

**ADVISING THE PRESIDENT:
THE GROWING SCOPE OF EXECUTIVE POWER
TO PROTECT AMERICA**

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INTRODUCTION

On the morning of March 19, 2003, President George W. Bush met with his national security team that included Vice President Dick Cheney, Secretary of State Colin Powell, Secretary of Defense Don Rumsfeld, Chairman of the Joint Chiefs Richard Myers, and Central Intelligence Agency Director George Tenet.¹ The Bush Administration had been working for months with Congress, American allies, and the United Nations to decide on an appropriate response to Iraqi President Saddam Hussein's refusal to allow U.N. inspectors into Iraq to search for chemical weapons.

Before a renovation in 2007, the White House Situation Room was a relatively small, wood-paneled room in the basement of the West Wing, located adjacent to the White House Mess. The President, as he always did, sat at one end of a rectangular conference table that sat only ten people comfortably. I was in my usual chair away from the table, just off to the President's right. On the opposite wall facing the President was a bank of video screens. General Tommy Franks and other regional military commanders provided status updates by video teleconferencing to the President.²

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1. Personal Account of Alberto R. Gonzales, former Counsel to President George W. Bush, 2001–2005.

2. *Id.*

After each commander spoke, the President asked whether the troops had what they needed and were ready to go. No one expressed reservations. General Franks replied, "Forces ready." After months of preparation and planning for multiple contingences, and hours of discussion, the President asked for the name of the military operation. He was told, "Operation Iraqi Freedom."³

The room was silent as the President focused on the largest of the screens and addressed General Franks. He said, "Tommy, I have been briefed by the Secretary of Defense and have now received these briefings. For the sake of the peace and freedom of the Iraqi people and for the sake of the peace and freedom of the world, I hereby give the order to execute Operation Iraqi Freedom." Pausing momentarily and then speaking with obvious emotion he said, "Tommy, may God bless the troops."⁴

General Franks stood and saluted, "Mr. President, may God bless America." President Bush rose from his chair, returned the salute, and quickly walked out of the Situation Room without saying another word.⁵

When the President of the United States rises during a meeting or leaves a room, protocol dictates that anyone who is seated should stand. However, no one moved for several seconds as President Bush departed. Those of us left seated had just witnessed history.⁶ Like President Lincoln at the outset of the Civil War, President Wilson at the outset of World War I, and President Roosevelt at the outset of World War II, for the second time during his presidency, President Bush had ordered men and women into harm's way. In both cases, American military forces were introduced into hostilities with congressional authorization, authority carefully crafted by lawyers in Congress and in the executive branch.⁷ However, congressional approval for the use of force has historically been the exception and not the rule.⁸

The Constitution does not use or refer to the terms "national security" or "foreign affairs." Thus, the scope of power that the executive branch has to act independently of the other government branches in the national security arena is one of the

3. *Id.*

4. *Id.*

5. *Id.*

6. *Id.*

7. *Id.*

8. Curtis A. Bradley & Jack L. Goldsmith, *Congressional Authorization and the War on Terrorism*, 118 HARV. L. REV. 2047, 2050 (2005).

most difficult questions to answer in constitutional law. Congress has passed a number of statutes empowering the President to take actions necessary to protect our national security, but on relatively few occasions has Congress authorized the President to use force through declarations of war.⁹ However, undeniably, the historical record is filled with hundreds of examples of presidential action in the name of national security without congressional approval.¹⁰

Some scholars and historians question the President's authority to act alone, as have some members of Congress.¹¹ Yet very few of these disputes have ever been resolved in the courts. To the contrary, as national security threats have be-

9. See *id.* at 2059–60 (“[T]he United States has been involved in hundreds of military conflicts that have not involved declarations of war.”).

10. Many scholars and historians believe we are witnessing an unprecedented expansion of power within the executive branch. Not surprisingly, virtually all the criticism and examination relates to the exercise of presidential power. But there is another expansion of power—a silent epidemic—within the executive branch that receives hardly any mention. This is the expansion of the administrative state, the orbit of federal agencies that have been afforded the power to perform legislative functions such as promulgating rules and regulations, the power to exercise executive functions such as enforcing those rules, and the power to perform judicial functions such as adjudicating disputes over its own rules. The ratio of regulations issued in 2013 by independent appointees and career bureaucrats unaccountable to the American public at these agencies, relative to laws passed by Congress, is estimated at fifty-one to one. CLYDE W. CREWS JR., COMPETITIVE ENTERPRISE INST., TEN THOUSAND COMMANDMENTS: AN ANNUAL SNAPSHOT OF THE FEDERAL REGULATORY STATE 2 (2014), available at <http://cei.org/sites/default/files/Wayne%20Crews%20-%20Ten%20Thousand%20Commandments%202014.pdf> [<http://perma.cc/QN8Q-N44V>]. Since 1993, federal agencies have published 87,282 final rules, *id.*, and in most cases did so through a very broad and vague delegation of authority by Congress. There has been little oversight by Congress, certainly as compared to oversight of executive Cabinet agencies. The courts have been equally deferential, holding that agency decisions and agency interpretations of their organic statutes should be given broad latitude. Perhaps the distribution of power away from our elected officials is necessary in a growing and complex world. Perhaps limiting the discretion of federal agencies will increase litigation and further burden our courts. Perhaps Congress cannot be expected to delegate in a more precise manner on complex issues; perhaps congressional members do not have time for oversight of the administrative agencies because of the necessary oversight of executive agencies. Whatever the reasons, it is clear that administrative agencies have great discretion in exercising power. Whether the expansion of the administrative state is a good thing and how it affects national security decision-making is a relevant question, but it is beyond the scope of this article.

11. Bradley & Goldsmith, *supra* note 8, at 2051; Charlie Savage, *Attack Renews Debate Over Congressional Consent*, N.Y. TIMES, Mar. 22, 2011, at A14.

come more dangerous and incidents of unilateral action have become more common, it appears that the most effective check on the executive branch in dealing with a national security crisis has less to do with the other branches of government and more to do with the media, public opinion, and the popularity of the President.

Admittedly, there exists already a significant amount of scholarship on this question of executive branch power. As Counsel to the President, my job was to work with Attorney General John Ashcroft and other senior lawyers in the Bush Administration to advise the President on the limits of his power to protect America. When I became Attorney General in 2005, I assumed the primary role for that responsibility. In this article, I will explain how I approached this question then from an insider's perspective, based on a straightforward framework of necessity balanced against accountability.

This article will begin with a brief summary of the three sources of power most commonly cited by judges and scholars. The first is authority expressly granted by the U.S. Constitution.¹² The second is authority granted by Congress by statute or, with respect to war making, through a declaration of war or authorization to use force.¹³ Readers should understand that while the text of the Constitution or a congressional statute may appear unambiguous, the authority of the executive branch to exercise discretion in the execution of our laws affords the President great flexibility. This in turn often gives rise to disagreements between the elected branches over the scope of power even when a statute or the Constitution appears unambiguous on its face. The third source is inherent or implied authority emanating from the Constitution.¹⁴ The President's reliance on inherent authority based upon historical practice and necessity most often gives rise to the greatest tension between the elected branches.

Following this introductory summary, I will discuss the apparent reluctance of our courts to decide cases involving na-

12. U.S. CONST. art. II, § 2, cl. 1.

13. Bradley & Goldsmith, *supra* note 8, at 2057–60.

14. *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 637 (1952) (Jackson, J., concurring); see Roy E. Brownell II, *The Coexistence of United States v. Curtiss-Wright and Youngstown Sheet & Tube v. Sawyer in National Security Jurisprudence*, 16 J.L. & POL. 1, 50 (2000).

tional security matters either by declaring a legal dispute a political question or by relying on principles of standing.¹⁵ Then I will discuss the checks available to Congress to limit executive power—checks that are rarely used. I will then explain why today's threats require the President to have the authority to act quickly and decisively. By way of example, I will discuss how I might have advised the President (based on information in the public record) with respect to three recent national security situations. Scenario number one: Syrian President Bashar al-Assad used chemical weapons against the Syrian people in 2013 in spite of warnings by the United States that doing so would cross a red line. If the President had chosen to do so, did he have authority to use force against the al-Assad regime without congressional authorization? Scenario number two: a member of the Islamic State of Iraq and the Levant (ISIL) recently beheaded three American citizens. What is the scope of the President's authority, independent of Congress, to respond? Scenario number three: The Senate Intelligence Committee released a report condemning practices of the Central Intelligence Agency (CIA) after September 11 as torture and alleging lack of oversight and management of the program. What level of oversight should be in place to check the executive branch's power over controversial issues such as enhanced interrogation of suspected terrorists?

Although the questions posed by these three scenarios do not lend themselves to easy answers, they do demonstrate how a basic framework, when consistently applied, can provide predictability to our friends and allies. It also helps to ensure that executive branch action does not exceed constitutional limits. The Framers of the Constitution created a government of separate branches with the hope that there would always be one branch to check the power of another, and thus prevent tyran-

15. Another factor that keeps certain disputes out of the court system is the state secret privilege, which allows an executive department head to claim privilege regarding evidence that presents a reasonable possibility of revealing national security secrets. In *Totten v. United States*, the Supreme Court explained that "public policy forbids the maintenance of any suit in a court of justice, the trial of which would inevitably lead to the disclosure of matters which the law itself regards as confidential, and respecting which it will not allow the confidence to be violated." 92 U.S. 105, 106 (1875).

ny.¹⁶ When the Framers drafted the Constitution, the most dangerous threats were crude cannons and muskets. The initial balance between executive accountability and flexibility was created in this milieu.¹⁷ The world has changed since then, as has the magnitude of the threats to U.S. interests. While accountability and flexibility remain important, the balance between the two has arguably shifted.

Based upon my experiences and study, I believe the Framers intended for the executive branch to be able to act with speed and agility to respond to threats and crises.¹⁸ Today the ability to act rapidly is more necessary than ever. I witnessed it firsthand in the immediate aftermath of the September 11 attacks.¹⁹ However, precisely because the executive branch is expected by the American people to respond alone when necessary, it is important for the legislative and judicial branches to aggressively discharge their constitutional duties with fidelity and to serve as a check on executive branch abuses of power—even if that check must come after the fact. In reviewing executive branch actions, the legislative and judicial branches should act not with the purpose of second guessing national security policy, but should act to validate separation of powers concerns. Congress is a vital partner with the President in America’s constitutional scheme, and our elected branches of government must work together if we are to remain safe in a manner consistent with the principles of the Constitution.

I. FRAMEWORKS OF PRESIDENTIAL AUTHORITY

A. *Constitutional Framework*

There are no references to “national security” or “foreign affairs” in the Constitution.²⁰ Thus, part of the difficulty in defining the scope of executive power in the area of national security is the limited discussion of and reference to these powers in

16. See Stephen I. Vladeck, *The Supreme Court, the War on Terrorism, and the Separation of Powers*, HUMAN RIGHTS, Winter 2011, at 13, 15.

17. See Robert J. Delahunty & John Yoo, *Making War*, 93 CORNELL L. REV. 123, 129 (2007).

18. See *id.* at 130.

19. Personal Account of Alberto R. Gonzales, *supra* note 1.

20. See U.S. CONST.

our founding document. Article I of the Constitution grants Congress power to “provide for the common Defence and general Welfare of the United States;²¹ . . . declare War, grant Letters of Marque and Reprisal, and make Rules concerning Captures on Land and Water; ²² raise and support Armies;²³ . . . provide and maintain a Navy”²⁴ among other specific duties. Article II grants the President the power as the “Commander in Chief of the Army and Navy of the United States, and of the Militia of the several States, when called into the actual Service of the United States.”²⁵

When advising President Bush, I relied on the principle that the text of the Constitution is the beginning point—and potentially the ending point—in any discussion about the source of presidential power. If the text of the Constitution is clear, then there is no need to rely on other sources. From a textual perspective, it seems evident that the executive branch has express authority to supervise and direct our military forces and make tactical decisions with respect to our military once committed to battle. After all, that is the very essence of being Commander in Chief. However, it also appears from a strict construction of the Constitution’s text that the President cannot declare war, and one can argue that the President has no authority (beyond acting in self-defense) to initiate force or engage in military operations unless Congress has authorized him to do so. This would appear to be consistent with the Founding Fathers’ original understanding of checks and balances.²⁶ However, whether consistent with the intent of the Founding Fathers or not, over time the war powers roles have become increasingly murky due to Congress’s frequent reluctance and inability to act, the judiciary’s inclination to demur and not to become entangled in such matters, and the growing severity of the threats requiring decisive and rapid responses that only the President can provide.

21. U.S. CONST. art. I, § 8, cl. 1.

22. U.S. CONST. art. I, § 8, cl. 11.

23. U.S. CONST. art. I, § 8, cl. 12.

24. U.S. CONST. art. I, § 8, cl. 13.

25. U.S. CONST. art. II, § 2, cl. 1.

26. THE FEDERALIST NO. 51 (James Madison).

Some historians point to the difference in language between Article I and Article II as evidence of the Framers' intent regarding the delegation of war powers between the President and Congress.²⁷ Article II, Section 2 does not list specific duties of the Commander in Chief, but rather leaves those duties open to broad interpretation and discretion.²⁸ On the other hand, Article I lists specific duties of Congress. Was this intentional and is it significant? History tells us that based on their experiences dealing with the monarchy in England, the Founding Fathers were concerned with the checks and balances of government, in particular the checks against a powerful executive. Did the Founding Fathers intend for this list in Article I to be exhaustive, intentionally limiting Congress's role so as to not interfere with executive authority? Did they intend to preclude the President from exercising power not expressly granted under the Constitution?

Even before there was a Constitution, questions existed about who should have authority when it comes to warfare decision-making.²⁹ The term "Commander in Chief" appears to have originated from the British experience, where Parliament directed the Commander in Chief in his duties.³⁰ This same understanding of careful legislative oversight and command of war-making appeared to continue in the colonies during the early stages of the Revolutionary War when the Continental Congress conferred Commander in Chief powers to General George Washington.³¹ Yet, it quickly became apparent that this arrangement was inefficient and ineffective. Congressional members allowed General Washington to use more of his own discretion when it came to making strategic and tactical war decisions because he himself had better knowledge of the situation and was in a better position to make effective decisions.³²

27. See, e.g., Delahunty & Yoo, *supra* note 17, at 127–29.

28. U.S. CONST. art. II, § 2, cl. 1.

29. David J. Barron & Martin S. Lederman, *The Commander in Chief at the Lowest Ebb—Framing the Problem, Doctrine, and Original Understanding*, 121 HARV. L. REV. 689, 779 (2008).

