. During the 1995 shutdown, for example, the AO responded by cancelling trainings, reducing travel of court personnel, and furloughing two-thirds of its staff.⁴⁹ Some courts granted motions to continue civil cases, while at least one district court stopped hearing any new civil jury trials, and an appellate court rescheduled several arguments because government lawyers could not attend.⁵⁰ When the government shut down again later that year, the judiciary relied on nonappropriated funds, but the concern about the shutdown’s effect on the courts continued.⁵¹ On January 4, 1996, the Executive Committee of the Judicial Conference issued a press release about the funding lapse’s threat to the judiciary, warning that “[o]ur justice system will be seriously disrupted.”⁵²

In the absence of official guidance on the Antideficiency Act’s application to the judiciary, however, there is no reason why (and no practical instruction on how) the courts should abide such a serious disruption. While the *Armster* court abstractly discussed the obligation of courts to continue with their constitutional duties even when there was no funding to do so, the effects of the 1995 shutdown make clear that the judicial branch simply cannot function in the absence of necessary funding. Because the judiciary is a separate, independent, and co-equal branch of government, the text of the Antideficiency Act cannot be read to constrain it from obtaining the funds necessary to perform its constitutional function or to excuse the President from fulfilling his or her obligations prescribed by the Take Care Clause.

D. Proposed Solutions—Legislation or Mandamus?

Congress and the President have a constitutional obligation to ensure that the independent judiciary is funded in spite of their political battles. The judiciary must be prepared to protect itself in the likely event of a future shutdown, and we propose two solutions: a congressional solution and a judicial solution.⁵³ These solutions form the fourth building block

⁴⁸ *Id.* at 1431.

⁴⁹ *An Inside Look at the Shutdown*, THE THIRD BRANCH: NEWSLETTER OF THE FEDERAL COURTS (Admin. Office of the U.S. Cts., Wash., D.C.), Dec. 1995, at 1-2.

⁵⁰ *Id.* at 2.

⁵¹ Patrick E. Longan, *Congress, the Courts, and the Long Range Plan*, 46 AM. U.L. REV. 625, 634 (1997).

⁵² *Id.* (quoting Press Release, Exec. Comm. of the Judicial Conference (Jan. 4, 1996)).

⁵³ Though we draw from state precedent in advocating for a legislative solution, we recognize that state and federal laws differ in significant ways. Although Congress arguably has the power to abolish lower federal courts, the Pennsylvania Constitution mandates the existence of the judiciary. *Compare* *Martin v. Hunter’s Lessee*, 14 U.S. (1 Wheat.) 304, 337 (1816) (“[T]he language of the constitution is not mandatory, and . . . congress may constitutionally omit to vest the judicial power in the courts of

in our theory of necessity—that is, how and why the courts must utilize their inherent power to compel the Legislature to provide funds and/or compel the President to “take Care” to execute the Constitution.

The preferred solution for funding of the judiciary is through congressional action. Among Congress’s enumerated powers is the power “to constitute tribunals inferior to the Supreme Court.”⁵⁴ Under the Necessary and Proper Clause, we contend that Congress may and should designate funds for the judiciary as separate from any broad appropriations bill.⁵⁵ This was the solution advocated by Chief Justice Rehnquist in 1995, and it makes even more sense now in light of the fact that the judiciary appropriation, which represents only two-tenths of one percent of the overall federal budget,⁵⁶ has never been controversial. Just as Congress and the President have explicitly agreed that certain spending bills, such as for the military, should go into effect without being held captive by other controversial issues,⁵⁷ the judiciary deserves and requires the same.

Alternatively, the judiciary may have to move forward with a judicial solution, by instituting litigation based on the theory of necessity expressed in this Essay. Mandamus, as was successfully employed in *Carroll v. Tate*, is an appropriate remedy under 28 U.S.C. § 1361⁵⁸ as well as under the All Writs Act,⁵⁹ which is “to be used only in the exceptional case where there is clear abuse of discretion or ‘usurpation of judicial power.’”⁶⁰ Though a writ of mandamus has never been issued against the

the United States.”), and *Howard*, 440 F. Supp. at 1110 (citing H. Hart, *The Power of Congress to Limit the Jurisdiction of Federal Courts: An Exercise in Dialectic*, 66 HARV. L. REV. 1362 (1953)) (noting that Congress arguably may eliminate lower federal courts), with *Pa. State Ass’n of Cty. Comm’rs*, 681 A.2d at 703 (stating that the Pennsylvania Constitution provides for the existence of the courts).

