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NATIONAL SECURITY RULES: AMERICA'S CONSTITUTION OF LAW AND WAR

Kyle L. Greene

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NATIONAL SECURITY RULES: AMERICA'S CONSTITUTION OF LAW AND WAR

Kyle L. Greene*

ABSTRACT

Contemporary debates over the appropriate allocation of war powers between the political branches overemphasize the rigidity of the Constitution's framework. This style of academic discussion sacrifices the lessons of practice in search of steadfast, yet empty, principles. Even beyond the practical failings of this approach, there is no constitutional basis for the notion that either Congress or the President has a singular, fixed role when dealing with national security issues.

In fact, the Founders developed a constitutional structure capable of continually reshaping—within parameters—the government's division of national security power to match the nation's security challenges. Rather than scouring the constitutional text and the historical record for a concrete legal dictate on congressional or presidential supremacy, we should instead look to text, history, and structure for guidance on how the political branches can legitimately and affirmatively negotiate their emergent responsibilities.

This Article does exactly that, beginning with the capacious and forward-looking text of the Constitution and then analyzing actions taken by the political branches during the early years of the nation, the Civil War, and the mid-20th century. No easy answers appear, but certain consistent rules and best practices emerge that demonstrate the Constitution's power to cohere American law and strategy. That is, as long as our elected leaders are up to the task.

I. INTRODUCTION

*Ense petit placidam sub libertate quietem.*¹

The founding generation had just finished fighting a war when they ordained and established our new nation's Constitution, and war was never far from the minds of the men who wrote that enduring and generative text. Accordingly, the Constitution enacted a cohesive geostrategy grounded in the preservation of: (1) geographically isolated political union to defend American liberty from foreign threats, and (2) a hybrid federal-state military under the control of civilian leadership to preserve that liberty from domestic despotism.² Yet the Constitution also endorsed a flexible legal order that could effectively carry out American geostrategy going

* J.D., Columbia Law School, 2020; B.A., University of Massachusetts, 2016. Thank you to the many people who have helped me to think more carefully and clearly about the law. For this Article, I owe a particular debt to the excellent teaching and scholarship of Akhil Amar and Matthew Waxman, and to the invaluable writing of Philip Bobbitt.

1. "[This hand] seeks with the sword a quiet peace under liberty." *The History of the Arms and Great Seal of the Commonwealth of Massachusetts*, SEC'y OF THE COMMONWEALTH OF MASS., <https://www.sec.state.ma.us/pre/presea/sealhis.htm> [<https://perma.cc/R2UM-BE6V>] (last visited Apr. 12, 2021).

2. See AKHIL REED AMAR, *AMERICA'S CONSTITUTION: A BIOGRAPHY* 44-51 (2005).

forward. The Constitution divides national security powers between the political branches according, approximately, to each branch's comparative advantage over the other, but it provides no rigid, textual algorithm to decide just how far those powers reach or what to do when they overlap. Therefore, the Founders—although particular about the appropriate geostrategic framework for their day—did not set down so ironclad a set of legal rules and restrictions that future protectors of the nation and Constitution would be unable to adapt to changed strategic realities.

The Founders' geostrategic plan faced intense pressures during the early decades of the nation's existence, but the basic premises of their national security strategy—and the key elements of the accordant legal order established by the Constitution—proved solid. However, as the Founders expected, America's geostrategic position has evolved in dramatic ways throughout the long years from 1788 until today. As the decades turned into centuries, looming threats to the domestic security of the American people have become increasingly varied and catastrophic.³ At the same time, America's national interests have become increasingly global and complex.⁴ It would have been impossible to meet these substantial challenges to American national security with the exact constitutional order of the late 1700s, and, thankfully, the nation's strategy and law have both been characterized by growth rather than stasis.