30. See Commission to General Monck as Commander in Chief (Jan. 26, 1659), in 4 THE CLARKE PAPERS 137–39 (photo-reprint 1965) (C.H. Firth ed., 1901).

31. Barron & Lederman, *supra* note 29, at 773–74.

32. *Id.* at 778.

Negotiations by our Founding Fathers following victory in the Revolutionary War over terminology in the Constitution provide further support for the position that the President had the authority to make war. Article I, Section 8, Clause 11 states that, "Congress shall have the power to . . . declare War."³³ James Madison's notes indicate that the Founding Fathers had originally included the phrase *make* war instead of *declare* war.³⁴ It is speculated that the final change in language reflected an intention of the delegates to clarify the scope of power, making clearer that it was the Commander in Chief's role, not Congress's, to conduct hostilities during war.³⁵

The Supreme Court in *The Prize Cases* announced an early interpretation of the delegation of war powers under the Constitution.³⁶ These were cases in which a number of merchant vessels were seized by public ships of the United States pursuant to President Lincoln's declaration of a blockade on certain southern ports.³⁷ The vessel owners argued that the President did not have the authority to declare a blockade and subsequently seize their ships because Congress had not authorized such action through a formal declaration of war.³⁸ The Supreme Court disagreed and upheld President Lincoln's blockade on the grounds that "[i]f a war be made by invasion of a foreign nation, the President is not only authorized but bound to resist force by force. He does not initiate the war, but is bound to accept the challenge without waiting for any special legislative authority."³⁹

Over time, following the decision in *The Prize Cases*, it became widely accepted, at least by the executive branch, that the President had the inherent authority, acting on his own if necessary, (i) to respond in self-defense to an attack, and (ii) to take defensive measures in the face of an imminent threat. However, determining which executive branch actions constitute a use of force, or when a use of force qualifies as in response to an

33. U.S. CONST. art. I, § 8, cl. 11 (emphasis added).

34. See John C. Yoo, *The Continuation of Politics by Other Means: The Original Understanding of War Powers*, 84 CAL. L. REV. 167, 261–63 (1996).

35. *Id.*

36. 67 U.S. 635 (1862).

37. *Id.* at 635–37.

38. *Id.* at 640–41.

39. *Id.* at 668.

imminent threat, quickly became the subject of disagreement. Presidents began sending troops into hostile territories without congressional approval with increasing frequency.⁴⁰ The growing tension between the two branches concerning their respective authority regarding war powers reached its peak during the Vietnam War.⁴¹ Congress authorized President Lyndon Johnson in the Gulf of Tonkin Resolution to take action to repel hostile forces in Asia.⁴² Ultimately, members of Congress concluded that the President abused his authority by expanding the Vietnam War far beyond what Congress had authorized.⁴³ This prompted members to take action to prevent future abuses.⁴⁴

B. Statutory Framework

1. War Powers Resolution

Congress responded to perceived executive branch abuses with the enactment of the War Powers Resolution in 1973.⁴⁵ While the War Powers Resolution recognizes the authority of the President as Commander in Chief, the law requires the President to follow certain reporting requirements, to obtain congressional approval within a specified time period after committing troops, and to consult with Congress whenever feasible before introducing troops.⁴⁶ Additionally, Congress may in essence “veto” the President’s actions, override his judgment, and pull the troops home immediately by joint resolution.⁴⁷

The executive branch has consistently interpreted the application of the War Powers Resolution narrowly, and presidential administrations from both political parties have uniformly rejected the position that the President is required under the Constitution to follow it. This was certainly the position of the Justice

40. See S. REP. NO. 90-797, at 5–6 (1967).

41. See Alexander Chanoock, *Fixing the War Powers Resolution in the Age of Predator Drones and Cyber-Warfare*, 78 J. AIR L. & COM. 453, 454 (2013).

42. *Id.*

43. *Id.*

44. *Id.*

45. *Id.* at 454–55.

46. Pub. L. No. 93-148, 87 Stat. 555 (1973).

47. Note, *Congressional Control of Presidential War-Making Under the War Powers Act: The Status of a Legislative Veto After Chadha*, 132 U. PA. L. REV. 1217, 1218 (1984).

Department during my tenure as Attorney General, although, like other administrations, we tried to comport with the reporting requirements as a matter of comity.⁴⁸ Furthermore, various legal opinions from the Department of Justice show an effort to interpret the War Powers Resolution in a way that will not bring up constitutional concerns.⁴⁹ This canon of constitutional avoidance—adopting a statutory interpretation that avoids a constitutional conflict—is a doctrine that Justice Department lawyers relied upon regularly when advising the President on national security issues.⁵⁰

a. Hostilities

Much of the tension over the requirements of the War Powers Resolution results from the ambiguity of certain provisions. The most problematic requires the President to terminate the use of United States Armed Forces if Congress has not approved continued use of such forces within sixty days of the introduction of those forces into “hostilities.”⁵¹ The law also requires the President to notify Congress when United States Armed Forces are introduced into hostilities or into situations where imminent involvement in hostilities is clearly indicated by the circumstances.⁵² In the event of an “unavoidable military necessity respecting the safety of United States Armed Forces,” the sixty-day time limit may be extended for up to thirty additional days.⁵³

One of the many difficulties with this law is that the term “hostilities” is not defined, and courts have repeatedly declined to define it despite numerous opportunities to do so.⁵⁴ As a result, disagreements have arisen over whether or not a particular use of military force constitutes the introduction of troops into “hostilities.”⁵⁵ Because of this ambiguity, most Presidents have avoided reporting military activity on the

48. Personal Account of Alberto R. Gonzales, *supra* note 1.

49. Lori Fisler Damrosch, *The Clinton Administration and War Powers*, 63 LAW & CONTEMP. PROBS. 133, 134 (2000).

50. Personal Account of Alberto R. Gonzales, *supra* note 1.

51. 50 U.S.C. § 1544 (2012).

52. Stephen L. Carter, *The Constitutionality of the War Powers Resolution*, 70 VA. L. REV. 101, 103–04 (1984).

53. 50 U.S.C. § 1544 (2012).

54. Chanock, *supra* note 41, at 457–58.

55. *Id.* at 456.

grounds that such activity does not fall within the category of introducing the United States Armed Forces into hostilities.⁵⁶ By not reporting these activities to Congress, the President is able to avoid triggering the sixty-day clock, effectively rendering the War Powers Resolution inapplicable.⁵⁷

In *Lowry v. Reagan*, the United States District Court for the District of Columbia declined to define hostilities in an action related to the War Powers Resolution, as the act of doing so was barred as a political question.⁵⁸ In a footnote, the Court opined that because Congress did not include a definition, the decision of whether or not America is involved in “hostilities” is for the President to decide, as he has all the information and “must have flexibility in executing military and foreign policy on a day to day basis.”⁵⁹ In short, if the President says America is not involved in hostilities, then the War Powers Resolution is not invoked.

For example, President Ford adopted the position that periodic exchanges of fire with enemy forces were not enough to invoke the reporting requirements of the War Powers Resolution.⁶⁰ Similarly, President Reagan did not provide notice under the War Powers Resolution when he decided to send troops into Lebanon to remove the Palestinian Liberation Organization.⁶¹ After nearly a year of periodic firefights, Congress finally invoked the War Powers Resolution when four Marines were killed and several others were wounded.⁶² The War Powers Resolution was not invoked yet again by President George H.W. Bush when he sent troops into Saudi Arabia to defend against Iraqi aggression.⁶³ Although the situation in Saudi Arabia escalated to the point where war seemed imminent, President Bush still refused to report the activity as hostilities, avoiding the trigger of the Resolution’s sixty-day clock.⁶⁴

56. *Id.*

57. *Id.*

58. 676 F. Supp. 333 (D.D.C. 1987).

59. *Id.* at 340–41 n.53.

60. Chanock, *supra* note 41, at 458.

61. *Id.* at 459.

62. *Id.*

63. *Id.*

64. *Id.* at 459–60.

The other problematic section of the law involves the question of when the President may enter into hostilities. The War Powers Resolution provides that the President's power as Commander in Chief to introduce United States Armed Forces into hostilities can only be exercised pursuant to "(1) a declaration of war, (2) specific statutory authorization, or (3) a national emergency created by attack upon the United States, its territories or possessions, or its armed forces."⁶⁵ While this national security exception to respond in self-defense permits the President to respond to true emergencies, there is neither a definition nor any guidelines concerning what is considered to be an emergency.⁶⁶ Consequently, the President could conceivably ignore the reporting requirement in any situation in which he could make a case that an emergency existed.

b. Emerging Military Tactics

In addition to containing ambiguous language, the War Powers Resolution also suffers from having been passed in the 1970s, an era when terrorist organizations and other non-state actors did not pose as great a risk as they do today, and when technology had not yet advanced to include cell phones, personal GPS tracking devices, and the Internet. Emerging military tactics, such as drone warfare,⁶⁷ illustrate this problem. Drone warfare typically involves a person remotely controlling an unmanned aircraft that delivers a strike on a designated target.⁶⁸ The United States military and intelligence agencies have been using drone warfare with increasing frequency since the Afghanistan War.⁶⁹ Given the absence of any person inside the aircraft, drone warfare rarely leads to any direct American casualties.⁷⁰ Without any direct American casualties, a President may not be inclined to report the use of drone warfare because of the recent practice of only invoking the War Powers Resolution if American casualties have been suffered.⁷¹ Of course, American drone strikes create a

65. Pub. L. No. 93-148, 87 Stat. 555 (1973).

66. *Id.*

67. Chanock, *supra* note 41, at 455.

68. *Id.* at 464.

69. *Id.* at 463.

70. *Id.* at 464.

71. *Id.*

real probability of future American casualties as they may well trigger a military response.⁷²

Cyber warfare is another emerging military tactic creating questions under the War Powers Resolution.⁷³ Cyber warfare generally consists of efforts to interfere with the technological capabilities of a target.⁷⁴ This can be accomplished by remotely shutting down the target's power supply or critical infrastructure, infecting the target's technology with viruses, or other methods that attack the target's technology rather than its soldiers directly.⁷⁵ Like drone warfare, the nature of cyber warfare severely lessens the possibility of any direct American casualties,⁷⁶ but it, too, may prompt a retaliatory attack.⁷⁷

For these reasons and others, critics of the War Powers Resolution believe the law is woefully inadequate as a check on presidential power. Even when the President commits troops and follows the reporting requirements, there appears to be no danger of congressional second guessing. Congress has never pulled troops out of hostilities over the President's objections.⁷⁸ Instead, relying on the President's assurances that the continued commitment of troops is in the national interest, members of Congress have always authorized and ratified the President's actions.

While critics of the War Powers Resolution argue it is toothless, the law does serve a separation of powers purpose. Whenever the Bush Administration was confronted with a situation involving possible use of force, lawyers first carefully examined the legal authority of the President, as well as the legal obligation of the President with respect to the Congress.⁷⁹ The War Powers Resolution served as a check. Because of the law, we knew that any use of force without congressional authorization or notification would be scrutinized, criticized, and second guessed by certain members of Congress, and by some in the

72. *Id.*

73. *Id.* at 468.

74. *Id.* at 469–70.

75. *Id.*

76. *Id.* at 471.

77. *Id.* at 473.

78. See *Congressional Control of Presidential War-Making*, *supra* note 47, at 1218.

79. Personal Account of Alberto R. Gonzales, *supra* note 1.

media and the public. While no President should make national security decisions based on fear of being criticized, the scrutiny alone ensures that administrations will take a second look and carefully consider its legal authority before using military force. Then, faced with a real life set of circumstances, Congress is in a much better position to craft an authorization broad enough for the President to meet the threat, yet narrow enough to limit abuses.

My experience leads me to conclude that some of the ambiguity in the War Powers Resolution is not only necessary to save the law from being unconstitutional, but it is also wise because it provides flexibility to the Commander in Chief. Congress cannot possibly anticipate all of the different circumstances where force may be necessary to protect our interests and the law's ambiguity allows the President to respond as necessary to threats. There are other more effective checks on the war making power than the War Powers Resolution, such as the passage of congressional authorizations to use force.

2. *Authorizations for Use of Military Force*

Presidents have often relied on authorization for use of military force passed by Congress to use force in foreign nations. Although the law does not require an authorization from Congress to use force, many Presidents have gone before Congress to obtain such measures. For example, in response to the Iraqi troop invasion of Kuwait led by Saddam Hussein, President George H.W. Bush requested a congressional resolution in support of United Nations Security Council Resolution 678.⁸⁰

80. Authorization for Use of Military Force Against Iraq Resolution, Pub. L. No. 102-1, 105 Stat. 3 (1991). Some may question whether a U.N. resolution is sufficient to provide the President with legal authority to use force. In June of 1950, President Truman authorized U.S. military forces to intervene in the Korean conflict without congressional approval or an overt attack on American interests. See Louis Fisher, *The Korean War: On What Legal Basis Did Truman Act?*, 89 AM. J. INT'L L. 21, 32 (1995). President Truman relied on a resolution ordering North Korea to halt its military action against the Republic of Korea and, if necessary, authorizing the use of military force from United Nations members to achieve this goal. *Id.* Although the Korean conflict lasted many years, it is important to note that while Congress never expressly declared war, the courts held that the nation was at war in suits incidental to the conflict. *Weissman v. Metropolitan Life Ins. Co.*, 112 F. Supp. 420, 425 (S.D. Cal. 1953) ("We doubt very much if there is any question in

Congress passed P.L. 102-1, the "Authorization for Use of Military Force Against Iraq Resolution on January 12, 1991."⁸¹

Shortly after the September 11 attacks, President George W. Bush signed the "Authorization for Use of Military Force" (2001 AUMF) into law. Signed on September 18, 2001, it authorized the President to:

use all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001, or harbored such organizations or persons, in order to prevent any future acts of international terrorism against the United States by such nations, organizations or persons.⁸²

Approximately one year after signing the 2001 AUMF into law, President Bush expressed to both the United Nations and the Congress the current and imminent dangers posed by the actions of Saddam Hussein.⁸³ On October 10, 2002, the House of Representatives passed H.J.Res. 114 by a vote of 296–133.⁸⁴ The next day, the Senate passed the House bill by a vote of 77–23.⁸⁵ The resolution, named the "Authorization for Use of Military Force Against Iraq Resolution of 2002," P.L. 107-243 (Iraq AUMF), provided that the President "is authorized to use the Armed Forces of the United States as he determines to be nec-

the minds of the majority of the people of this country that the conflict now raging in Korea can be anything but war."). Some scholars believe that the Korean War was the beginning of the "imperial president" acting without constitutional authority to introduce American troops on foreign land and set an unnerving precedent for future administrations. Fisher, *supra*, at 37–38. Others say that President Truman's actions were wholly constitutional based on the U.N. Charter and congressional enactment of the U.N. Participation Act. Robert F. Turner, *Truman, Korea, and the Constitution: Debunking the "Imperial President" Myth*, 19 HARV. J.L. & PUB. POL'Y 533, 580–81 (1996). Both sides agree, however, notwithstanding whether or not the President has the sole constitutional authority to do so, that it is wise policy for Presidents to convene Congress and seek specific approval for their military actions. *Id.* at 583; Fisher, *supra*, at 37.

