Syllabus

NOTE: Where it is feasible, a syllabus (headnote) will be released, as is being done in connection with this case, at the time the opinion is issued. The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States* v. *Detroit Timber & Lumber Co.*, 200 U. S. 321, 337.

SUPREME COURT OF THE UNITED STATES

Syllabus

CALDWELL *v.* UNITED STATES

REVIEW TO THE UNITED STATES GOVERNMENT

No. 09–17. Decided June 6, 2020

After the Executive Branch declared FatherCyborgCaldwell a National Security Threat, he filed this anytime review action challenging section 208(g) of the Intelligence Apparatus Reform Act, which makes any person designated a National Security Threat "arrest on sight." He alleged that the provision was superseded by Federal Rule of Criminal Procedure 62 and, in the alternative, violated both Article III and the Due Process Clause.

Held: Section 208(g) is unconstitutional. Accordingly, a National Security Threat declaration cannot render a person "arrest on sight." Pp. 4–15.

(a) Section 208(g) is not superseded by Rule 62 because the Court has a duty to read laws harmoniously and not to infer any conflict between them absent a clear congressional intention. Additionally, Rule 62 predates section 208(g) so the supersession argument runs into the surplusage canon. Pp. 5–7.

(b) Section 208(g) violates Article III as construed by this Court in *Benda* v. *United States*, 6 U. S. 24, and *Party* v. *Board of Law Examiners*, 7 U. S. ___. Moreover, Congress lacks the authority to confer the power to issue arrest warrants on any entity outside Article III. Pp. 7–13.

(c) The procedures attending a National Security Threat declaration are also insufficient under the Due Process Clause to permit the automatic attachment of "arrest on sight" status. Pp. 13–15.

HOLMES, C. J., delivered the opinion of the Court, in which STEWART, REHNQUIST, and HARLAN, JJ., joined. PITNEY, J., filed a dissenting opinion, in which BORK and THOMPSON, JJ., joined.

SUPREME COURT OF THE UNITED STATES

No. 09–17

FATHERCYBORGCALDWELL, PETITIONER *v.* UNITED STATES

ON WRIT OF REVIEW TO THE UNITED STATES GOVERNMENT

[June 6, 2020]

CHIEF JUSTICE HOLMES delivered the opinion of the Court.

We consider whether Section 208(g) of the Intelligence Apparatus Reform Act, which designates government-labeled National Security Threats "arrest on sight," violates the Constitution. For the reasons that follow, we hold that it does and strike it down.

I

A

The IARA, Pub. L. 77–3, was adopted in early 2020 to replace an older law from 2018 known as the National Security Council and Intelligence Revitalization Act, Pub. L. 66–4. Although this case concerns Section 208(g) of the IARA, that specific provision originated as Section 207(i) of the NSCIRA. Both provisions provide that a "'National Security Threat' refers to . . . an arrest on sight . . . from the . . . Executive Branch." To better understand the origins of this provision, it helps to consider where the NSCIRA fits in the lengthy legislative history of the National Security Council.

The NSCIRA repealed three preexisting laws which had to that point governed the Nation's national security

infrastructure. The first, Pub. L. 30–1, established the National Security Council as a purely advisory body within the Executive Branch's national security system. See § 4 (empowering the Council to make only "recommendations"). This reflected the view at the time that while advisors had an important role to play in the planning of government decisions, it would ultimately be the government officers themselves who would be responsible for making them.

The second law the NSCIRA repealed was the Enhancement to National Security Act, Pub. L. 44–3, which had slightly departed from the more constrained view of advisory power taken by Pub L. 30–1 and empowered the National Security Council for the first time ever to issue "national security threat" declarations with substantive legal effect. Under ENSA, designated threats would be barred from employment in the Executive Branch and restricted from employment to various non-civil offices in the other two branches and in city governments. See §§ 110(f)(1)–(3). Additionally, designated threats would "lose any and all security clearances," be placed on watchlists, and be barred from reentry to the United States in the event they left. §§ 110(f)(4)–(7).