Over time, therefore, the rough division of responsibilities between the President and the Congress has been continually reformed in response to the external impositions of shifting threats and sudden catastrophes. These events often spur the President to act in forceful and novel ways, but nonetheless to act with an eye toward the many congressional and judicial counterweights that ensure a continued equilibrium of security and democracy under the Constitution.⁵ This dynamic—occurring primarily between the political branches and constrained by text and structure—is a *constitutional* process of national security calibration that legitimately incorporates geostrategic avulsion into an evolving legal order. It reflects the Founders' careful coordination of Revolutionary War-era geostrategy with constitutional law and their decision to provide a versatile, adaptable legal structure capable of recreating such calibrated coordination in the future.⁶ And it has

3. PHILIP BOBBITT, *TERROR AND CONSENT: THE WARS FOR THE TWENTY-FIRST CENTURY* 86 (2008) ("New strategic threats are arising owing to the proliferation of WMD and long-range delivery systems that make every state, whether it has nearby enemies or not, and whether its borders are otherwise secure, vulnerable. . . ."). Bobbitt points out additional threats to civilians, including cyber, biological, and radiological weapons. *Id.* at 99.

4. *See, e.g.*, ANDREW KENT & JULIA DAVIS MORTENSON, *THE CAMBRIDGE COMPANION TO THE UNITED STATES CONSTITUTION* 283 (Karen Orren & John W. Compton eds., 2018) ("Partly [the increase of presidential unilateralism] came in response to massively increasing stakes and complexity of modern foreign policy.").

5. *See* DAVID J. BARRON, *WAGING WAR: THE CLASH BETWEEN PRESIDENTS AND CONGRESS 1776 TO ISIS* 426 (2016) ("[P]residents have time and time again recognized the danger . . . that inheres in the idea that decisions about the conduct of war are theirs alone to make. And so they have struggled to find ways to conduct war that have not depended on the view that they possess uncheckable war time powers.").

6. Or as another graduate of Columbia Law School put it:

It has been said that the [C]onstitution marches. That is, there are constantly new applications of unchanged powers, and it is ascertained that in novel and complex

limits.⁷ If either the President or Congress deviate too far from good-faith participation in the process, then the other political branch can choose to abandon its own collaborative posture by invoking core constitutional war powers, petitioning the courts for assistance, or turning to the electoral check of public opprobrium.

Even if this iterative process sounds plausible as a conceptual description of how constitutional national security has evolved, actionable insights only emerge from a more careful examination of American history. One must, therefore, analyze how specific episodes of national security stress have driven the process of constitutional calibration forward. The entire breadth of that story is well beyond the scope of a single article. Instead, this Article makes an incremental contribution to our collective knowledge by analyzing key events and ideas from three influential periods: early America, the Civil War, and the post-World War II 20th century.

Each of these periods posed momentous national security problems, and this Article looks at what happened—to America and to the Constitution—during each. I argue that, apart from the continued relevance and application of a few core powers, the efficacy of national security law has been maintained and renewed through presidential and congressional participation in an interbranch constitutional process that attempts to match the strategic context of the moment with a corresponding division of national security powers and responsibilities.⁸ Although my focus necessarily involves discussing the normative valence of specific actions, the point is not to take a red pen to history and grade how America handled each event that I come across. The point is to sharpen our understanding of the process that has, in practice, guided the political branches as they cohered war, security, law, and the Constitution throughout American history.

In Part II, I engage closely with the text of the Constitution and sketch out the Founders' original vision of geostrategy and national security. In Part III, I highlight early moments in American history that challenged and reinforced this picture, and I caution against drawing anachronistic lessons about presidential or congressional predominance from this period. In Part IV, I delve into the complex and fraught issues of the Civil War and describe how it led to the first tectonic changes in the process of constitutional calibration, creating constitutional upheavals that continue to shape today's national security landscape. In Part V, I take up events following World War II and analyze how the obligations and options associated with America's

situations, the old grants contain, in their general words and true significance, needed and adequate authority. So, also, we have a fighting [C]onstitution.

Charles E. Hughes, *War Powers Under the Constitution*, 2 MARQ. L. REV. 1, 18 (1917) (emphasis omitted).