81. JENNIFER K. ELSEA & MATTHEW C. WEED, CONG. RESEARCH SERV., RL31133, DECLARATIONS OF WAR AND AUTHORIZATION FOR THE USE OF MILITARY FORCE: HISTORICAL BACKGROUND AND LEGAL IMPLICATIONS 12, 13 (2014).

82. Authorization for Use of Military Force, Pub. L. No. 107-40, 115 Stat. 224 (2001).

83. ELSEA & WEED, *supra* note 81, at 16.

84. *Id.*

85. *Id.* at 16–17.

essary and appropriate to . . . defend the national security of the United States against the continuing threat posed by Iraq[,] and . . . enforce all relevant United Nations Security Council resolutions regarding Iraq.”⁸⁶

While congressional authorizations provide the President statutory authority to use military force, they also provide Congress the opportunity to control how that authority is to be exercised. In the 1991 AUMF, Congress mandated the President to provide a determination that “all appropriate” diplomatic means were exhausted and determined ineffective prior to utilizing military force, and required periodic reporting to congressional leaders.⁸⁷ The 2001 AUMF provided arguably broader discretion. Unlike the 1991 AUMF, the 2001 AUMF did not require the President to periodically report to Congress or to ensure that less drastic means were impractical.⁸⁸ Moreover, executive branch lawyers negotiated for a “where as” provision that recognized the authority of the President under the Constitution to take action in order to deter and prevent acts of international terrorism against the United States.⁸⁹

Whether effective or not in substantially limiting the President’s war powers, Congress has succeeded in asserting its own war declaration power through these authorizations. In so doing, Congress has made progress in protecting its institutional prerogatives. While Congress gave its consent to the use of force in these instances, Congress also imposed certain conditions on the President that were eventually met, even if as a matter of comity. Ironically, one could argue that the President may have less flexibility to act with congressional authorization than without it.

In addition to limiting war-making powers, Congress has passed a number of laws intended to regulate, authorize, and limit the power of the executive branch in the field of national security. We now turn to a discussion of some of the more

86. AUMF Against Iraq Resolution of 2002, Pub. L. No. 107-243, 116 Stat. 1501 (2002).

87. AUMF Against Iraq Resolution, Pub. L. No. 102-1, 105 Stat. 3 (1991).

88. AUMF Against Iraq Resolution of 2002, Pub. L. No. 107-243, 116 Stat. 1501 (2002).

89. Personal Account of Alberto R. Gonzales, *supra* note 1.

prominent laws, beginning with those regarding electronic surveillance.

3. *Electronic Surveillance and the Foreign Intelligence Surveillance Act*

Collecting intelligence information about our enemies is an important aspect of successfully waging war in the 21st century. With advances in technology, much of that information is best collected or captured today through electronic surveillance. The Foreign Intelligence Surveillance Act (FISA) became law in 1978 and provides a legal framework to obtain permission from a specialized court, whose members are Article III federal judges appointed by the Chief Justice of the United States, to perform electronic wiretaps, collect documents, and perform physical searches.⁹⁰ Among other requirements, the law requires the government to meet a “probable cause” standard that the target of the surveillance “is a foreign power or an agent of a foreign power” and that the objective of the surveillance is the collection of foreign intelligence information.⁹¹

The executive branch has routinely interpreted its authority under FISA broadly for maximum flexibility to deal with national security threats. After the September 11 attacks, the executive branch pushed for a number of additional electronic surveillance tools consistent with the tools already available to law enforcement in the criminal justice context. That effort was successful with the passage of the PATRIOT Act.⁹²

The Attorney General of the United States is charged with approving and signing every FISA application, certifying that the application meets all of the requirements of FISA.⁹³ From the law’s inception to 2013, more than 33,900 applications have been filed, and of those only eleven were rejected.⁹⁴ Critics of

90. Foreign Intelligence Surveillance Act, Pub. L. No. 95-511, 92 Stat. 1783 (1978).

91. See *United States v. Rosen*, 447 F. Supp. 2d 538, 543–44 (E.D. Va. 2006).

92. See *In re Sealed Cases*, 310 F.3d 717, 719–20 (FISA Ct. Rev. 2002).

93. Nola K. Breglio, *Leaving FISA Behind: The Need to Return to Warrantless Foreign Intelligence Surveillance*, 113 *YALE L.J.* 179, 189 (2003).

94. Evan Perez, *Secret Court’s Oversight Gets Scrutiny*, *WALL ST. J.*, June 9, 2013, <http://online.wsj.com/news/articles/SB10001424127887324904004578535670310514616> [<http://perma.cc/3BVM-B8FJ>]; see also U.S. DOJ OFFICE OF LEGISLATIVE AFFAIRS, OFFICE OF THE ASSISTANT ATTORNEY GENERAL (Apr. 30, 2014), <http://www>.

FISA assert that these statistics prove the FISA court is a rubberstamp for the executive branch.⁹⁵ As a former Attorney General, I know better. FISA applications are routinely complex and voluminous, and lawyers at the Department of Justice work closely with lawyers and analysts at the NSA and CIA to ensure that each application meets the statutory requirements. Based on my personal review of hundreds of these applications, this is the likely reason why the FISA court has denied few applications. Simply put, if the Attorney General is not convinced an application meets the statutory requirements of Congress through FISA, then the Attorney General will not certify the application.⁹⁶

FISA is an effective check on the executive branch because it requires the executive to exercise diligence in seeing that every application meets the statutory requirements of FISA. Additionally, FISA requires that an Article III judge approve each application, which by definition serves as a check on power. Critics also complain that FISA is one-sided because targets have no idea they are being targeted and therefore have no opportunity to challenge an application because decisions of the FISA court are made *ex parte*. While true, these are the procedures adopted by Congress—another branch of government. The procedures reflect the recognition that electronic surveillance is necessary to collect intelligence on suspected agents of foreign power. Targets would change their behavior, hide evidence, and refrain from contacting their collaborators if they suspected they were under government surveillance. The involvement of another branch of government in the decision to move forward and engage in electronic surveillance necessarily means that in some cases delays will occur in intelligence collection. Such delays, even for a few hours or days, could mean losing valuable intelligence related to a specific attack. President Bush decided we could not afford such delays.

justice.gov/sites/default/files/nsd/legacy/2014/07/23/2013fisa-ltr.pdf [http://perma.cc/A8ZN-XH35].

95. See Breglio, *supra* note 93.

96. Personal Account of Alberto R. Gonzales, *supra* note 1.

a. *Surveillance Programs Under the Bush Administration*

President Bush met with his national security team at a Camp David summit the weekend immediately following the September 11 attacks.⁹⁷ The directors of the CIA and National Security Agency informed him that the U.S. government had the capability to collect electronic intelligence far more quickly outside of FISA.⁹⁸ Within weeks, the Department of Justice advised the White House that the President had authority to take advantage of those additional capabilities.⁹⁹ We intended to continue to use FISA in most cases of course because it was, and remains, an effective and valuable tool in collecting intelligence. Relying on guidance from the Department of Justice beginning in October 2001, however, the President authorized additional electronic surveillance without the involvement of the FISA Court.¹⁰⁰ The President's surveillance program was reauthorized approximately every forty-five days on the recommendation of the Secretary of Defense, the CIA Director, and the legal advice of the Attorney General.¹⁰¹

FISA provides that, except as otherwise authorized by Congress, the government is to engage in electronic surveillance only pursuant to the requirements of FISA.¹⁰² Consequently, critics have argued that the President's surveillance program was unlawful. However, the Justice Department provided written legal advice that the President had constitutional authority to collect intelligence to protect and defend our country against further attacks, and that the 2001 AUMF authorized the President to take all actions incident to waging war, including the collection of intelligence about our enemies.¹⁰³ In order to guard against executive branch abuse, key congressional lead-

97. *Id.*

98. *Id.*

99. *See generally* The President's Constitutional Authority to Conduct Military Operations Against Terrorists and Nations Supporting Them, 25 Op. O.L.C. 1, 188 (2011).

100. John Yoo, *The Terrorist Surveillance Program and the Constitution*, 14 GEO. MASON L. REV. 565, 565 (2007).

101. *See* Brian R. Decker, "The War of Information": The Foreign Intelligence Surveillance Act, Hamdan v. Rumsfeld, and the President's Warrantless Wiretapping Program, 9 U. PA. J. CONST. L. 291, 300 (2006).

102. 18 U.S.C. § 2511(2)(f) (2012).

103. Personal Account of Alberto R. Gonzales, *supra* note 1.

ers received periodic briefings regarding the mechanics and effectiveness of the President's surveillance program. No member ever expressed the view that collection should stop because of possible illegality.¹⁰⁴ Additionally, in the months following the beginning of the President's surveillance program, the Justice Department informed the Chief Judge of the FISA Court of these additional surveillance activities authorized by the President.¹⁰⁵ Finally, both the NSA General Counsel and the Inspector General were tasked to closely monitor this electronic surveillance for any unauthorized collection.

Over time, one of the collection activities authorized by President Bush in October 2001 became controversial within the Administration and was discontinued.¹⁰⁶ Because of its value, however, the disputed intelligence collection activity was later restarted, first under FISA, then pursuant to amendments to FISA.

b. Metadata Collection

Of the many files leaked by Edward Snowden in 2013, the collection of bulk metadata from American citizens by the government has garnered the most debate. Metadata collection involves third parties producing "the telephone numbers dialed, other session-identifying information, and the date, time, and duration of a call."¹⁰⁷ Metadata collection also involves third parties' email servers' production of the email addresses delivered to and sent from users, including the date and time.¹⁰⁸ It is important to note that the government claims it has no access to the substance of the telephone or email conversations or the

104. *Id.*

105. *Id.*

106. *Wartime Executive Power and the NSA's Surveillance Authority: Hearing Before the S. Comm. on the Judiciary*, 109th Cong. (2006) (statement of Alberto Gonzales, Att'y Gen. of the United States).

107. ADMINISTRATION WHITE PAPER: BULK COLLECTION OF TELEPHONY METADATA UNDER SECTION 215 OF THE USA PATRIOT ACT 3 (Aug. 9, 2013), available at <https://www.documentcloud.org/documents/750211-administration-white-paper-section-215.html> [<http://perma.cc/K5DR-FQW6>].

108. U.S. DEP'T OF JUSTICE, REPORT ON THE NATIONAL SECURITY AGENCY'S BULK COLLECTION PROGRAM FOR USA PATRIOT ACT REAUTHORIZATION (Feb. 2, 2011), available at <http://www.scribd.com/doc/157208901/2011-Report-on-the-NSA-Bulk-Collection-Program-for-USA-PATRIOT-Act-Reauthorizations-Report-Collection> [<http://perma.cc/P5TZ-3BGE>].

subject line of the email.¹⁰⁹ In 2013, the government released a white paper admitting to this metadata collection and argued that it is authorized by the USA PATRIOT Act and is constitutional within the framework of the Fourth Amendment.¹¹⁰

Section 215 of the USA PATRIOT Act authorizes the FBI to apply for a warrant to the FISA Court requiring the production of tangible things for counterterrorism investigations.¹¹¹ The government argues that section 215 applies to communication metadata as “tangible things” by the way of business records from third party providers.¹¹² As a basis for this conclusion, the government states “fourteen different judges of the [FISA Court] have concluded [this] in issuing orders directing telecommunications service providers to produce the data to the Government” and that “connections between individual data points are important, and analysis of bulk metadata is the only practical means to find those otherwise invisible connections in an effort to identify terrorist operatives and networks.”¹¹³ Further, numerous reports show that Congress was aware of the program and its intricacies and still reauthorized section 215 knowing how it was being used by the government.¹¹⁴ Thus, the government’s actions in collecting metadata have been authorized by a court of law, with no serious objection from Congress, and therefore are legal.

On the argument for constitutionality, the government cites the applicable case of *Smith v. Maryland* where the Supreme Court upheld pen registers, the government’s collection of telephone numbers, as a legal search since the users of telephones

109. *Id.*

110. See ADMINISTRATION WHITE PAPER, *supra* note 107, at 2.

111. 50 U.S.C. § 1861(a)(1) (2012) (“[T]he Director of the Federal Bureau of Investigation . . . may make an application for an order requiring the production of any tangible things (including books, records, papers, documents, and other items) for an investigation to obtain foreign intelligence information not concerning a United States person or to protect against international terrorism or clandestine intelligence activities, provided that such investigation of a United States person is not conducted solely upon the basis of activities protected by the first amendment to the Constitution.”).

112. ADMINISTRATION WHITE PAPER, *supra* note 107, at 7–8.

113. *Id.* at 5.