But while the powers granted by ENSA were clearly broad, they were critically limited by the statute's terms. To begin with, they were written with specific care so as to not authorize any form of undue encroachment on the powers of the Legislative or Judicial Branches. For instance, while ENSA barred designated threats from "any and all Trello [b]oards [and] Google [d]ocuments" used by the Government, it made exceptions for "Trello boards devoted solely to the Congress or the Judicial Branch." § 110(f)(9). Under this design, the substantive power given to the National Security Council was primarily confined to directing the use of existing Executive Branch discretion and prerogatives. Even with that narrow scope, moreover, ENSA provided an avenue for a national security threat

declaration to be challenged judicially. See § 110(h).

The third bill repealed by the NSCIRA amended the structure of the National Security Council. While advisors serving on the Council under ENSA served at the absolute "pleasure" of the President, § 103(b)(6), the National Security Council Reform Act, Pub. L. 60–1, amended that structure and conferred greater autonomy to the Council. Indeed, rather than serving at the President's pleasure, under the NSCRA, advisors appointed to the Council served at the "pleasure" of whichever senior advisor the President named "Chair of the [National Security Council]." See § 3(h)(iv). This reflected a wider trend in legislation governing the body. Not only was the Council's role gradually transforming from that of a purely advisory body to that of a substantively powerful agency, the Council was also quickly changing from a body of advisors to a body of independent actors.

The NSCIRA continued this trend. In addition to granting an "Executive Secretary" virtually plenary control over the Council's members (by authorizing him to "suspend any member of the council, for any reason, and for any amount of time," § 104(b)(a)), the NSCIRA removed any cap on the amount of extra advisors the Executive Secretary could appoint to the Council, giving advisors the virtually unfettered ability to outvote government officers on the Council.

This is where Section 207(i)—and its successor, IARA § 208(g)—came in. The Council had by this point completed its legislative journey to autonomy and had been fully converted from an advisory entity to an independent one. Now, the modest limits on its power contained in ENSA were erased. These provisions authorized the Council to command the arrest of any person (usurping a traditional judicial function: the issuance of arrest warrants) for essentially any reason (usurping a traditional legislative function: determining permissible grounds for arrest through criminal law). No longer would the Council be subject to limits preventing "undue encroachment on the powers of

the Legislative or Judicial Branches." *Supra*, at 2. Adding to this, the NSCIRA also replaced ENSA's provisions providing for expedited review by this Court of national security threat declarations with a process of expedited review by the Council itself. The IARA retained these changes.

All this leaves us with the system challenged today: one where Executive Branch advisors may designate virtually anyone a national security threat, subject to only narrow forms of review, and may then have that person arrested on sight indefinitely.

B

Petitioner filed this case in response to the fact that he had been "deemed a National Security Threat" by the Executive Branch. Brief for Petitioner 2. He considers the fact that the IARA makes him automatically arrest on sight both a violation of his constitutional rights and of the Constitution's division of power. He makes three claims before us.

First, petitioner argues that Section 208(g) conflicts with Federal Rule of Criminal Procedure 62, which provides: "No person shall be declared [a]rrest on [s]ight without the issuing judge bearing the intent to provide a trial for the individual." Petitioner says that the IARA system, which makes no provision for a trial to occur, must yield to Rule 62, presumably because rules prescribed under 28 U. S. C. §2072 take precedence over laws that "conflict" with them. *Max* v. *Secret Service*, 9 U. S. ___, ___ (2020) (HOLMES, C. J., concurring) (slip op., at 2).

Second, petitioner contends that the Constitution grants the power to issue arrest on sight warrants solely to the courts and that, therefore, Section 208(g) conflicts with the Constitution's allocation of power.