7. Although I admit that a statement like “[w]hen national emergencies strike, the executive acts, Congress acquiesces, and courts defer” might sketch a rough outline of the constitutional process, such an account fails to reflect the many law-sensitive considerations each participant carefully engages with. Posner and Vermeule, the quoted authors, downplay legality in favor of “rationality.” ERIC A. POSNER & ADRIAN VERMEULE, *TERROR IN THE BALANCE: SECURITY, LIBERTY, AND THE COURTS* 3-5 (2007). But our constitutional system deserves, and demands, much more than mere contingent rationality.

8. With this approach, I hope to strike a path around the war powers debate that is typically traveled by more committed pro-Congress or pro-Executive scholars. That debate has so far proved interminable, which one should expect when the resolution up for debate—“To which branch did the Constitution ultimately assign the predominant role in war?”—is one that the Constitution, wisely, gave no answer to.

status as a global superpower have strained the traditional framework of constitutional national security. Finally, in Part VI, I conclude the Article with some reflections and discuss whether modern political and strategic developments have finally overwhelmed the ability of this constitutional process to effectively update the nation's legal order.

II. CONSTITUTIONAL GEOSTRATEGY AND COMPLEMENTARY GOVERNMENT POWERS

America is subject to a considerable array of paternal claims, but her midwife was undoubtedly war. Naturally, the Founding Fathers were fixated on national security. Many of the principal goals of the Constitution, as listed in the document's vigorous Preamble, were relevant to national security⁹: to “provide for the common defence, promote the general Welfare, and secure the Blessings of Liberty.”¹⁰ The text, history, and structure of the Constitution together demonstrate that the Founders' plan to secure America against external threats depended on the three pillars of political unity, territorial integrity, and naval force. Fully interwoven with this vision of defense against foreign threats, the Founders' Constitution simultaneously sought to create a military apparatus that would fulfill its defensive purpose without raising the specter of domestic, military tyranny. But how to do so? Instead of relying on a large and powerful standing army, the Constitution vested Congress with the power to “raise and support Armies” with funding that could last “no more than two Years[,]”¹¹ and a more open-ended power to “provide and maintain a Navy”¹² with no term limits on appropriations. The particular verbs and nouns chosen—“provide and maintain a Navy” against “raise and support Armies” (Armies!)—pointed to a permanent, preferred naval force and temporary, successive land forces. Any resulting deficit of land troops could be met by Congress “calling forth the Militia”¹³ as needed to enforce the laws or put down rebellion. Thus, there is a well-organized plan in Article I for defending the nation by using the navy—and calling out the state militias as a secondary resort¹⁴—rather than by depending on a perpetual, national land army.¹⁵

In several of the early Federalist Papers, the strategic and structural logic behind the textual preference for navy over army was developed at greater length and directly linked to the Founders' strong focus on national unity. Alexander Hamilton and John Jay warned that disunity between the states would be a sufficient predicate

9. See, e.g., HAROLD HONGJU KOH, *THE NATIONAL SECURITY CONSTITUTION: SHARING POWER AFTER THE IRAN-CONTRA AFFAIR* 74 (1990) (“From the beginning, our Constitution has been obsessed with the idea of national security . . .”); AKHIL REED AMAR, *AMERICA'S UNWRITTEN CONSTITUTION* 27 (2012) (describing John Marshall's analysis in *McCulloch v. Maryland* that “[t]he central purpose of the Constitution was to safeguard national security”).

10. U.S. CONST. pmb1.

11. U.S. CONST. art. I, § 8, cl. 12.

12. U.S. CONST. art. I, § 8, cl. 13.

13. U.S. CONST. art. I, § 8, cl. 15.

14. See FEDERALIST NO. 29 (Alexander Hamilton) (“To render an army unnecessary [by maintaining a well-regulated militia], will be a more certain method of preventing its existence than a thousand prohibitions upon paper.”).