114. REPORT ON THE NATIONAL SECURITY AGENCY’S BULK COLLECTION PROGRAM FOR USA PATRIOT ACT REAUTHORIZATION, *supra* note 108.

have no reasonable expectation of privacy.¹¹⁵ This case, heard in 1979, paved the way for the collection of bulk metadata because almost every person in the United States uses third party services through the use of the email, social media, or telephones. The government also argues, however, that even if metadata collection constituted a search, it is reasonable under Supreme Court precedents because the search is minimally intrusive.¹¹⁶

Whether the government's arguments are correct is still subject to debate given the advances of technology. The D.C. Circuit Court in December 2013 expressed doubt that the government's actions are constitutional and granted an injunction, stayed pending appeals, in favor of plaintiffs challenging the collection of their metadata.¹¹⁷ Additionally, certain law professors and commentators have condemned the programs as criminal.¹¹⁸ However, Senator Dianne Feinstein, the former chair of the Senate Intelligence Committee, has publically supported the program and applauded its efforts in disrupting terrorist activities around the world.¹¹⁹ Of course, the effectiveness of an activity cannot make it lawful in the face of a clear statutory prohibition. However, where there is ambiguity in the law and discretion available to the executive branch, the effectiveness of

115. *Smith v. Maryland*, 442 U.S. 735, 743–46 (1979) (“This Court consistently has held that a person has no legitimate expectation of privacy in information he voluntarily turns over to third parties.”).

116. ADMINISTRATION WHITE PAPER, *supra* note 107, at 21 (“That standard [reasonableness] requires a balancing of ‘the promotion of legitimate Governmental interests against the degree to which [the search] intrudes upon an individual’s privacy.’ *Maryland v. King*, 133 S. Ct. 1958, 1970 (2013) (internal citation and quotation marks omitted). Such a balance of interests overwhelmingly favors the Government in this context.”).

117. *Klayman v. Obama*, 957 F. Supp. 2d 1, 43–44 (D.D.C. 2013).

118. See Jennifer Stisa Granick & Christopher Jon Sprigman, *The Criminal N.S.A.*, N.Y. TIMES, June 27, 2013, http://www.nytimes.com/2013/06/28/opinion/the-criminal-nsa.html?pagewanted=all&_r=0 [<http://perma.cc/A4S7-RHTU>] (“Through a series of legal contortions, the Obama administration has argued that Congress, since 9/11, intended to implicitly authorize mass surveillance. But this strategy mostly consists of wordplay, fear-mongering and a highly selective reading of the law.”).

119. See Dianne Feinstein, *Continue NSA Call-Records Program*, USA TODAY, Oct. 20, 2013, <http://www.usatoday.com/story/opinion/2013/10/20/nsa-call-records-program-sen-dianne-feinstein-editorials-debates/3112715/> [<http://perma.cc/7DGQ-3RUD>].

the disputed activity can be a factor supporting the President's authority.

These programs have been in existence at least since 2006 and were only exposed and acknowledged to the public seven years later, in 2013.¹²⁰ Congress, however—or at least key members of the Senate and House Intelligence Committees—was aware of the program and continually reauthorized the statutes upholding the program. Additionally, the FISA court continually issued orders with knowledge of the programs. Thus, one cannot legitimately argue there were no checks in place to curb abuses of executive power here.

4. *Consultation and Reporting of Intelligence Activities*

In addition to the consultation and reporting requirements under the War Powers Resolution, Congress requires the President to keep the Intelligence Committees in the House and Senate apprised of all intelligence activities.¹²¹ Subject to certain exceptions discussed below, these reporting requirements are appropriate. Congress cannot conduct appropriate oversight of the executive branch unless it receives information relating to intelligence activities. Congress needs this information in order to confirm that its policies are being carried out and that the executive branch is spending appropriated dollars properly. Secure facilities on Capitol Hill provide an appropriate venue for classified hearings and are routinely used to examine executive branch classified activity relating to national security.

While I have no objections in general to reporting requirements, disagreements often arise over who specifically in the legislative branch should have access to such reporting. I believe all members of Congress have at least one dedicated intelligence staffer, and members understandably want that intelligence staffer to be briefed by the executive branch on all classified activities. In the Bush Administration, we had serious concerns with entrusting the nation's most sensitive secrets in a

120. Laura K. Donohue, *Bulk Metadata Collections: Statutory and Constitutional Considerations*, 37 HARV. J.L. & PUB. POL'Y 757, 759–60 (2014).

121. 50 U.S.C. §§ 3091–3092 (2012).

time of war to an unelected staffer.¹²² Access is intentionally limited to prevent leaks and protect lives. On many sensitive matters, the executive branch often insists that only members of the House and Senate Intelligence Committees receive the intelligence reporting. On the most confidential matters, sometimes the executive branch is willing to provide a briefing only to the Chair and Ranking Member of the House and Senate Intelligence Committees.¹²³ Limiting access to information in the manner discussed above is not expressly provided for in the law, except in the case of covert actions.¹²⁴ However, the practice is consistent with longstanding custom, accepted by the Intelligence Committees in recognition of the authority of the President as Commander in Chief to protect information vital to our national security interests.¹²⁵

Consultation presents a greater challenge for the executive branch. Unlike reporting, which normally occurs after executive action is taken, consultation often involves reaching out to Congress before executive action and seeking counsel. On the one hand, advance consultation may prevent the needless loss of life or save the country valuable resources from an unnecessary conflict. On the other hand, consultation raises the stakes in the event of a leak that may compromise a sensitive operation, place lives at greater risk, or harm relationships with a foreign ally. Further, with advance consultation comes the possibility that Congress may not respond in a timely fashion, or worse, reject the President's request. Nevertheless, collective wisdom and shared responsibility can be a good thing under the appropriate circumstances when it comes to national security matters.

The executive's ability to control access to information bearing on national security has long been recognized, particularly in the field of intelligence gathering. Both federal statutes and Supreme Court case law indicate clearly that the executive can limit such access. The Freedom of Information Act was passed

122. Personal Account of Alberto R. Gonzales, *supra* note 1. Perhaps this concern can be addressed by tougher penalties for government employees who leak confidential information.

123. 50 U.S.C. § 3093(c)(2) (2012).

124. *See id.*

125. Personal Account of Alberto R. Gonzales, *supra* note 1.

by Congress as a mechanism for the public to have access to information about the work of its government. However, the Act contains two exceptions for information pertaining to national security.¹²⁶ The effect of these exceptions is a broad statutory grant of executive authority that supplements the President's implied authority to protect our nation's secrets.

In sum, congressional concerns over the President unilaterally introducing military forces without congressional approval are as serious—admittedly to a different degree—in the intelligence collection context. An unsuccessful covert action or intelligence mission could at best embarrass the United States and at worst have an American agent killed. There should thus be substantial reporting requirements to Congress and oversight of executive actions to guard against abuses. Nevertheless, for the same reasons discussed earlier, the executive must have the flexibility to engage in necessary targeted intelligence activities to protect America. In order to win the war against terrorism, we must win the war of information.

C. *Inherent Authority of the Executive Branch*

Much of the debate over the exercise of executive power in the national security context arises in those circumstances where the President arguably has neither express constitutional nor express congressional authority. In these situations, presidents have relied upon an inherent or implied authority under the Constitution, emanating from their Commander in Chief power to protect and defend America.¹²⁷

As the Supreme Court has recognized, the President is considered the “sole organ” of the United States in foreign affairs.¹²⁸ The Court held in *United States v. Curtiss-Wright Export Corp.* that the President is uniquely positioned to act decisively and quickly in the field of international relations and especially in times of war, given the delicate nature of intelligence and negotiations with foreign sovereigns.¹²⁹

126. 5 U.S.C. §§ 552 (a)(3)(E), (b)(7)(D) (2012).

127. See generally Brownell, *supra* note 14.

128. *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304, 319–20 (1936).

129. *Id.* at 315–16 (“The broad statement that the federal government can exercise no powers except those specifically enumerated in the Constitution, and such

Although the Constitution says relatively little about the national security powers of the executive, I am unaware of any serious widespread disagreement that the President has some inherent authority. However, there is serious disagreement as to the scope of that authority.¹³⁰ Unfortunately, the courts have been inconsistent in the development and application of a framework to help resolve the question.¹³¹ From my study of history, the default position throughout American history appears to be that the President has inherent power to do what he needs to do to protect our country, subject to examination after the fact by Congress, the media, historians, and the American people. The President's inherent authority to take action appears to be even more widely accepted when such action is against non-citizens outside the boundaries of the United States. Given the growing magnitude of today's threats, I believe this default position will remain true as we move into the future.

One constitutional scholar has written that the scope of the President's inherent power can be traced along a spectrum.¹³² At one end of the spectrum are advocates such as James Madison who argue there is no inherent power; presidential authority must come expressly from the Congress or the Constitution.¹³³ On the opposite end of the spectrum are others, such as Alexander Hamilton, who believe in the existence, even necessity, of broad inherent executive power, limited only by express constitutional prohibitions.¹³⁴ In my experience, the realities and practicalities of national security make both of these

implied powers as are necessary and proper to carry into effect the enumerated powers, is categorically true only in respect of our internal affairs.”)

130. *See e.g.*, *Dames & Moore v. Regan*, 453 U.S. 654 (1981) (upholding President Carter's executive order freezing Iranian assets); *Goldwater v. Carter*, 444 U.S. 996 (1979) (declining to challenge the President's power to rescind a treaty with Taiwan); *Train v. City of New York*, 420 U.S. 35 (1975) (invalidating President's power to impound congressionally appropriated funds); *United States v. Nixon*, 418 U.S. 683 (1974) (dismissing the President's plan to keep secrets from other branches of government); *United States v. United States District Court*, 407 U.S. 297 (1972) (invalidating the use of warrantless wiretaps).

131. *Id.*

132. Erwin Chemerinsky, *Controlling Inherent Presidential Power: Providing a Framework for Judicial Review*, 56 S. CAL. L. REV. 863, 870 (1983).

133. *Id.* at 868.

134. *Id.* at 867–68, 878.

positions unworkable and potentially dangerous. The President's inherent power must exist somewhere between these two extremes.

One possible framework advocated to avoid these disputes would allow the President to act without an explicit congressional or constitutional grant of authority so long as he does not infringe upon the institutional prerogatives of another branch.¹³⁵ Alternatively, another possible framework is that the President may act so long as he is not expressly prohibited by the Constitution or Congress.¹³⁶ Under this framework, it is immaterial whether the authority of another branch of government is usurped.¹³⁷

As between these two frameworks, the latter provides an insufficient check during those times when Congress is divided and nothing can be passed into law because of political wrangling. Consequently, the appropriate framework to judge the President's inherent power is one where the President may take action in the field of national security and foreign affairs so long as in doing so he does not usurp the prerogatives of another branch of government.

1. *Bush Actions on September 11*

For the purpose of illustrating the exercise of inherent power, it may be helpful to examine President Bush's actions immediately following the attacks on September 11, 2001. The 9/11 Commission (created after the fact by Congress as a congressional commission) reported that the President and other agencies under his control immediately took the following actions: military planes scrambled to find hijacked planes; all planes grounded at 9:25 AM (EST); decision to shoot down aircraft at 10:25 AM (EST); and Defense Department raised defense level to Def.-Con 3.¹³⁸

In the following days, the President and his cabinet discussed measures to protect the country from further attacks and made plans for war against those responsible for the at-

135. *Id.* at 872.

136. *Id.* at 874.

137. *Id.*

138. See NAT'L COMM'N ON TERRORIST ATTACKS UPON THE UNITED STATES, 9/11 COMMISSION REPORT 25, 37, 326 (2004) [hereinafter 9/11 COMMISSION REPORT].

tacks, including Al Qaeda and the Taliban.¹³⁹ Military jets patrolled the air space over New York City and Washington, D.C. Additionally, the Department of Justice requested that the Immigration & Naturalization Service (INS) begin arresting individuals of “special interest” for immigration violations, and delaying their hearings or denying release bonds.¹⁴⁰

The President, as the Commander in Chief of the armed forces, is authorized to act in defense of the country. No one can legitimately deny that the nation was under attack on September 11. As such, the President was authorized by the Constitu-

139. *Id.* at 330–31.

140. One of the first major actions taken by the United States following September 11 was to register immigrants and visitors from Middle Eastern countries. Registration of Certain Nonimmigrant Aliens From Designated Countries, 67 Fed. Reg. 70,526 (November 22, 2002). On September 11, 2002, Attorney General John Ashcroft implemented a program known as the National Security Entry-Exit Registration System (NSEERS), which at first required non-immigrant aliens to register with the INS as they entered the country, and then was expanded to require immigrants from particular countries who were already in the country to register with the INS. *Id.*; Dep’t of Justice, *Second Phase of National Security Entry-Exit Registration System Announced*, D.O.J. 02-649 (Nov. 22, 2002), http://www.justice.gov/archive/opa/pr/2002/November/02_ag_649.htm [<http://perma.cc/4N5H-TGEX>]. The registration process included identity verification, interviews, photographs, and fingerprinting. Registration of Certain Nonimmigrant Aliens From Designated Countries, 67 Fed. Reg. 70,526 (November 22, 2002). From September to the following May, nearly 83,000 individuals registered with the INS, more than 13,000 of whom were found to be in violation of their visas. Dep’t of Homeland Security, *Department of Homeland Security Fact Sheet - Changes to the National Security Entry-Exit System* (2003). The program also registered more than 127,000 people from Middle Eastern countries as they entered or left the country. *Id.* These travelers were also required to provide detailed descriptions of their plans and to inform either the State Department or the INS if their plans changed. Registration of Certain Nonimmigrant Aliens From Designated Countries, 67 Fed. Reg. 70,526 (Nov. 22, 2002). The program was phased out in May of 2003, and a more comprehensive program was put into place. Dep’t of Homeland Security, *Department of Homeland Security Fact Sheet - Changes to the National Security Entry-Exit System* (2003). The other major immigration action taken by the United States was the detention of immigrants for extended periods of time. Karen C. Tumlin, *Suspect First: How Terrorism Policy is Reshaping Immigration Policy*, 92 CAL. L. REV. 1173 (2004). The United States used the material witness statute to hold immigrants in custody indefinitely, presumably to secure grand jury testimony. *Id.* Because the government relied on statutes that existed before September 11, it is likely that the executive had authority to take this action before the AUMF. The Supreme Court had the opportunity to hear cases on this and similar detention practices, most notably in *Ashcroft v. Iqbal*, 556 U.S. 662 (2009), and *Ashcroft v. Al-Kidd*, 131 S. Ct. 2074 (2011). The Court did not reach the merits of either case, instead deciding the cases based on other elements (pleadings and immunity, respectively).

tion to take action. The 9/11 Commission found that there were already military protocols to follow in case of hijacked aircraft, including the scrambling of military planes to “intercept” the hijacked planes.¹⁴¹ Further, raising the defense level to Def.-Con 3 occurred without the need for congressional approval, as it is for the President to decide the instrumentalities and operations of the armed forces.¹⁴²

However, the decision to ground all commercial aircraft, as well as the shoot-down order of commercial aircraft judged to be hijacked and a threat, were unprecedented. The President can undoubtedly direct the military, but directing private aircraft with civilian passengers and possibly shooting them down is a different matter. Nevertheless, the Constitution granted the President the authority to do so in his role as Commander in Chief. Although it is not explicitly stated in the constitutional text, this authority lies in the penumbra of the responsibility placed upon him by the Constitution to control the operations of the military.