Third, and finally, petitioner alleges that Section 208(g) violates the Due Process Clause because it involves a

deprivation of liberty but denies various fundamental procedural safeguards, including "[n]otice of the proposed action and the grounds asserted for it"; the "opportunity to present reasons why the proposed action should not be taken"; and "[t]he right to know opposing evidence." Brief for Petitioner 5.

We address each argument in turn.

II

We begin with petitioner's narrowest claim: that Section 208(g) may be nullified on statutory grounds because Rule 62 ranks higher in the order of precedence under the Rules Enabling Act. See *Max*, *supra*. The problem with this line of argument, however, is that there is no visible conflict between Section 208(g) and Rule 62. As such, it is entirely immaterial to ask which must take precedence. If the two are consistent with one another they may both stand.

To begin with, there is a strong presumption against giving a law an interpretation that would bring it into conflict with another law. As we have explained, "[i]t is this Court's duty to interpret Congress's statutes as a harmonious whole rather than at war with one another." *Epic Systems Corp.* v. *Lewis*, 584 U. S. ___, ___ (2018) (slip op., at 2). The Court is not at "liberty to pick and choose among congressional enactments" and must instead strive to "give effect to both." *Morton* v. *Mancari*, 417 U. S. 535, 551 (1974). When a party suggests that it is impossible for two statutes to be harmoniously read, it has the heavy burden of showing a "clearly expressed congressional intention" to displace the other law. *Vimar Seguros y Reaseguros, S. A.* v. *M/V Sky Reefer*, 515 U. S. 528, 533 (1995). And that intention must be "clear and manifest." *Morton*, *supra*, at 551.

Petitioner points to no such evidence. Indeed, petitioner's argument is undercut by the fact that Rule 62's adoption preceded the enactment of both the NSCIRA and the IARA. When Congress adopted these statutes, it can hardly be

assumed they included provisions which were meant to have absolutely no effect when considered in tandem with existing law. As we have stated before, there is a "basic presumption [known as the surplusage canon] that the legislature does not waste words." *British* v. *Ozzymen*, 3 U. S. 60, 66 (2017); see also *Reset* v. *United States*, 9 U. S. ___, ___ (2020) (*per curiam*) (slip op., at 23). This interpretation by petitioner, that Section 208(g) is statutorily inoperative, runs "smack dab into the surplusage canon." *Ibid.*

And that is not all, for there are two additional reasons why petitioner's statutory argument is untenable.

First, the language of Rule 62 and the language of Section 208(g) are perfectly consistent. As a reminder, the relevant text of Rule 62 is: "No person shall be declared [a]rrest on [s]ight without the issuing judge bearing the intent to provide a trial for the individual." Two features of this provision refute petitioner's argument that there is some irreconcilable conflict with Section 208(g). To begin with, the Rule directly affirms that its restrictions are tied to actions by "judge[s]." Section 208(g) does not involve any action by a judge, but rather a declaration by the National Security Council. The second feature is that the Rule applies when someone is declared "*arrest on sight*," which is not something federal law empowers the National Security Council to do. The Council has no freestanding power to declare individuals "arrest on sight"; it has the power to designate threats to national security who, by the operation of the IARA, *become* arrest on sight. As such, there is no visible conflict between Rule 62 and Section 208(g).

Second, even if there was irreconcilable conflict between the two, it is far from clear why the Court would have to pick Rule 62 over Section 208(g). For starters, in this circumstance, Section 208(g) would be the more specifically applicable statute, and it is hornbook law that "[i]f there is a conflict between a general provision and a specific provision, the specific provision prevails." Stevenson, Canons of

Construction 2 (2018). Petitioner provides no response for why that would not be the case here. And the order of precedence prescribed by the Rules Enabling Act is inapposite since Rule 62 was adopted prior to Section 208(g).