15. See FEDERALIST NO. 41 (James Madison) (“Next to the effectual establishment of the Union, the best possible precaution against danger from standing armies is a limitation of the term for which revenue may be appropriated to their support.”).

for a fearful and jealous mood to arise on the continent, inexorably leading to standing land armies¹⁶ and foreign alliances¹⁷ as the states sought to protect themselves against one another. Powerful standing armies would, in turn, lead directly to a diminution of personal liberties and rights wherever those armies existed.¹⁸ Therefore, if the several states in America wished to avoid internecine conflict on the continent and the collapse of civil and political liberties within their borders, they would need to unite and jealously preserve the strength of their union. Then, the United States of America could enjoy the benefits of a navy-guarded island nation like Great Britain: “An insular situation, and a powerful marine, [to guard] it in great measure against the possibility of foreign invasion [and] supersede the necessity of a numerous army within the kingdom.”¹⁹ In summary, the Founders thought that if America could remain a stable political union with territorial control over the continent, then the Atlantic Ocean and the American navy could easily handle any external threats without the nation needing recourse to a liberty-threatening standing army.²⁰

The legal order that the Founders paired with this strategic plan divided civilian control over national security powers and the military between Congress and the President. Congress, through the specific enumerations of Article I, was primarily given *constitutive* national security powers: the sort of powers necessary to create, fund, and regulate the military.²¹ Some of these creative powers—to raise armies, maintain the navy, and nationalize the state militias in certain circumstances—were already discussed above. These military-specific funding powers are a specialized instantiation of Congress’s greater power of the purse, often its most potent tool for

16. See FEDERALIST NO. 8 (Alexander Hamilton) (“But standing armies, it may be replied, must inevitably result from a dissolution of the Confederacy. Frequent war and constant apprehension, which require a state of constant preparation, will infallibly produce them.”).

17. See FEDERALIST NO. 5 (John Jay) (“Considering our distance from Europe, it would be more natural for these [independent] confederacies to apprehend danger from one another than from distant nations, and therefore that each of them should be more desirous to guard against the others by the aid of foreign alliances, than to guard against foreign dangers by alliances between themselves.”).

18. See FEDERALIST NO. 8, *supra* note 16 (“The violent destruction of life and property incident to war . . . will compel nations the most attached to liberty to resort for repose and security to institutions [standing armies] which have a tendency to destroy their civil and political rights.”).

19. *Id.*; see also FEDERALIST NO. 4 (John Jay) (“[U]nion and a good national government . . . will tend to repress and discourage [war]. That situation consists in the best possible state of defense . . .”).

20. George Washington would re-articulate the logic of the Federalist Papers in his farewell address to the nation: “[A]ll the parts [of the country] combined cannot fail to find in the united mass of means and efforts greater strength, greater resource, proportionably greater security from external danger, [and] a less frequent interruption of their peace by foreign nations” all without the “necessity of those overgrown military establishments, which under any form of government are inauspicious to liberty, and . . . [especially] hostile to Republican Liberty . . .” George Washington, Washington’s Farewell Address (Sep. 19, 1796).

21. It is worth noting that, when one moves from focusing on war to national or homeland security writ large, additional congressional powers also have important national security implications. For instance, the interstate Commerce Clause vests Congress with broad power to regulate a vast array of activities with spillover effects that traverse federal or state borders. Or, consider what the Necessary and Proper Clause portends for gap-filling legislative power when Congress has already been vested with powers to declare war and raise armies.

setting national policy related to security²² or other issues.²³ In addition to its straightforwardly creative powers, Congress also has enumerated regulatory powers over the military—“[t]o make Rules for the Government and Regulation of the land and naval Forces”²⁴—that afford Congress prospective, attenuated control over even day-to-day military structures and activities. Finally, Congress’s most obvious national security power is the body’s much-debated ability to “declare War” and thereby commit the nation to an all-out conflict.²⁵