The President is tasked to protect the country. When an enemy turns an instrument of the private sector, such as a commercial aircraft, into an instrumentality of war, the President may take control of this sector as necessary to reduce the threat. Therefore, directing the grounding of all commercial aircraft is within the scope of his authority. After all, a significant segment of commercial aviation is already heavily regulated by the Federal Aviation Agency.¹⁴³

Directing that the military may forcibly shoot down commercial airliners judged to be a threat to civilian lives on the ground also falls within the penumbra of the President’s constitutional authority. This action is a judgment call that is best left to the President. As numerous cases support,¹⁴⁴ the knowledge of the executive branch places the President in the best position to make decisions that are time sensitive. The executive branch has access to information that is not readily available to Congress, and Congress would not have been capable of convening quick-

141. 9/11 COMMISSION REPORT, *supra* note 138, at 20.

142. *Id.* at 326.

143. See 18 C.F.R. §§ 1–1399 (2014).

144. See *e.g.*, *Iqbal*, 556 U.S. 662; *INS v. Chadha*, 462 U.S. 919 (1983); *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 308 (1936).

ly during a large national crisis. The President, with the consultation of his advisors, is in the best position to make such a decision in the time required, and it is within his authority to do so.

President Bush acted on his express and implied authority under the Constitution in the immediate aftermath of September 11. His actions were subsequently examined by the 9/11 Commission acting on behalf of Congress and the American people. Thus, our nation benefited from the flexibility available to the President to effectively respond to threats, subject to accountability to Congress for any abuses of power.

2. *Executive Actions for Enemy Combatants*

As discussed above, the 2001 AUMF is a recent example of statutory approval by Congress allowing expansive presidential authority during wartime. In the years since passage of the 2001 AUMF, there has been much debate over whether it authorized the executive to detain enemy combatants, engage in electronic surveillance of the enemy, and employ military commissions to try these combatants. Several U.S. Supreme Court decisions hint at the scope of authority of the Commander in Chief. Two of these cases are *Hamdi v. Rumsfeld*¹⁴⁵ and *Hamdan v. Rumsfeld*.¹⁴⁶

In *Hamdi*, the court addressed whether the judiciary must defer to the executive's determination that a U.S. citizen is an enemy combatant. The Court stated that the judiciary does not have to defer to the executive's decision to designate an individual as an enemy combatant, but instead should act as a check against the executive in this situation.¹⁴⁷ The Supreme Court's decision in *Hamdan* concerned whether the Bush Administration could set up military commissions to try detainees at Guantánamo Bay without congressional authorization. The Court held 5–3 that the Administration was not authorized to set up the military commissions without congressional authorization because doing so would violate existing congressional statutes.¹⁴⁸ Thus the President would need congressional per-

145. 542 U.S. 507 (2004).

146. 548 U.S. 557 (2006).

147. *Hamdi*, 542 U.S. at 536–37.

148. *Hamdan*, 548 U.S. at 593–94.

mission in order to proceed.¹⁴⁹ Whether the Court would uphold presidential action over a conflicting congressional statute in a situation where the powers allotted to Congress are less defined remains unanswered.

In a time of emergency or when facing a threat, the President has a number of options in the presence of a conflicting congressional statute. First, he can choose to do nothing and suffer the consequences of such inaction. Second, he can go to Congress and try to get some type of congressional authorization resolution, or approval to act in spite of the conflicting statute. Finally, the President can rely on his own constitutional authority and be willing to suffer the legal and political consequences, including impeachment and losses by him and his political party in future elections. Since I believe the American people are better off when the elected branches of government work together in a time of war, I would like to see the President try to work with Congress for some type of approval or support. However, the realities of today's threats make it doubtful that congressional action would be forthcoming in a timely manner. If no help is forthcoming from Congress, I would hope the President would rely on his constitutional authority, doing what is necessary to protect our country and having the courage to be accountable for his decisions.

II. SEPARATION OF POWERS FRAMEWORK FOR PRESIDENTIAL AUTHORITY

A. *The Role of the Court*

Chief Justice John Marshall famously declared in *Marbury v. Madison* that it is the role of the judiciary to interpret the Constitution.¹⁵⁰ Yet, in the area of national security, the courts have often appeared reluctant to define the power of the elected branches of government. For this reason, disagreements over the scope of executive branch power in the national security realm are most often decided in the political arena, not the courts.

As scholars have noted, the deference shown by our federal courts to the President's exercise of national security power in

149. *Id.* at 594–95.

150. *Marbury v. Madison*, 5 U.S. 137, 177 (1803).

times of war and other threats is decidedly mixed.¹⁵¹ The courts' deference appears to have been based on a number of factors, including the popularity of the President and Congress, the timing of the executive action, and whether the use of force was in connection with a conflict supported by the people.¹⁵² In part, it is the courts' inconsistent treatment that has prevented the establishment of a coherent, consistent framework to analyze the question of presidential power.

While the authority of the executive branch to exercise power in the area of national security is dependent on the sources of authority discussed above, whether such sources even apply and are available will in certain cases depend on what the courts say. Historically, the courts have relied upon prudential and constitutional doctrines to avoid answering questions about executive branch power in the national security context. However, as the power of the modern executive grows and the potential for abuse increases, the courts may feel pressure to allow judicial review after the fact as a check against such abuses. This is particularly important in connection with the war on terrorism. Unfortunately, our fight against terrorism in the future is more likely to occur within U.S. borders and more directly impact the rights of American citizens. Because terrorists do not wear uniforms, the enemy may look like the average American citizen. The enemy may actually be an American citizen. Under such circumstances, there is a growing probability that government actors will mistakenly target innocent American citizens. If so, our courts are more likely to be motivated to step up and check executive branch power.

Though the judiciary has been reluctant in many instances to issue opinions that may define the executive and legislative roles more distinctly, *Little v. Barreme*¹⁵³ is a case that gives us some insight into the position the judiciary took when interpreting the scope of the war powers nearly two centuries ago. The case arose out of the "quasi-war" with France in the late 18th century. It concerned a presidential order to seize certain vessels sailing into or out of French ports. Captain Little, under

151. See generally Chemerinsky, *supra* note 132.

152. *Id.*

153. 6 U.S. 170 (1804).

the orders of President Adams, seized a vessel sailing from a French port. A congressional statute had been passed stating that vessels may only be seized when sailing *to* a French port, not *from*. In an opinion issued by Chief Justice Marshall, the Supreme Court held that the President was not authorized to issue this order in contravention of the congressional statute.¹⁵⁴ This case established an early threshold for congressional precedence in an area with minimal court precedent to look toward for guidance. Chief Justice Marshall expanded this threshold; Skibell argues he explained that “even in rapidly changing circumstances of naval engagement the will of Congress with respect to how the war was to be fought had to take precedence.”¹⁵⁵ This decision indicates that Congress has the power, by passing legislation, to control aspects of how the Commander in Chief can conduct a war.¹⁵⁶

1. Deference to Executive Power

Over the years, courts have grappled with how much deference congressional silence over executive branch actions and broad gaps within statutes give the executive branch. Justice Jackson’s famous tripartite scheme of presidential power, articulated in *Youngstown Sheet & Tube Co. v. Sawyer*, postulates that the president is at his highest power when acting with congressional approval, in a twilight area when acting with congressional silence, and at his lowest when acting against the wishes of Congress.¹⁵⁷ Cases within the highest power are usually decided in favor of the executive, as the President’s constitutional authority is supported statutorily.¹⁵⁸ However, even when dealing with the twilight area and lowest power of authority, the Court has still found favorably for the executive more often than not.

For instance, the Supreme Court in *Dames & Moore v. Regan* held that President Carter’s executive order to nullify and

154. *Id.* at 177–78.

155. Reid Skibell, *Separation of Powers and the Commander in Chief: Congress’s Authority to Override Presidential Decisions in Crisis Situations*, 13 *GEO. MASON L. REV.* 183, 214 (2004).

156. *Id.*

157. *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 635–37 (1952).

158. *Id.* at 637.

transfer frozen Iranian assets, in response to the Iranian hostage crisis, was constitutionally permissible.¹⁵⁹ This power stemmed from the International Emergency Economic Powers Act (IEEPA) which gave “broad authority to the President to act in times of national emergency” and recognized an area of “loose discretion” in which the President had freedom to act.¹⁶⁰ Writing for the Court, Justice Rehnquist took note of Justice Jackson’s concurrence in *Youngstown* and of the necessity of a “consideration of all the circumstances which might shed light on the views of the Legislative Branch toward such action, including ‘congressional inertia, indifference or quiescence.’”¹⁶¹ Further, the Court stated:

Congress cannot anticipate and legislate with regard to every possible action the President may find it necessary to take or every possible situation in which he might act. Such failure of Congress specifically to delegate authority does not, “especially . . . in the areas of foreign policy and national security,” imply “congressional disapproval” of action taken by the Executive.¹⁶²

No cases hold that congressional acquiescence applies to all future actions, but it can be persuasive to courts when deciphering a President’s actions.¹⁶³ As Justice Frankfurter stated in *Youngstown*, “a systematic, unbroken, executive practice, long pursued to the knowledge of the Congress and never before questioned . . . may be treated as a gloss on ‘executive Power’ vested in the President by § 1 of Art. II.”¹⁶⁴ For past practice does not, by itself, create power, but “long-continued practice, known to and acquiesced in by Congress, would raise a presumption that the [action] had been [taken] in pursuance of its consent.”¹⁶⁵

159. See 453 U.S. 654 (1981).

160. *Id.* at 677–78.

161. *Id.* at 668–69 (quoting *Youngstown*, 343 U.S. at 637).

162. *Id.* at 678 (quoting *Haig v. Agee*, 453 U.S. 280, 291 (1981)).

163. *Id.* at 686.

164. *Youngstown*, 343 U.S. at 610–11.

165. *United States v. Midwest Oil Co.*, 236 U.S. 459, 474 (1915); see also *Haig*, 453 U.S. at 291–92.

Some may question whether the courts even have the necessary expertise to judge the president's national security actions. One scholar argues:

Courts and commentators have emphasized the lack of judicial competence in evaluating questions about the conduct of war. As compared to courts, the executive branch has more experience and better access to information about war. It also needs to act at times with dispatch, secrecy, and "unity of plan," all of which may counsel against interference by the courts.¹⁶⁶

From this observation, it may be best for the courts to defer to the executive before action is taken. As to the question of whether or not the courts have the expertise to deal with technical national security issues after the fact, I believe this is less of a problem. Courts routinely decide cases about which judges and juries know very little, such as medical malpractice and environmental laws. Some national security experts support the establishment of a specialized national security court.¹⁶⁷ I do not believe that is necessary. If a case that meets the justiciability requirements is filed with the courts, I have confidence that judges will be able to decide it properly, provided measures are in place to protect classified information and confidential sources.

2. *Justiciability Issues*

Perhaps more significant than the opinions that the Court has rendered are the cases that have not been granted certiorari. Most notably, the Court has used standing to avoid hearing cases about NSA surveillance and the targeted killing of U.S. citizen Anwar al-Aulaqi.¹⁶⁸ The Court has also used the state secrets privilege to avoid hearing cases about extraordinary rendition, effectively denying claims by non-citizens against the government for the role it played.¹⁶⁹ The courts have shied away from reviewing presidential actions overseas unless there are judicial-

166. Ingrid Brunk Wuerth, *International Law and Constitutional Interpretation: The Commander in Chief Clause Reconsidered*, 106 MICH. L. REV. 61, 71 (2007).

167. See, e.g., Glenn Sulmasy, *The Need for a National Security Court System* 23 ST. JOHN'S J. OF CIV. RTS. & ECON. DEV. 1007 (2009).

168. See *Al-Aulaqi v. Obama*, 727 F. Supp. 2d 1, 9 (D.D.C. 2010).

169. *Tenet v. Doe*, 544 U.S. 1, 9 (2005).

ly discoverable and manageable standards of review; otherwise, the question is barred by the political question doctrine.¹⁷⁰ I agree with the courts' reluctance to become involved with general foreign policy issues, as well as events occurring overseas. However, as a general rule in the national security context, courts should strive to review executive branch acts affecting domestic policy or involving the rights of American citizens. The following cases highlight how these doctrines have been employed with respect to national security issues.

a. *Standing*

In *United States v. Richardson*, a taxpayer filed suit against the government alleging that the Central Intelligence Agency's accounting procedures were unconstitutional.¹⁷¹ The Supreme Court did not address the merits of the case, as it found the taxpayer lacked standing because he had neither sustained, nor was in imminent danger of sustaining, a direct injury from these procedures.¹⁷² The Court sympathetically opined on behalf of the respondent, stating:

It can be argued that if respondent is not permitted to litigate this issue, no one can do so. . . . [But] lack of standing . . . does not impair the right to assert his views in the political forum or at the polls. Slow, cumbersome, and unresponsive though the traditional electoral process may be thought at times, our system provides for changing members of the political branches when dissatisfied citizens convince a sufficient number of their fellow electors that elected representatives are delinquent in performing duties committed to them.¹⁷³

The difficulty in satisfying the standing requirements in the national security domain was vividly demonstrated in the case

170. See *Baker v. Carr*, 369 U.S. 186, 217 (1962).

171. 418 U.S. 166, 166 (1974).