Finally, the Rules Enabling Act's order of precedence is not the only word on precedence in this case, since the IARA also provides that it "shall not be superseded by any . . . law unless that law specifically declares its intent to supersede this Act's provisions." §1(b). Petitioner's argument provides no insight into how—if there actually were conflict here—the Court should pick between the two rules of precedence.

As such, we reject petitioner's argument that Section 208(g) is statutorily inoperative under Rule 62.

III

With the statutory arguments now to the side, the Court turns to petitioner's constitutional arguments. In particular, petitioner argues that Section 208(g) violates Article III and the Due Process Clause. On both grounds, we agree with petitioner and find Section 208(g) unconstitutional.

A

Section 208(g) violates Article III in two respects. First, the issuance of an arrest warrant is fundamentally an exercise of core judicial power. By authorizing the National Security Council to issue orders with essentially the same effect, Section 208(g) impermissibly delegates judicial power to an Executive Branch agency. And second, the Constitution vests exclusively in the "courts of the Judiciary . . . the ability to issue Warrants for arrest." Art. III, §5, cl. 1. Congress has no authority under the Constitution to confer this power elsewhere.

1

The issuance of an arrest warrant is a core judicial power.

Beyond the fact that the Constitution's text grants this power only to the Judiciary, as will be discussed later, the right to issue an arrest warrant is fundamentally tied to the judicial function assigned to the courts by Article III.

In describing the legal significance of warrants in the past, this Court has always emphasized their judicial character. For example, we have said that they represent a form of constitutionally necessary "advance judicial approval" for certain acts by law enforcement. *Terry* v. *Ohio*, 392 U. S. 1, 20 (1968). The reason is because constitutional law contains many restrictions on the Government's ability to impose on liberty without some form of judicial check. The ultimate "measure of the constitutionality of a governmental [action governed by the Fourth Amendment] is 'reasonableness.'" *Vernonia School Dist. 47J* v. *Acton*, 515 U. S. 646, 652–653 (1995); see also *United States* v. *TPR*, 5 U. S. 36, 45 (2018) (Thomas, J., dissenting) ("arrest[s]" are governed by the Fourth Amendment). As we have elsewhere stated, "[i]n the absence of a [judicial] warrant, a [Fourth Amendment action] is reasonable only if it falls within a specific exception to the warrant requirement." *Carpenter* v. *United States*, 585 U. S. ___, ___ (2018) (slip op., at 18) (quoting *Riley* v. *California*, 573 U. S. ___, ___ (2014) (slip op., at 5)). An arrest warrant issued by a court serves an important legal purpose, therefore, because it is a judicial guarantee of reasonableness.

Providing this check on executive authority is a fundamental part of the Article III scheme, which gives "independent judges the task of applying the laws to cases and controversies." *Gundy* v. *United States*, 588 U. S. ___, ___ (2019) (Gorsuch, J., dissenting) (slip op., at 5). We must therefore recognize the issuance of arrest warrants as an exercise of judicial power. This recognition implicates two of our recent precedents: *Benda* v. *United States*, 6 U. S. 24 (2018), and *Party* v. *Board of Law Examiners*, 7 U. S. ___ (2019). We consider each.

a

Under *Benda*, Congress is categorically barred from conferring "'the Government's "judicial power" on entities outside Article III.'" 6 U. S., at 31 (quoting *Stern* v. *Marshall*, 564 U. S. 462, 484 (2011)). As we have already determined, but as *Benda*'s logic reinforces, the issuance of an arrest warrant is an exercise of judicial power. The question then becomes whether the National Security Council is an entity "outside Article III." We expand on each subject below.