In contrast, the Constitution gave the President a set of *directory* national security powers: the sort of powers necessary to superintend, manage, and command the nation’s security apparatus. The Articles of Confederation had previously vested these traditionally executive powers over foreign affairs with the Continental Congress, but the plodding, multi-member body had been ill-suited for their exercise.²⁶ The new Constitution recognized the need for a more energetic wielder of executive power, and thus created the office of the President to ensure that a single, active commander had ultimate control over the armed forces.²⁷ Still, the President’s powers are less clearly defined in the Constitution’s text and so their contours—more dependent on structural, historical, and prudential considerations—appear both more expansive and more fragile than those of Congress.²⁸

Nonetheless, the solid text of several Article II provisions stands out. First, no discussion of presidential powers can take place without noting that the President—vested with the “executive Power”²⁹—is broadly and ultimately responsible for carrying out the laws of the United States and keeping the nation running.³⁰ Next, pursuant to Section I of Article II, the President must swear an oath to “faithfully execute the Office of President” and “preserve, protect, and defend the

22. JOSH CHAFETZ, CONGRESS’S CONSTITUTION: LEGISLATIVE AUTHORITY AND THE SEPARATION OF POWERS 74 (2017) (“Congress has, in fact, repeatedly used its power of the purse to end, limit, or forestall military action.”).

23. *See id.* at 66 (“[I]t is a mistake to think about the congressional power of the purse solely in terms of Congress’s power to determine spending levels. Control over spending also provides Congress with significant leverage to use in negotiations over other policies . . .”).

24. U.S. CONST. art. I, § 8, cl. 14.

25. U.S. CONST. art. I, § 8, cl. 11. This clause also includes the power to incorporate the civilian fleets of America into armed naval service through letters of marque and reprisal, which fits neatly with the rest of Congress’s constitutive powers and suggests that the Framers intended Congress to be able to commit U.S. forces to conflict short of declaring total war.

26. *See* Saikrishna Prakash & Michael Ramsey, *The Executive Power over Foreign Affairs*, 111 YALE L.J. 231, 277-78 (2001).

27. *See* FEDERALIST NO. 70 (Alexander Hamilton) (“Energy in the Executive . . . is essential to the protection of the community against foreign attacks . . .”); FEDERALIST NO. 74 (Alexander Hamilton) (“Of all the cares or concerns of government, the direction of war most peculiarly demands those qualities which distinguish the exercise of power by a single hand.”).

28. Speaking of this phenomenon at the macrolevel of the Constitution, Amar writes: “Thanks to its gap and silences, Article II in effect delegated authority to the political branches to negotiate more concrete settlements.” AMAR, AMERICA’S CONSTITUTION, *supra* note 2, at 197.

29. U.S. CONST. art. II, § 1, cl. 1.

30. Barrels of ink have been spilled writing about the extent of the President’s Article II executive power, which contains no restrictive qualification—as do Congress’s Article I legislative powers—to those powers “herein granted” in the rest of the text. I see little hope that I could advance the debate much by dwelling on it here, and the ideas and arguments in this Article do not depend on a particularly polarized view of the quantum of power granted by the Executive Vesting Clause.

Constitution.”³¹ There is a contested argument that this language grants the President additional, affirmative powers as necessary to fulfill the oath, but it is more plausible that the oath instead provides a firm ground for the President to lawfully decline to execute unconstitutional legislative action.³²

The language of Section II is a crucial addition to the President’s national security role. It appoints the President as the “Commander in Chief of the Army and Navy of the United States [and of the State Militias when called into service,]”³³ which at least indicates the President’s authority to prosecute war by deploying troops and making tactical decisions during conflict,³⁴ but says little about precisely when that command authority begins or ends.³⁵ However, it can be safely stated that the President’s command authority is activated if Congress declares war or the nation suffers a sudden attack.³⁶ Finally, in Section III, yet another provision—that the President “take care that the laws be faithfully executed”³⁷—arguably gives the President an additional grant of broad authority to undertake whatever measures are needed to ensure federal laws are enforced. But, on a more cautious reading, the Take Care Clause instead obligates the President to interpret and execute duly-enacted constitutional laws on behalf of Congress and to use his available *existing* powers to overcome any barriers to that fruitful execution.³⁸

31. U.S. CONST. art. II, § 1, cl. 8.

32. See AMAR, AMERICA’S CONSTITUTION, *supra* note 2, at 178-80 (describing that presidential fidelity to the oath and the Constitution could lead the President to properly decline to execute an unlawful statute); Presidential Authority to Decline to Execute Unconstitutional Laws, 18 Op. O.L.C. 199, 200 (1994).