172. *Id.* at 174.

173. *Id.* at 179; see also *Raines v. Byrd*, 521 U.S. 811, 818–19 (1997); *Schlesinger v. Reservists Comm. to Stop the War*, 418 U.S. 208, 220–21 (1974) (“[S]tanding to sue may not be predicated upon an interest of the kind alleged here which is held in common by all members of the public, because of the necessarily abstract nature of the injury all citizens share. Concrete injury, whether actual or threatened, is that indispensable element of a dispute which serves in part to cast it in a form traditionally capable of judicial resolution.”).

of *Al-Aulaqi v. Obama*.¹⁷⁴ There, the father of Al-Aulaqi, an American citizen, challenged President Obama's decision to place his son on the kill list.¹⁷⁵ The suit was dismissed for lack of jurisdiction.¹⁷⁶ Al-Aulaqi was later killed by a CIA drone strike in 2011.¹⁷⁷

b. Political Question Doctrine

The political question doctrine refers to subject matters that the court deems to be inappropriate for judicial review.¹⁷⁸ In other words, courts have said that constitutional interpretation in certain areas should be left to the politically accountable branches of government. This is, in part, due to the courts' need for "judicially discoverable and manageable" standards from which to judge a President's actions.¹⁷⁹ In the realm of national security, such standards are difficult to find and often non-existent.¹⁸⁰ The Court has recognized that this exception must be applied narrowly or it could possibly encompass every action of the President, since most involve issues of foreign policy, calling it "error to suppose that every case or controversy which touches foreign relations lies beyond judicial cognizance."¹⁸¹

This is illustrated in *Orlando v. Laird*, where certain enlistees in the Army sought to enjoin military commanders from enforcing deployment orders.¹⁸² The enlistees argued that since Congress had not declared war with Vietnam, the commanders lacked authority to deploy troops.¹⁸³ The Court decided for the government since Congress had taken affirmative action to fund the

174. See *Al-Aulaqi v. Obama*, 727 F. Supp. 2d 1 (D.D.C. 2010); see also Alberto R. Gonzales, *Drones: The Power to Kill*, 82 GEO. WASH. L. REV. 1, 15–16 (2013).

175. *Al-Aulaqi*, 727 F. Supp. 2d at 8.

176. *Id.* at 9.

177. Jennifer Griffin & Justin Fishel, *Two U.S.-Born Terrorists Killed in CIA-Led Drone Strike*, FOX NEWS (Sept. 30, 2011), <http://www.foxnews.com/politics/2011/09/30/us-born-terror-boss-anwar-al-awlaki-killed/> [<http://perma.cc/HGH4-98LD>].

178. See Chemerinsky, *supra* note 132, at 896–98.

179. *Baker v. Carr*, 369 U.S. 186, 217 (1962).

180. See Themes Karalis, *Foreign Policy and Separation of Powers Jurisprudence: Executive Orders Regarding Export Administration Act Extension in Times of Lapse as a Political Question*, 12 CARDOZO J. INT'L & COMP. L. 109, 159 (2004).

181. *Baker*, 369 U.S. at 211; see also *Greenham Women Against Cruise Missiles v. Reagan*, 591 F. Supp. 1332, 1339 (S.D.N.Y. 1984).

182. *Orlando v. Laird*, 443 F.2d 1039, 1040 (2d Cir. 1971).

183. *Id.*

military action and “[t]he constitutional delegation of the war-declaring power of Congress contains a discoverable and manageable standard . . . The test is whether there is any action by the Congress sufficient to authorize or ratify the military activity in question.”¹⁸⁴ However, the Court also held “the form which congressional authorization should take is one of policy . . . because there are no intelligible and objectively manageable standards by which to judge such actions” and is thus a political question.¹⁸⁵ In sum, the question of *whether* Congress had the authority to “make war” was not a political question, but the question of *how* Congress chose to “make war” was barred.

In my judgment, the courts should be more involved in reviewing the actions of the executive in the field of national security, particularly when the rights of American citizens are involved while still maintaining the security measures necessary to secure the safety of the United States. In a dangerous world where the American people demand that the President protect them, no President is likely to give up power to meet these threats. Therefore, executive power will likely continue to grow unchecked at the expense of congressional power in the national security context. The political question doctrine is based in part on the notion that the political branches will act to protect their own institutional prerogatives. But what if that is not true and Congress is paralyzed and unable to work out a compromise with the executive branch? Today, Congress appears to be virtually powerless, or at least unwilling, to enforce any checks on the executive.¹⁸⁶ I am less concerned with the courts taking a more active role in enforcing separation of powers if they are engaged in providing an ex-post check as opposed to an ex-ante check. The ex-post check would allow the President to act quickly and discreetly if necessary to protect the United States. However, the President could still be held accountable in the courts for any abuses.

184. *Id.* at 1042.

185. *Id.* at 1043–44.

186. See, e.g., Louis Fisher, *Congressional Abdication: War and Spending Powers*, 43 ST. LOUIS U. L.J. 931, 1005 (1999) (arguing that Congress has “abdicated crucial institutional powers to the President”); Neal Kumar Katyal, *Internal Separation of Powers: Checking Today’s Most Dangerous Branch from Within*, 115 YALE L.J. 2314, 2320 (2006) (describing the “demise of the congressional checking function”).

B. *The Role of the Legislature*

Earlier we discussed various laws passed by Congress to expand or limit presidential authority. In the field of national security, four additional legislative “checks of power” are routinely offered: the power of the purse, the power to block appointments, the power to impeach, and the power to sue the President.¹⁸⁷ While any or all of these powers may affect presidential decision-making to a degree, in my judgment, these checks alone remain largely ineffective to reign in the power of the President.

First, the congressional power to control the purse is explicitly derived from the Constitution. Article I vests Congress with the power to “lay and collect taxes . . . [and] borrow money”¹⁸⁸ and bars the use of funds for uses other than as appropriated by Congress.¹⁸⁹ Further, Congress is vested to “raise and support armies.”¹⁹⁰ Thus, if the President wishes to wage military action successfully, he must ask Congress to appropriate federal funds to support his military efforts.

The power of the purse is often touted as a powerful check, but in reality it has limited utility because the executive branch often has the power to fund military actions by moving funds within the executive branch without specific appropriation from Congress.¹⁹¹ Moreover, often the President has already committed troops prior to congressional authorization.¹⁹² Congress subsequently appropriates money to fund the troops, but this is not the same as funding the President’s decision for military action. While some courts have insisted that supporting an appropriations bill is not an assent to war,¹⁹³ many other courts

187. See generally Noah Feldman, *Our Presidential Era: Who Can Check the President?*, N.Y. TIMES, Jan. 8, 2006, http://www.nytimes.com/2006/01/08/magazine/08court.html?pagewanted=all&_r=0 [<http://perma.cc/Z996-K8CG>]; Matthew C. Waxman, *The Power to Threaten War*, 123 YALE L.J. 1626 (2014).

188. U.S. CONST. art. I, § 8, cl. 1–2.

189. U.S. CONST. art. I, § 9, cl. 7.

190. U.S. CONST. art. I, § 8, cl. 12.

191. Richard D. Rosen, *Funding “Non-Traditional” Military Operations: The Alluring Myth of a Presidential Power of the Purse*, 155 MIL. L. REV. 1, 12–13 (1998).

192. Louis Fisher, *Presidential Independence and the Power of the Purse*, U.C. DAVIS J. INT’L L. & POL’Y 107, 124–25 (1997).

193. *Mitchell v. Laird*, 488 F.2d 611, 615 (D.C. Cir. 1973) (“This court cannot be unmindful of what every schoolboy knows: that in voting to appropriate money

have deduced that congressional appropriation bills in conjunction with executive action gives rise to acceptance of military action.¹⁹⁴

Secondly, the power to block appointments, specifically key leadership positions at the State Department, Department of Defense, CIA, and NSA, is often cited as an important check on executive abuses. However, even if the Senate can successfully block an appointment, there is a line of succession created by statute for every government agency.¹⁹⁵ Whenever a vacancy arises, an “acting” officer will hold the position and discharge duties until filled. This allows the agency to pursue the President’s agenda despite the absence of a confirmed nominee.

Members of Congress have attempted repeatedly to sue the President for failing to faithfully execute the laws. In all cases, these efforts have failed for lack of standing.¹⁹⁶ Most recently, branches of Congress have passed resolutions to confer standing on members.¹⁹⁷ It remains to be seen whether these resolutions will be sufficient to confer standing.

Finally, the ultimate congressional check on presidential power is impeachment.¹⁹⁸ This process allows Congress to institute proceedings to oust the President from office for impeachable offenses. Throughout our history, there have been numerous cries from both parties to impeach the President when their party does not hold the White House.¹⁹⁹ Yet, the impeachment

or to draft men a Congressman is not necessarily approving of the continuation of a war no matter how specifically the appropriation or draft act refers to that war. A Congressman wholly opposed to the war’s commencement and continuation might vote for the military appropriations and for the draft measures because he was unwilling to abandon without support men already fighting.”)

194. *United States v. Sisson*, 294 F. Supp. 511, 514 (D. Mass. 1968).

195. *E.g.*, Memorandum on Designation of Officers of the General Services Administration to Act as Administrator of General Services, 78 Fed. Reg. 59,161 (Sept. 20, 2013).

196. See generally R. Lawrence Dessem, *Congressional Standing to Sue: Whose Vote is This, Anyway?*, 62 NOTRE DAME L. REV. 1 (1986).

197. Jacob Gershman, *A Legal Preview of Boehner v. Obama*, WALL ST. J., July 2, 2014, <http://blogs.wsj.com/law/2014/07/02/a-legal-preview-of-house-v-obama/> [<http://perma.cc/3BJT-KTYT>].

198. Feldman, *supra* note 187.

199. Sean Sullivan, *GOP Congressman Says House Probably has Votes to Impeach Obama*, WASH. POST, Jun. 17, 2014, <http://www.washingtonpost.com/blogs/post-politics/wp/2014/06/17/gop-congressman-says-house-probably-has-votes-to-impeach-obama/> [<http://perma.cc/3TCA-85XW>]; Kucinich introduces Bush impeach-

process almost never moves forward beyond the political posturing. In fact, only two presidents have been formally impeached, and the impeachment process does not automatically result in a forfeiture of office.²⁰⁰ Moreover, trying to rally the number of votes needed for impeachment is difficult for fear that impeachment will become commonplace when an opposing party of the White House holds the majority in Congress.²⁰¹ Impeachment should not be used to force compliance or alter behavior; it should be reserved for criminal charges and severe abuses of power, not mere disagreement concerning debated constitutional issues.

III. THE 21ST CENTURY FRAMEWORK OF SEPARATION OF POWERS

When reflecting on the proper framework today for executive branch authority in the area of national security, I am influenced in part by what I see as an evolving standard of self-defense. Historically, under the *Caroline* case, force can be used in self-defense in response to an attack or in anticipation of an imminent threat.²⁰² Of course, since the formulation of the doctrine of self-defense, the gravity of the threats has grown significantly. During the Bush Administration, lawyers debated a subtle but important shift in the factors argued to use to self-defense. Given the grave harm from a successful nuclear, biological or chemical attack, we concluded it would be unnecessary to wait for a gun to be cocked and pointed at our heads before taking preventative action.²⁰³ If we have knowledge of a serious and legitimate threat, and if the enemy has already demonstrated an intent and capability to hurt American interests, then given the gravity of the potential harm, the United

ment resolution, CNN (June 11, 2008, 3:07 AM), <http://www.cnn.com/2008/POLITICS/06/11/kucinich.impeach/> [<http://perma.cc/CFM4-CL85>].

200. Feldman, *supra* note 187.

201. Tom Cohen, *Obama impeachment talk just political theater*, CNN (Aug. 27, 2014, 3:42 PM), <http://www.cnn.com/2014/07/30/politics/obama-impeachment-talk/> [<http://perma.cc/HRF6-P9JW>].

202. See generally Martin A. Rogoff & Edward Collins, Jr., *The Caroline Incident and the Development of International Law*, 16 BROOK. J. INT'L L. 493 (1990).

203. Personal Account of Alberto R. Gonzales, *supra* note 1.

States is legally entitled to use force in self-defense.²⁰⁴ Having the wisdom and judgment to make the right decision in such situations is not enough. The decision-maker must be able to do so quickly. For these reasons, I continue to believe that the President remains in the best position to make national security decisions, particularly those involving self-defense. Any effective framework must recognize this new reality.

What are the objectives of a workable framework? The executive needs flexibility to respond quickly and effectively to national security threats. I refer to it as a presumption of legality or validity based on necessity. It is not identical to the presumption of validity in the context of patents, nor is it a conclusive presumption or rule of evidence; it is a permissive presumption. This presumption would be limited to the national security context and exist only with respect to decisions by the President, but would not apply when government action affects the rights of American citizens. This presumption is an acknowledgement that the President is best able, because of expertise, experience, and intelligence capabilities, to initially assess and respond to a national security threat. Finally, this presumption of validity already exists in practice and is supported by precedent.

On the other hand, the flexibility afforded by the presumption of validity must be balanced by accountability. Congress should be more disciplined and not give the President broad delegations of authority in every case. Authorizations to act should be limited, perhaps even subject to sunset. The executive branch should strive to make Congress more of a partner by sharing with congressional leaders contingency plans for various scenarios well before they occur. In this way, the executive branch will be able to take advantage of the collective wisdom of Congress. Congress must engage in greater oversight and demand greater visibility into what the executive is doing in the national security context. Not surprisingly, most presidents would prefer not to have to work with Congress in many cases because of possible security leaks, costly delays, and congressional opposition to the course of action the President believes is necessary. However, it is not the job of Congress to

204. *Id.*

help the President feel comfortable. It is its job to ensure our rights are protected against executive branch abuse.