(1)

First, the logic of *Benda* reaffirms that the issuance of an arrest warrant is an exercise of judicial power. As we said there and in related cases, "[w]hen 'determining whether a proceeding involves an exercise of Article III judicial power, this Court's precedents have distinguished between "public rights" and "private rights."'" *Benda*, *supra* (quoting *Oil States Energy Services, LLC* v. *Greene's Energy Group, LLC*, 584 U. S. ___, ___ (2018) (slip op., at 6), in turn quoting *Executive Benefits Ins. Agency* v. *Arkison*, 573 U. S. ___, ___ (2014) (slip op., at 6)). Congress has "significant though not unlimited latitude to assign adjudication of public rights to entities other than Article III courts." *Ibid* (brackets omitted). On the other hand, when a proceeding involves private—rather than public—rights, Congress has *no* latitude to assign its adjudication to entities other than Article III courts.

The issuance of an arrest warrant is not a matter of public rights. The public rights doctrine "includes only matters . . . that historically could have been determined exclusively by th[e] [executive or legislative departments]." *Benda*, *supra*, at 32 (quotations omitted). An arrest warrant is not one of those matters. As explained earlier, the issuance of an arrest warrant was a traditional judicial function and not something to be decided by a "policeman or government enforcement agent." *Johnson* v. *United States*, 333 U. S. 10,

13–14 (1948). It provides an essential "check on executive authority," *supra*, at 8, which would be nonsensical if the Executive Branch could make these decisions "exclusively." *Benda*, *supra*. As such, *Benda* confirms that the issuance of an arrest warrant is not a matter of public rights, but a matter of private ones which can only be assigned to the courts under Article III.

(2)

The next question is whether the National Security Council is an entity within Article III that can be assigned the adjudication of private rights. The answer, obviously, is no.

To begin with, members of the National Security Council do not enjoy any of the independence protections afforded to federal judges. The Framers provided that federal judges would be appointed by the President with the Senate's approval to serve without term limits and free from at-will removal by the other branches. The objective of judicial tenure protection and the multi-branch selection process was to ensure that judicial decisions would be rendered with the "[c]lear heads . . . and honest hearts" that are "essential to good judges." 1 Works of James Wilson 363 (J. Andrews ed. 1896). Without these protections and without that selection process, the members of the National Security Council quite clearly cannot be Article III judges.

Second, no Act of Congress even purports to describe the National Security Council as a court of law. We have catalogued the entire body of legislation regulating the Council, see *supra*, at 1–4, and no law makes that statement. This cuts strongly against the notion the Council might somehow be an Article III entity.

Third, the members of the Council are not tasked with basing their decisions on existing law, but are empowered with the flexibility necessary for making national security decisions. While this level of discretion makes sense for an

Executive Branch body, it clearly illustrates that the Council is not an Article III entity which can be assigned Article III powers.

We therefore hold Section 208(g) unconstitutional under *Benda*.

b

Section 208(g)'s assignment of Article III power to a non-Article III entity also implicates *Party*, which held that the powers granted by the Constitution to each branch must remain "separate with a system of checks and balances between the three [branches] and the People." 7 U. S., at ___ (slip op., at 4).

In that case, the Court reviewed an Act of Congress which assigned the judicial power to license attorneys to an agency controlled by the Executive Branch. We held that it "abridges the judicial power vested in the [courts]" when judicial power is conferred on entities outside Article III. *Ibid*. As such, we invalidated the Act of Congress on Article III grounds. The constitutional violation in this case is indistinguishable from the one presented by *Party*. Here, an Executive Branch agency is once again assigned an aspect of the judicial power. The Court can think of no reasonable rationale for departing from the unambiguous application of *Party* to these circumstances.

We therefore conclude that Section 208(g) violates *Party* as well.

2

Beyond violating fundamental principles of Article III, Section 208(g) also runs contrary to the Constitution's express assignment of the power to issue arrest warrants to the federal courts. The Constitution does not empower Congress to duplicate that power and vest it in an Executive Branch entity.

As quoted earlier, the Constitution gives the federal courts alone the "the ability to issue Warrants for arrest."