⁵⁴ U.S. CONST. art. I, § 8, cl. 9.

⁵⁵ See *supra* note 2 and accompanying text.

⁵⁶ *Hearing on the Supreme Court Budget before the Subcomm. on Fin. Servs. and Gen. Gov’t of the H. Comm. on Appropriations*, 116th Cong. 1 (2019) (statement of Justice Samuel A. Alito). Justice Alito made a presentation to the Subcommittee on Financial Services and General Government on March 7, 2019 requesting \$90 million for federal courts for the fiscal year 2020. *Id.* at 3.

⁵⁷ See Li Zhou, *What’s Open—and Closed—During a Partial Government Shutdown*, VOX (Jan. 19, 2019, 3:21 PM), <https://www.vox.com/policy-and-politics/2018/12/20/18136667/partial-government-shutdown-post-office-military-passports> [<https://perma.cc/23LE-5HYN>] (explaining that active duty members of the military are exempt from furloughs and that most military programs had already been funded by bills passed prior to the 2019 shutdown).

⁵⁸ Section 1361 reads: “The district courts shall have original jurisdiction of any action in the nature of mandamus to compel an officer or employee of the United States or any agency thereof to perform a duty owed to the plaintiff.” 28 U.S.C. § 1361 (2012). Thus, “if [the President] neglects or refuses to perform [his duties], he may be compelled by mandamus, in the same manner as other persons holding offices under the authority of the United States.” *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 141 (1803).

⁵⁹ 28 U.S.C. § 1651 (2012).

⁶⁰ *La Buy v. Howes Leather Co., Inc.*, 352 U.S. 249, 257 (1957) (quoting *Bankers Life & Casualty Co. v. Holland*, 346 U.S. 379, 383 (1953)).

President, the D.C. Circuit held in *National Treasury Employees Union v. Nixon* that the district court could issue a writ of mandamus under § 1361 to compel President Nixon to take care that federal legislation mandating pay adjustments be faithfully executed.⁶¹ The D.C. Circuit explained that “nothing in the Constitution commits to the President the ultimate authority to construe federal statutes, at least when those statutes concern federal pay,” and that the Take Care Clause “does not permit the President to refrain from executing laws duly enacted by the Congress *as those laws are construed by the judiciary*.”⁶² As we noted above, the courts are rightly vested with significant power to attain self-preservation—it would be inconsistent not to apply such a view in this context. And while mandamus relief may be extraordinary, it is utterly unthinkable—as the D.C. Circuit agreed in *Nixon*—that the functionality of the judicial branch should be subject to the whim of another branch to fulfill its constitutionally prescribed duties. Based on this precedent, a federal court may mandamus the President if he or she fails to perform his or her duty under the Take Care Clause to grant the judiciary reasonable and necessary appropriations during a shutdown.

CONCLUSION

Using a theory of necessity, and in order to protect its independence, the federal judiciary must ensure a funding source that is protected from infighting of the political branches. If not, the next shutdown may result in a constitutional crisis that is injurious to the nation, the courts, and the citizenry. With the building blocks identified here, we have demonstrated how the judiciary can rely on this theory of necessity to avoid such a crisis.

*We must not make a scarecrow of the law;
Setting it up to fear the birds of prey,
And let it keep one shape till custom make it*

⁶¹ See 492 F.2d 587, 616 (D.C. Cir. 1974).

⁶² *Id.* at 604 (emphasis added). The D.C. Circuit’s holding is limited to a court’s ability to mandamus the President to perform “ministerial” duties. *Id.* at 616. Federal courts have not yet addressed whether the President’s duty to “faithfully execute the Laws” to maintain the functioning of the judiciary is “ministerial.” Academic articles, however, have debated this issue, recognizing the ambiguity in the Take Care Clause as it constrains the President’s autonomy. Compare Sam Kamin, *Prosecutorial Discretion in the Context of Immigration and Marijuana Law Reform*, 14 OH. ST. J. CRIM. L. 183, 196 (2016) (“[The Take Care Clause] cannot be taken to mean that the federal executive’s duty to administer the law is merely ministerial[.]”), with Delahunty & Yoo, *supra* note 3, at 799-800 (“The Take Care Clause is . . . naturally read as an instruction or command to the President to put the laws into effect . . .”).

Their perch and not their terror.

—WILLIAM SHAKESPEARE, *MEASURE FOR MEASURE* act 2, sc. 1.

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