Additionally, because Congress is often paralyzed by politics, in appropriate cases where our national security is not compromised, it is my hope that it will become more common and more acceptable for courts to allow Congress and the public to test the validity of the presumption in favor of the President. The courts should carefully evaluate the application of justiciability, standing doctrine, and the political question doctrine in cases involving executive power in the national security context—particularly when the rights of American citizens are at issue. If plaintiffs are denied access to the courts, there may be no real check when there is a divided Congress. As discussed above, even with a unified Congress, the normal checks of blocking appointments, controlling the budget, and threatening impeachment are of limited utility.

We turn now to three actual national security scenarios.

A. *Syria's Red Line*

On September 10, 2013, President Obama delivered a speech to the nation on the use of chemical weapons by the regime of Syrian President Bashar al-Assad.²⁰⁵ Despite numerous warnings by the United States that the use of chemical or biological weapons would cross a “red line” drawn by President Obama on August 21, 2013, the Syrians used chemical weapons against their own people.²⁰⁶ On August 31, 2013, President Obama provided to Congress a draft Authorization for Use of Force against Syria.²⁰⁷ In his September 2013 speech, the President asserted that looking the other way could hurt U.S. interests by increasing the

205. Barack Obama, *Remarks by the President in Address to the Nation on Syria*, WHITE HOUSE, Sept. 10, 2013, <http://www.whitehouse.gov/the-press-office/2013/09/10/remarks-president-address-nation-syria> [http://perma.cc/47JS-2M85].

206. Barack Obama, *Remarks by the President to the White House Press Corps*, WHITE HOUSE, Aug. 20, 2012, <http://www.whitehouse.gov/the-press-office/2012/08/20/remarks-president-white-house-press-corps> [http://perma.cc/S4HT-UP7U]; See also John Kerry, *Statement on Syria*, U.S. DEPT. OF STATE, Aug. 30, 2013, <http://www.state.gov/secretary/remarks/2013/08/213668.htm> [http://perma.cc/8UGJ-HKDX].

207. *Text of draft legislation submitted by Obama to Congress*, CNN (Aug. 31, 2013, 8:10 PM), <http://www.cnn.com/2013/08/31/us/obama-authorization-request-text/> [http://perma.cc/R86P-35B5].

likelihood that our armed forces would encounter chemical weapons in hostilities.²⁰⁸ The President also warned that al Qaeda would “only draw strength in a more chaotic Syria.”²⁰⁹ In claiming his authority to “draw a red line” after political pushback from Congress, President Obama stated:

That’s my judgment as Commander-in-Chief. But I’m also the President of the world’s oldest constitutional democracy. So even though I possess the authority to order military strikes, I believed it was right, in the absence of a direct or imminent threat to our security, to take this debate to Congress. I believe our democracy is stronger when the President acts with the support of Congress. And I believe that America acts more effectively abroad when we stand together.²¹⁰

Ultimately, Congress never voted on whether to give the President authority to take military action because Russia brokered a deal ensuring that all chemical weapons were removed from Syria.²¹¹ The media reports indicate that there was modest support, even among Democrats, to authorize the use of force in Syria.²¹² Because the diplomatic solution was effective, we do not know what would have happened if Congress had refused the President’s request for statutory authorization to take military action. He could have abided by that decision or opted to rely on his authority as Commander in Chief and taken action anyway.

In my judgment, it was a mistake for President Obama to issue an ultimatum and then approach Congress to gauge support for military force. There should be no doubt that any country that ignores our warnings will suffer the consequences. If the President truly believed congressional support was legally necessary to use force, then he should have gauged congressional support before issuing the ultimatum.

208. Obama, *supra* note 205.

209. *Id.*

210. *Id.*

211. Barack Obama, *Weekly Address: Pursuing a Diplomatic Solution in Syria*, WHITE HOUSE, Sept. 14, 2013, <http://www.whitehouse.gov/the-press-office/2013/09/14/weekly-address-pursuing-diplomatic-solution-syria> [<http://perma.cc/RMR3-MAVH>].

212. *Modest Support for Military Force if Syria Used Chemical Weapons*, PEW RESEARCH, Apr. 29, 2013, <http://www.people-press.org/2013/04/29/modest-support-for-military-force-if-syria-used-chemical-weapons/#> [<http://perma.cc/69N3-U24N>].

As for whether the President had the authority to take action alone, I believe that is a hard question. The best arguments may have already been made by the Administration; but if these arguments are accepted, then arguably use of force under virtually all circumstances would be justified. The problem for the President is that there does not appear to be congressional support here, nor was there was a direct link or threat to U.S. interests. In his remarks, the President admitted there was no direct or imminent threat to our security. Thus, it is hard to argue that the President has express or inherent power under the Constitution to use force.

B. *Islamic State of Iraq and the Levant (ISIL)*

Another illustration of the struggle of separation of powers in regard to the President's authority to facilitate military operations overseas concerns ISIL.²¹³ Forming after the U.S. invasion of Iraq in 2003, ISIL acted as the al Qaeda affiliate throughout Iraq and later gained power over Islamic fighters in Syria.²¹⁴ As of September 2014, ISIL is believed to control large swaths of land, up to 35,000 square miles, in Iraq and Syria.²¹⁵ In addition to the numerous human rights atrocities committed by ISIL against the civilian populations of Iraq and Syria,²¹⁶ ISIL has publicly beheaded two American journalists

213. The Islamic State of Iraq and the Levant (ISIL) is also referred to as the "Islamic State" or "Islamic State of Iraq and Great Syria (ISIS)" in many publications. For purposes of this article, the organization will be referred to as "ISIL", in continuity with its designation as a Foreign Terrorist Organization by the U.S. Secretary of State. See *Terrorist Designations of Groups Operating in Syria*, U.S. DEPT. OF STATE, May 14, 2014, <http://www.state.gov/r/pa/prs/ps/2014/05/226067.htm> [<http://perma.cc/Z33Q-L5TX>].

214. In February 2014, al Qaeda renounced all ties with ISIL and stated it was not responsible for ISIL's actions. Oliver Holmes, *Al Qaeda breaks link with Syrian militant group ISIL*, REUTERS (Feb. 3, 2014), <http://www.reuters.com/article/2014/02/03/us-syria-crisis-qaeda-idUSBREA120NS20140203> [<http://perma.cc/QH7B-9DP7>].

215. Kathy Gilsinan, *The Many Ways to Map the Islamic 'State,'* THE ATLANTIC (Aug. 27, 2014, 3:39 PM), <http://www.theatlantic.com/international/archive/2014/08/the-many-ways-to-map-the-islamic-state/379196/> [<http://perma.cc/HL7W-EUYG>].

216. Catherine Russell, *ISIL's Abuse of Women and Girls Must be Stopped*, DIPNOTE, U.S. DEPT. OF STATE OFFICIAL BLOG, Sept. 12, 2014, <http://blogs.state.gov/stories/2014/09/12/isils-abuse-women-and-girls-must-be-stopped> [<http://perma.cc/NKR4-JZKN>].

and one American aid worker, as well as several aid workers from other countries.²¹⁷

On August 7, 2014, President Obama authorized targeted airstrikes in Iraq to combat ISIL movement towards Erbil, Iraq, housing the American consulate, and Mount Sinjar, where ISIL called for genocide of the Yezidi people.²¹⁸ As legal authority to conduct these military operations in Erbil, the President relied on his authority as Commander in Chief to protect American personnel and facilities abroad.²¹⁹ Concerning Mount Sinjar, the executive branch relied on the request from the Iraqi government and the overwhelming need for humanitarian aid in the region as grounds for intervention.²²⁰ Notwithstanding the President's sole authority to carry out these missions, he has filed reports in compliance with the War Powers Resolution.²²¹

On September 10, 2014, President Obama delivered a prime-time address to the nation outlining broader military action against ISIL.²²² This action entails broader airstrikes against ISIL strongholds and leaders throughout Iraq and Syria, additional

217. Greg Botelho, *ISIS executes British aid worker David Haines; Cameron vows justice*, CNN (Sept. 14, 2014), <http://www.cnn.com/2014/09/13/world/meast/isis-haines-family-message/> [<http://perma.cc/8JDQ-BX4W>].

218. Barack Obama, *Statement by the President*, WHITE HOUSE, Aug. 7, 2014, <http://www.whitehouse.gov/the-press-office/2014/08/07/statement-president> [<http://perma.cc/9BUH-PBUD>].

219. *Background Briefing by Senior Administration Officials on Iraq*, WHITE HOUSE, Aug. 8, 2014, <http://www.whitehouse.gov/the-press-office/2014/08/08/background-briefing-senior-administration-officials-iraq> [<http://perma.cc/9QTL-UZUD>].

220. Obama, *Statement by the President*, *supra* note 218; *Background Briefing by Senior Administration Officials on Iraq*, *supra* note 219.

221. *Letter from the President—War Powers Resolution Regarding Iraq*, WHITE HOUSE, Aug. 8, 2014, <http://www.whitehouse.gov/the-press-office/2014/08/08/letter-president-war-powers-resolution-regarding-iraq> [<http://perma.cc/2AJX-2CMH>]; *Letter from the President—War Powers Resolution Regarding Iraq*, WHITE HOUSE, Aug. 17, 2014, <http://www.whitehouse.gov/the-press-office/2014/08/17/letter-president-war-powers-resolution-regarding-iraq> [<http://perma.cc/6XZA-EHPN>]; *Letter from the President—War Powers Resolution Regarding Iraq*, WHITE HOUSE, Sept. 5, 2014, <http://www.whitehouse.gov/the-press-office/2014/09/05/letter-president-war-powers-resolution-regarding-iraq> [<http://perma.cc/V3HZ-ZTPF>]; *Letter from the President—War Powers Resolution Regarding Iraq*, WHITE HOUSE, Sept. 8, 2014, <http://www.whitehouse.gov/the-press-office/2014/09/08/letter-president-war-powers-resolution-regarding-iraq> [<http://perma.cc/2U39-DPK9>].

222. Barack Obama, *Statement by the President on ISIL*, WHITE HOUSE, Sept. 10, 2014, <http://www.whitehouse.gov/the-press-office/2014/09/10/statement-president-isil-1> [<http://perma.cc/Z24V-BAQG>].

support to local government militaries, sophisticated and collaborative counterterrorism strategies with global partners, and continued humanitarian aid to affected civilian populations.²²³ In a White House background conference call held before the President's address, a senior administration official stated:

[T]o be clear, we do not believe the President needs [a] new authorization [from Congress] in order to take sustained action against ISIL. We believe that he can rely on the 2001 AUMF as statutory authority for the military airstrike operations he is directing against ISIL, for instance. And we believe that he has the authority to continue these operations beyond 60 days, consistent with the War Powers Resolution, because the operations are authorized by a statute.²²⁴

It has been the view of the Obama administration that the 2001 AUMF does not apply to all terrorist organizations, but only those linked to the September 11 attacks or associated forces.²²⁵ Jeh Johnson, current Secretary of Homeland Security and former General Counsel to the Department of Defense, defines an "associated force" as a group that is "(1) an organized, armed group that has entered the fight alongside al Qaeda, and (2) is a co-belligerent with al Qaeda in hostilities against the United States or its coalition partners."²²⁶

While it is not questioned that ISIL was once an associated force of al Qaeda, the designation seemingly no longer applies since al Qaeda has purposefully distanced itself from ISIL.²²⁷

223. David Hudon, *President Obama: "We Will Degrade and Ultimately Destroy ISIL"*, WHITE HOUSE BLOG, Sept. 10, 2014, <http://www.whitehouse.gov/blog/2014/09/10/president-obama-we-will-degrade-and-ultimately-destroy-isil> [http://perma.cc/5FPN-V4S6].

224. *Background Conference Call on the President's Address to the Nation*, WHITE HOUSE, Sept. 10, 2014, <http://www.whitehouse.gov/the-press-office/2014/09/10/background-conference-call-presidents-address-nation> [http://perma.cc/MU9V-APPH].

225. Jeh Johnson, Address at Yale Law School, *National Security Law, Lawyers and Lawyering in the Obama Administration*, COUNCIL ON FOREIGN RELATIONS, Feb. 2, 2012, <http://www.cfr.org/defense-and-security/jeh-johnsons-speech-national-security-law-lawyers-lawyering-obama-administration/p27448> [http://perma.cc/E3QN-A7PP].

226. *Id.*

227. Liz Sly, *Al-Qaeda disavows any ties with radical Islamist ISIS group in Syria, Iraq*, WASH. POST, Feb. 3, 2014, http://www.washingtonpost.com/world/middle_

Press Secretary Josh Earnest stated the administration formed the view that the AUMF continued to apply to ISIL as an associated force of al Qaeda based on ISIL's prior history and name "al Qaeda in Iraq;" continued similarity of operatives and fighters since the public split; perpetuation of the same barbaric acts and tactics as al Qaeda; and the ideology of both ISIL and al Qaeda to establish an Islamic caliphate.²²⁸

President Obama may also rely on the 2002 AUMF in Iraq as an alternative authorization at least in part for the military operations in Iraq.²²⁹ This legal analysis turns on the question of whether the fight against ISIL is a continuation of the original war or the start of a new one.²³⁰ Given that President Obama's administration has publicly stated the Iraq AUMF is "no longer used for any U.S. government activities and the Administration fully supports its repeal,"²³¹ it is a difficult proposition to rely on its authority now. New York University law professor Ryan Goodman finds "the theory 'a stretch' and 'politically awkward' because . . . it amounted to a concession that Mr. Obama 'was unsuccessful in closing out the conflict.'"²³²

As discussed, President Obama has asserted that he has the statutory authority to move forward with military operations against ISIL. However, in his address to the nation he called on Congress to support the action²³³ and senior administration of-

east/al-qaeda-disavows-any-ties-with-radical-islamist-isis-group-in-syria-iraq/2014/02/03/2c9afc3a-8cef-11e3-98ab-fe5228217bd1_story.html [http://perma.cc/3RYC-L9KF]. As of November 2014, there are reports that Al-Qaeda and ISIL have once again joined forces. Polly Mosendz, *Report: ISIS Reaches Agreement with Al-Qaeda*, NEWSWEEK (Nov. 14, 2014), <http://www.newsweek.com/isis-islamic-state-iraq-syria-oil-jihad-terrorist-terrorism-284533> [http://perma.cc/7PXY-ES93].