Art. III, § 5, cl. 1. Putting aside the other constitutional issues for a moment, this constitutional provision on its own, does not necessarily foreclose Congress from enacting laws that broaden the power of the Executive Branch. But in our governmental system, "Congress' authority is limited to those powers enumerated in the Constitution." *United States* v. *Morrison*, 529 U. S. 598, 610 (2000). After all, "[t]he enumeration of powers was the first, and most important, line of defense against an overbearing government." Geithner, Preface to the Declaration of Independence and the Constitution 5 (Geithner ed. 2020). Thus, if an Act of Congress broadening the powers of the Executive Branch is to be sustained, the Act must be founded in one of Congress' enumerated powers.

In this case, only one of Congress' enumerated powers even potentially applies: the Necessary and Proper Clause. That Clause empowers Congress to "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." Art. I, § 8, cl. 14.

It is possible to justify Section 208(g) as "necessary" in the sense that it helps to protect national security, but for the reasons that follow, it is impossible to describe Section 208(g) as "proper." Laws which are not "consist[ent] with the letter and spirit of the constitution . . . are not *proper* means for carrying into Execution" the powers of the Government. *National Federation of Independent Business* v. *Sebelius*, 567 U. S. ___, ___ (2012) (opinion of Roberts, C. J.) (slip op., at 29). Rather, they are, "in the words of The Federalist, 'merely acts of usurpation' which 'deserve to be treated as such.'" *Printz* v. *United States*, 521 U. S. 898, 924 (1997) (alterations omitted) (quoting The Federalist No. 33, at 204 (A. Hamilton)). Section 208(g) is an "act of usurpation." As described earlier, judicial arrest warrants are an "essential check on executive authority." *Supra*, at 10 (quotations omitted). By removing this check, even if only under

certain conditions, Section 208(g) is inconsistent with both the letter and spirit of the Constitution.

As our Fourth Amendment jurisprudence already makes clear, there are "specific exception[s]" to the judicial warrant requirement. *Supra*, at 8. When one of those exceptions applies, it is consistent with the Constitution for the Government to act without a warrant. But where those exceptions do not apply, Government action is contrary to the Constitution. Congress cannot, by law, excuse or authorize unconstitutional conduct. To do so would not be a "proper" exercise of authority under the Necessary and Proper Clause.

We therefore hold that Congress lacked the power to enact Section 208(g).

B

Finally, petitioner also argues that Section 208(g) violates the Due Process Clause by failing to provide basic procedural safeguards. We agree.

Fundamentally, "the touchstone of due process is protection of the individual against arbitrary action of government." *Wolff* v. *McDonnell*, 418 U. S. 539, 558 (1974). We have reaffirmed this principle "time and again." *County of Sacramento* v. *Lewis*, 523 U. S. 833, 845 (1998). We conclude that Section 208(g) implicates the Due Process Clause's protection of "liberty" and must be attended by nonarbitrary processes. We find the process afforded by the IARA arbitrary in three respects.

First, while the IARA does specify concrete grounds under which individuals may be "declared national security threats," it also contains an exception authorizing the declaration of national security threats, with the President's approval, for "any reason." § 105(ix). This discretion is appropriate in the national security context because such decisions require flexibility and the ability to adapt to unique circumstances, but it makes little sense when considering

the imposition of "arrest on sight" status. Section 105(ix) may stand, but Section 208(g), in view of these procedures, cannot.

Second, as petitioner argues, the IARA makes no provision for a person to receive "[n]otice of the proposed action and the grounds asserted for it." Brief for Petitioner 5. The IARA's rationale makes sense: if you give a national security threat prior notice of the actions you intend to take against them, you cripple your ability to act decisively. In the national security context, swift and decisive action is important. But where a criminal process is concerned, such as with the issuance of an arrest warrant, reasoned decision-making is an essential safeguard of liberty. So while prior notice is by no means the standard, there must at least be reasonable grounds for an arrest warrant to issue. The IARA does not require that.