33. U.S. CONST. art. II, § 2, cl. 1.

34. The Commander in Chief power, juxtaposed against the congressional power to “declare war,” is often described as the power to “make war.” See, e.g., DARREN WHEELER, CONGRESS AND THE WAR ON TERROR: MAKING POLICY FOR THE LONG WAR 5 (2018) (“[The Commander in Chief power] can, at a minimum, be safely described as the ability to make war.”).

35. The decision to vest the tactical power to “make war” with the executive rather than the legislative branch was a conscious amendment, proposed by James Madison and Elbridge Gerry, to earlier drafts of the Constitution. The Framers wanted to ensure that the nation could act with the speed necessary to repel a sudden attack. Yet it was just as conscious a decision to leave the power to “declare war” with Congress. See LOUIS FISHER, PRESIDENTIAL WAR POWER 6-7 (1995).

36. There is no doubt that the President can unilaterally spring into action when the nation is attacked. AMAR, AMERICA’S CONSTITUTION, *supra* note 2, at 188 (“The power to direct America’s professional troops entailed, at a minimum, authority to deploy these men to repel sudden invasions, even in the absence of prior legislative authorization.”). I would add to this only that there is at least some form of authorization for even this fundamental form of defensive action—the existence of professional troops to deploy. See also U.S. CONST. art. IV, § 4 (“[The United States] shall protect each of [the States] against Invasion.”). The Article IV protective obligation that the United States owes to the states is a clear indication that the President and military might be constitutionally required to respond to attacks even without congressional pre-approval. Still, one should not exaggerate the scope of implied presidential emergency powers by overinterpreting how energetic the office was meant to be or how far the executive power and Take Care Clause reach. After all, while “inherent” emergency powers can undoubtedly be located in constitutional design, history, practice, etc., such powers are not defined expansively—or expressly at all—in the text.

37. U.S. CONST. art. II, § 3.

38. This is a stronger reading of the clause and has essentially the inverse import of the Oath of Office. Where the oath *permits* the President *not* to execute unconstitutional laws, the Take Care Clause *requires* the President to execute constitutional laws. At times, this might require assertive, even

Armed with the Founders' geostrategic vision and the relevant text of the Constitution, it is possible to make some initial observations about the basic rules of constitutional national security. Congress—in light of its specific constitutive powers of creation, appropriation, and regulation—is responsible for making foundational, *ex ante* decisions about the capabilities and structure of American military forces. This authority dominates national security up until the moment when a conflict actually breaks out. After the nation is embroiled in conflict—whether through congressional authorization or the President's response to an attack—the enumerated congressional role largely subsides to the borders of the regulations it had previously passed, whatever ongoing appropriations decisions it has to make, and any lawful proscriptions that it can still impose. Meanwhile, the President—in light of his general directory powers of superintendence, management, and command—has only a restrained role to play during peacetime. But when the nation is engaged in conflict, the President, now fully engaged in the office of Commander in Chief, obtains broad discretion to prosecute the conflict as he sees fit—as long as he continues to act in the interest of the nation and its laws.

There is a great deal of clarity in this textual scheme. In practice, however, these powers do not operate in such sharp isolation from one another, and the President and Congress typically have reverberating opportunities to coordinate with and respond to one another. Still, the President appears likely to possess an advantage in decisiveness and finality. Congress, although in charge of forging additional national security capabilities for the President to use, has difficulty controlling their use once finished. When it comes to the *use* of those capabilities, the President often moves first—reacting to any sudden attacks and emergencies—and always moves last—deciding if, when, and how to actually make use of the options that Congress develops.³⁹

However, this analysis does *not* mean that the President enjoys unchecked power to act in the name of national security or that the President will prevail in every dispute with Congress (or the courts).⁴⁰ Even if the relative structure of the Constitution creates a more assertive and active executive than it does a legislature, it remains certain that the President has “no legal source of authority except those

unilateral, actions on behalf of the federal government, but whatever the President does must still stem from a legitimate, constitutional basis.