228. *Press Briefing by Press Secretary Josh Earnest, 9/11/2014*, WHITE HOUSE, Sept. 11, 2014, <http://www.whitehouse.gov/the-press-office/2014/09/11/press-briefing-press-secretary-josh-earnest-9112014> [http://perma.cc/L2DB-GFQP].

229. Zeke J. Miller, *White House: Iraq War Vote Obama Opposed Could be Used for ISIS Strikes*, TIME, Sept. 13, 2014, <http://time.com/3362683/obama-isis-iraqi-syria-war-aumf/> [http://perma.cc/UK7P-254V].

230. Charlie Savage, *Obama Sees Iraq Resolution as a Legal Basis for Airstrikes, Official Says*, N.Y. TIMES, Sept. 12, 2014, <http://www.nytimes.com/2014/09/13/world/americas/obama-sees-iraq-resolution-as-a-legal-basis-for-airstrikes-official-says.html> [http://perma.cc/J7BC-DYWV].

231. Miller, *supra* note 229.

232. Savage, *supra* note 230.

233. Obama, *supra* note 222.

ficials have suggested that this may be accomplished through a new authorization for use of military force.²³⁴

Under the *Youngstown* tripartite scheme of executive branch power, the President is at his highest level of power when he acts with statutory support from Congress.²³⁵ Relying on the 2001 AUMF and 2002 Iraq AUMF passed by Congress, President Obama believes he has the authority to act without further approval from Congress. Neither of the AUMFs have been repealed and therefore they are still good law. The Obama Administration has found a legal framework upon which to place the fight against ISIL within these statutes. It would appear the only way to halt this reliance upon the statutes is through litigation. But as discussed in this article, the justiciability of cases against the President's foreign affairs decisions is hard to overcome. Legally speaking, President Obama is within his authority as Commander in Chief, with support of the Congress, to authorize military operations against ISIL.

Politically speaking, however, it may be in the best interest of the President to ask Congress to pass a new authorization for use of military force against ISIL. This "concession" to Congress would bolster support among politicians who will be forced to fund the military actions and fall in line with the President's actions. Further, it would improve President Obama's image that he does not support the separation of powers doctrines through refusing to consult with Congress on major foreign actions.

The arguments for and against the President's authority to authorize air strikes are all set out above. From my perspective, the President's strongest argument is one of self-defense. Three Americans have already been beheaded and there is no indication ISIL will not strike again against American interests. No person, group, or country can be allowed to brazenly kill American citizens. There must be a response, and such a response would be lawful in self-defense, provided that the response is proportionate and symmetrical.

234. *Background Conference Call on the President's Address to the Nation*, *supra* note 224.

235. *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 635–36 (1952).

C. CIA Torture Report

On December 9, 2014, the Senate Intelligence Committee released a 528-page report detailing numerous interrogation techniques used by the CIA on detained terrorism suspects.²³⁶ The report labels as torture many enhanced techniques, including sleep deprivation, prolonged periods in stress positions, and waterboarding, and blames the program for the death of at least one detainee and the rise of major psychological and behavioral issues in others.²³⁷ Further, the report finds that the CIA routinely overruled officer requests to end the use of such techniques²³⁸ and misled the White House and Senate concerning the actual number of detainees subjected to enhanced techniques throughout the life of the program.²³⁹

While the report is questionable in its accuracy,²⁴⁰ it brings to light the important issue of how much power the executive branch solely should wield on issues such as the use of enhanced interrogation techniques on detainees. In this case, lawyers at the Department of Justice approved the legality of the program based in part on the understanding that the techniques were effective. The CIA managed and oversaw the program beginning in late 2001. Congress was notified of the program in September 2002, although information was restricted to only the chairman and vice chairman of the Senate Intelligence Committee until September 2006.²⁴¹ The release of the report has raised many questions: Should the executive branch have reached out for congressional approval before the program was initiated? Should the White House have provided more oversight over the CIA, or should the oversight role belong to Congress? How should the courts view the report and

236. *Committee Study of the Central Intelligence Agency's Detention and Interrogation Program*, Senate Select Committee on Intelligence (Dec. 9, 2014), available at <http://www.nytimes.com/interactive/2014/12/09/world/cia-torture-report-document.html> [<http://perma.cc/FFT4-T4WS>].

237. *Id.* at 114.

238. *Id.* at 44.

239. *Id.* at 15.

240. The accuracy of the report is questionable because it was prepared by staffers based only on internal memos and reports without interviewing any of the key players at the CIA, Justice Department, or White House at the time the program was authorized, and was signed only by Democrats on the Committee.

241. *CIA Detention and Interrogation Report*, *supra* note 236, at 5–6.

the actions of those who performed a role in the creation and management of the CIA program?

As a member of the Bush Administration during that time, I was involved in discussions relating to the legality of the tactics when applied under strict guidelines, including the supervision of experienced interrogators and qualified medical personnel. The Department of Justice issued multiple legal opinions focusing on our legal obligations under domestic and international law. The United States entered into one important obligation derived from the Convention Against Torture during the Reagan Administration.²⁴² Before this time, there was no domestic law outlawing torture. The Convention required every country that entered into the treaty to pass a law outlawing torture, which the United States did by outlawing the intentional infliction of severe physical or mental pain or suffering.²⁴³ However, what is often overlooked is that the Convention Against Torture prohibits two separate levels of conduct; one is torture, and the other is “cruel, inhuman and degrading treatment.”²⁴⁴ The treaty did not require any country to outlaw this second level of conduct, so there is no domestic criminal statute that makes it unlawful to engage in cruel, inhuman, and degrading treatment. Nonetheless, for cruel, inhuman, and degrading treatment, the United States applies the Fifth Amendment “shocks the conscience” test as the legal standard applicable to the interrogation of suspected terrorists regarding future terrorist attacks under the Convention Against Torture.²⁴⁵

In analyzing whether techniques like waterboarding, nudity, and sleep deprivation violate our domestic law against torture, Department of Justice lawyers analyzed whether or not the acts were considered torture and whether they were cruel, inhu-

242. 18 U.S.C. §§ 2340–2340A (2012).

243. *Id.*

244. Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment art. 16, Dec. 10, 1984, 1465 U.N.T.S. 85.

245. Memorandum for John A. Rizzo, Acting General Counsel, Cent. Intelligence Agency, from Steven G. Bradbury, Principal Deputy Assistant Attorney General, Re: Application of the War Crimes Act, the Detainee Treatment Act, and Common Article 3 of the Geneva Conventions to Certain Techniques that May Be Used by the CIA in the Interrogation of High Value al Qaeda Detainees 29 n.28 (July 20, 2007), available at <http://www.justice.gov/sites/default/files/olc/legacy/2009/08/24/memo-warcrimesact.pdf> [<http://perma.cc/GRL3-U76U>].

man, or degrading.²⁴⁶ This distinction between these levels of conduct is often lost to the general public. Thus, a technique may be viewed by the general public as cruel, inhuman, or degrading, but it might not necessarily constitute torture under domestic law. Furthermore, the technique would not be considered cruel, inhuman, or degrading if given the totality of circumstances, it does not shock the conscience. Thus, these acts would not violate our international obligations under the Convention Against Torture.

Today we know that congressional leaders were briefed on CIA actions and on the relevant legal guidance from the Department of Justice.²⁴⁷ We also know from a briefing by CIA Director John Brennan that CIA personnel in certain instances did not follow Justice Department guidelines.²⁴⁸ Finally, we know that Senator Feinstein, former Chair of the Senate Intelligence Committee, has introduced legislation to prohibit the use of enhanced interrogation techniques going forward.²⁴⁹

There are several lessons from all this. First, when our nation is under attack and lives are at risk, there is tremendous pressure to get information. Abuses will occur during wartime in spite of legal guidance and restrictions. Given this, is it dangerous to place so much authority and discretion in the executive branch with respect to national security? Are we better off as a nation with Senator Feinstein's legislation? The second lesson is that any executive branch official involved in a controversial program—however well intentioned—will likely see his or her actions scrutinized and second guessed. It is uncomfortable and may be unfair, but that is part of public service. Every public of-

246. Memorandum for John A. Rizzo, Senior Deputy General Counsel, Cent. Intelligence Agency, Re: Application of United States Obligations Under Article 16 of the Convention Against Torture to Certain Techniques that May Be Used in the Interrogation of High Value al Qaeda Detainees (May 30, 2005), available at <http://www.justice.gov/sites/default/files/olc/legacy/2013/10/21/memo-bradbury2005.pdf> [<http://perma.cc/6M4P-7K5C>].

247. *CIA Detention and Interrogation Report*, *supra* note 236, at 5.

248. Eric Bradner, *John Brennan defends CIA after torture report in rare press conference*, CNN (Dec. 12, 2014, 7:45 AM), <http://www.cnn.com/2014/12/11/politics/john-brennan-defends-cia-after-torture-report/> [<http://perma.cc/WC53-8YUC>].

249. Alex Rogers, *Feinstein to Introduce Anti-Torture Legislation*, TIME, Jan. 6, 2015, <http://www.time.com/3654577/dianne-feinstein-torture-bill/> [<http://perma.cc/PAS7-4ESD>].

ficial must do the best he or she can with the available information and guidance, and be willing to accept the consequences.

However, the legality of the CIA program is only one piece of this analysis. After it was decided that the program could move forward under the laws of the United States, it was then up to the CIA to manage the program and ensure that all actions taken stayed within the parameters of the law. The question of whether the White House should have provided oversight to the program lends itself to, in my opinion, a simple answer: Oversight of the CIA program was not a function of the White House once the program was approved. Whether or not the CIA followed the Justice Department's guidance was the responsibility of the CIA's senior leadership, inspector general, and general counsel.

As to that, the CIA Report alleges that there was virtually no oversight of the program even within the CIA. According to the report, those who went beyond the legal parameters went unpunished, and those who questioned the use or instrumentalities of the program were not heard.²⁵⁰ It is here that further congressional oversight and an ex-post review by the judiciary could provide accountability for executive branch agencies and reassure the American public. By being required to consistently report to congressional committees concerning controversial programs, the agency is motivated to stay within the bounds of the law. Such a system need not compromise our national security; because these programs involve some of our nation's most sensitive secrets, there should be harsh consequences for congressional members or staff who compromise classified information.

Furthermore, Congress and the American public must understand that certain interrogation techniques, while they may seem to cause some suffering, may nevertheless be lawful and necessary in these dangerous times. In appropriate cases where our national security can be protected, an ex-post review by the judiciary can determine the legality of the actions based on a full understanding of the circumstances. This level of review would force those authorizing the techniques to consider whether their choices would be upheld under judicial scrutiny. Mistakes and miscalculations will always be made in the war

250. *CIA Detention and Interrogation Report*, *supra* note 236, at 44.

against terror, but greater oversight from Congress and judicial review in appropriate circumstances can ensure that we learn from those mistakes and avoid them in the future.

IV. CONCLUSION

During my tenure at the White House, and then later at the Justice Department, I had numerous conversations with President Bush regarding his legal authority to take actions to protect our country. I advised the President that in a time of war or other emergency, the American people would expect him to defend us. That was his job. President Bush was not a lawyer, but he was curious about his authority to order surveillance, detention, interrogations, intelligence collection, economic sanctions, and the use of force. I never sensed that he wanted to expand presidential power for the sake of accumulating power or aggrandizing himself or the presidency. In my judgment, he wanted to know the limits of his power because we were confronting a dangerous threat and, while we would not go beyond legal limits, he would order executive branch actions to the limits of his authority, if necessary.

The Framers of the Constitution established a government of separate powers with the goal of checking the power of each of the branches to prevent tyranny, in particular tyranny by the executive branch. In the past, accountability was viewed as more important than flexibility. While both clearly remain important today, in my judgment the balance has tilted towards the need to be flexible. To be sure, however, accountability remains important, meaning that the legislative and judicial branches have to step up and discharge their constitutional duties, not to second guess national security policy but to validate separation of powers.

Many of the traditional concepts of the executive's role in national security remain consistent today. However, because of the scope of the September 11 attacks and the spread of terrorism around the world, the authority of the executive branch has expanded as necessary to deal with new types of threats. These new threats do not always adhere to traditional notions. The next attacker is likely to look like an American citizen, speak perfect English, and be able to travel freely within our borders. She will be trained and indoctrinated over the Internet. Today's en-

emies live in the shadows; their primary weapons will likely not be guns and bullets, but cyber warfare and biological terror.

The idea of a President with expansive, seemingly unchecked power to respond to these new threats should be uncomfortable for any citizen who loves freedom, particularly when the potential cost of a bad decision is billions of dollars and the lives of our most precious assets—our young men and women in uniform. However, the thought of leaving decisions demanding quick answers to Congress or the courts when those same lives are at stake is no less disturbing. The country needs a leader to be decisive, especially in the area of national security. In times of emergency, this is simply the primary responsibility Congress cannot perform with the same speed, agility, and force as the executive branch. The courts are likewise unable to respond with the same effectiveness. The case studies above demonstrate the need for flexibility to respond to rapidly changing events. This is not to say that we should set aside our fears of the concentration of power in one branch of government. To the contrary, we must always be vigilant for the possibility—even likelihood—of tyranny when so much power resides in one individual.

Under the appropriate circumstances, and when time permits, Congress should insist on prior consultation. Congress must engage in vigorous oversight and be unafraid to question executive action and to test the assumptions that drive executive decisions. Further, the courts must be willing to provide a forum to test the presumption of validity in favor of executive action. Additionally, a vibrant and skeptical press is essential in discouraging unfavorable behavior, exposing government wrongdoing, and educating the public. Finally, the American people must continue to elect to Congress members with the courage to demand accountability from the executive branch—even those from their own political party. Hopefully the American people will always elect Presidents of integrity and character who will not abuse power for personal or political gain, Presidents who understand the need for accountability to ensure the survival of this Republic. But in case we do not, Congress and the courts must be there to step into the breach in defense of liberty.