And third, it is by no means clear why the ability for the National Security Council to command arrests would be necessary to addressing a national security threat. Where a national security threat engages in criminal activity, the criminal process is more than sufficient to secure an arrest warrant against them. Where they do not engage in such activity, there seems to be little reason to obtain their arrest rather than rely on the various other sanctions prescribed by the IARA.

For these reasons, we hold that Section 208(g) violates the Due Process Clause.

* * *

Protecting our Nation's national security is among the most important functions of the President. The Court has great respect for that as well as the work of the National Security Council. But all Government work must be done in accord with the Constitution. We are confident that the constitutionally legitimate tools at the disposal of our Nation's national security officials are more than sufficient to

suit their needs. If they prove not to be, there are perhaps other authorities they may seek from the elected officials in Congress, within the bounds of the Constitution.

Our role in this case, however, is not to consider whether Section 208(g) is a good power for the Council to have. Our role is to discern and apply the law. For the foregoing reasons, we declare Section 208(g) of the IARA unconstitutional and strike it down. We do not pass judgment on any other provision of the IARA.

It is so ordered.

SUPREME COURT OF THE UNITED STATES

No. 09–17

FATHERCYBORGCALDWELL, PETITIONER *v.* UNITED STATES

ON WRIT OF REVIEW TO THE UNITED STATES GOVERNMENT

[June 6, 2020]

JUSTICE PITNEY, with whom JUSTICE BORK and JUSTICE THOMPSON joins, dissenting.

I strongly dissent against the decision of the Court. I believe the Court errs on one simple point. They seem committed to the idea that a designation of a person being a National Security Threat is synonymous with an issuance of an arrest warrant by the judicial branch: "Section 208(g) violates Article III in two respects. First, the issuance of an arrest warrant is fundamentally an exercise of core judicial power." *Ante*, at 7. A simple search of Pub. L. 77–3 for the term "warrant," however, yields *no* results. It is beyond any doubt in my mind that the Congress showed no intent on granting the Executive Branch the universal power of issuing writs such as a warrant for arrest. This case lies in the power of the Executive Branch to issue executive orders. It is no question that the President holds an awesome amount of power in issuing executive orders. Indeed we have never challenged the power of the EO and instead have recognized its inherent constitutionality when deciding cases. See generally *Panama Refining Co.* v *Ryan*, 293 U. S. 388 (1935); *Service* v. *Dulles*, 354 U. S. 363 (1957).

There is a strong distinction between Executive Orders and warrants.[1] In an instance where the District Court has

[1] Other than the constitutional distinction of one being from the Executive Branch and one being from the Judicial.

issued an arrest warrant against an individual it is an unlawful activity for *any* law enforcement officer[2] to ignore such warrant. Failure to comply with warrants can lead to contempt under 18 U. S. C. §401. This is not the case for executive orders. It is not outside the realm of possibility for the President to issue an executive order to federal law enforcement to detain an individual. I find Pub. L. 77–3 a blanket consent from Congress that EOs designating an individual an NST and ordering a subsequent arrest[3] not warranting an impeachment from their end. This does not allow the Executive free reign to arrest anyone for two reasons: (1) the judicial branch still holds the power to strike down Executive Orders, see generally *Youngstown Sheet & Tube Co.* v. *Sawyer*, 343 U. S. 579 (1952), that they deem to be outside the Constitution;[4] and (2) Congress reserves the legislative authority to revoke their approval of executive orders of this nature.

When dealing with threats to national security, special wartime powers must be granted to the President of the United States. We have held that National Security is his responsibility and I find us striking this law as unconstitutional a clear stride against securing national security. I am grateful the Court has left the Executive the power to decide whom they employ—functionally protecting threats to our national security from gaining access to classified information within the Executive.

I respectfully dissent.

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[2] Federal or municipal.

[3] Assuming their conditions are met, namely a majority approval of the EO from the National Security Council.

[4] Functionally serving as a filter against the Executive Branch issuing illegal NST EOs.