39. Cf. Philip Bobbitt, *War Powers: An Essay on John Hart Ely's War and Responsibility: Constitutional Lessons of Vietnam and its Aftermath*, 92 MICH. L. REV. 1364, 1390 (1994). Bobbitt writes that “[a]s a structural matter, Congress has the first and last word. It must provide forces before the President can commence hostilities, and it can remove those forces, by decommissioning them or by forbidding their use in pursuit of a particular policy at any time.” *Id.* at 1391. But Bobbitt continues, “once Congress has provided such forces, however, they are the President’s to command so long as they are used to enforce the laws and treaties of the United States . . . the President may validly commit U.S. forces without further returning to Congress for fresh mandates beyond those given by statutes.” *Id.* at 1391-92.

40. Academic separation of powers analysis often reasons from textual powers—with some carefully selected originalist gloss—right to a discussion of whether Congress or the President should have the upper hand in a direct, interbranch conflict. But, as this Article describes, the structure, the historical practice, and the strategic practicalities of implementing the Constitution are more often the determinative factors. See, e.g., H. JEFFERSON POWELL, TARGETING AMERICANS: THE CONSTITUTIONALITY OF THE U.S. DRONE WAR 32 (2016) (discussing that text, while incontestable, provides no definitive rubric for every constitutional decision).

created by and within the constitutional system.”⁴¹ Thus, while the President can use the office’s constitutional and statutory authority for many and various ends, he must always plausibly identify the authority supporting his actions and publicly defend the legality and wisdom of the chosen course.

In the long-run, only this forthright behavior will ensure that Congress—and the public—continue to preserve and provide security capabilities for the President to use. The most contentious and difficult questions for the nation’s legal order arise, therefore, when the factual predicates of the Constitution’s geostrategic plan cease to apply but Congress has not yet corrected the resulting fracture between world and law. Then, the political branches must scramble to align strategy with legality, and the potential for discord between Congress and the President is most pronounced.⁴² It is in these instances—increasing in urgency and discordance over time—that the process of constitutional calibration is fully tested and critically important.

III. EARLY AMERICAN PRACTICE

The nation’s early history is littered with illustrative events that provide insight into the Founders’ geostrategic and constitutional vision.⁴³ Due to the individuals involved in these events, and their nearness in time to the ratification of the Constitution, these occasions elucidate the implicit rationale and structure embedded in the text of the Constitution. The presidential practice of the era is particularly informative. This Article considers three examples: (1) George Washington and the Whiskey Rebellion, (2) John Adams and the Quasi-War with France, and (3) Thomas Jefferson and the nation’s first conflict with the Barbary pirates. If there is a theme that captures this era, it is that the process of constitutional calibration led to a national security practice that *satisfied* congressional constraints and *amplified* presidential powers. While the nation’s early presidents were careful to respect their constitutional obligations to act lawfully and defer to the exercise of congressional authority, they nonetheless consistently emerged as the dominant force in national security decision-making.⁴⁴

A. George Washington and the Whiskey Rebellion

George Washington’s response to the Whiskey Rebellion of 1794 is a textbook exemplar of the political branches using the flexibility of the Constitution to reallocate national security power from the legislature to the executive branch.

After Congress passed an excise tax on distilled whiskey in 1791, a small rebellion began to ferment in western Pennsylvania. Soon enough, farmers began to

41. *Id.* at 47-48.

42. “Is this kind of system sufficient?” is an alluring but unhelpful question. One might wish that a nation of laws could establish an *ex ante*-certified legal response for each potential state of the world. But if we exhausted every ream of paper on the planet, we would still have failed to extend the reach of our function to next Wednesday. Perhaps an artificial intelligence with extraordinary superhuman powers will one day be capable of the task. Until then, our nation of laws will depend on sound judgment and forthright justification, as it always has.

43. See KOH, *supra* note 9, at 77 (arguing that despite America’s geographic separation from European powers in the early years of the Republic, “foreign sovereigns inevitably began to breach the cordon sanitaire” and “it quickly became apparent that the Congress was poorly structured to respond”).

44. *Id.* at 77-81.

violently resist tax collectors and other federal agents.⁴⁵ Although the resistance was limited, the federal government worried that it might take root and spread to nearby rural areas.⁴⁶ Washington employed a light touch with the insurgents for several years, but he began to take a more aggressive approach in 1794. Relying on the Calling Forth Act of 1792—which allowed the President to call out the militia of the several states to enforce the federal laws when resistance consisted of “combinations too powerful to be suppressed by the ordinary course of judicial proceedings”⁴⁷—Washington brought out militiamen from Pennsylvania, New Jersey, Virginia, and Maryland to suppress the rebels.⁴⁸ Recall that Article I of the Constitution gives Congress the power to call forth the militia;⁴⁹ thus, the Calling Forth Act of 1792 was a notably quick delegation of this authority to the President. Washington, acting faithfully to the other branches in return, obtained judicial approval before calling forth the militia and sought legislative reauthorization for the militia deployment when Congress was back in session in full compliance with the requirements of Section 2 of the Act.⁵⁰

Following the Whiskey Rebellion, Congress reenacted the time-limited 1792 Calling Forth Act as the 1795 Militia Act. The 1795 revisions to the original Act made the delegation permanent and removed the requirement that the President first obtain judicial approval before calling forth the militia, leaving the decision of whether there was a qualifying situation to the discretion of the President.⁵¹ This interactive series—congressional delegation to the President, followed by presidential adherence to statutory limits,⁵² and then even further delegation to the President—is a powerful display of the political branches jointly developing legal innovations that better address security concerns and strategic needs.

B. John Adams and the Quasi-War

The actions taken by John Adams and Congress during the 1798 Quasi-War represent another interesting set of back-and-forth constitutional maneuvers.

45. FISHER, *supra* note 35, at 16-17.

46. *Id.*

47. Calling Forth Act of 1792, ch. 28, § 2, 1 Stat. 264, 264 (expired 1794).

48. Stephen I. Vladeck, Note, *Emergency Power and the Militia Acts*, 114 YALE L.J. 149, 161 (2004).

49. U.S. CONST. art. I, § 8, cl. 15.

50. Vladeck, *supra* note 48, at 160-61.

51. *Id.* at 162. Additionally, the 1795 Act removed the requirement that the President only call out militias from states other than the location of the resistance when Congress was not in session, and it removed the requirement that the President publish a proclamation that he intended to call out the militia prior to actually doing so. *Id.*; see Militia Act of 1795, ch. 36, §§ 2-3, 1 Stat. 424, 424 (repealed and superseded by statute in 1903).

52. In one respect, however, Washington did act without receiving express congressional approval. Given that Washington called forth the militia and brought it into the field with Congress out of session, there was no funding allocated for that specific mission. Thus, Washington used funds that had been appropriated for the army instead. Washington immediately reported this to Congress upon the militia's return, and Congress commended him and granted the necessary appropriations. Richard D. Rosen, *Funding “Non-Traditional” Military Operations: The Alluring Myth of a Presidential Power of the Purse*, 155 MIL. L. REV. 1, 104 (1998). This particular interaction between the President and Congress is an early and important precedent for the type of actions that Lincoln would take at the outset of the Civil War.

Tensions flared between America and revolutionary France after the United States took up a friendlier posture toward Great Britain with the Neutrality Proclamation and 1794 Jay Treaty. French naval forces soon began to attack and seize American ships engaged in trade with Britain, and the old Franco-American friendship rapidly deteriorated.⁵³ Adams, lacking a sufficient naval force to defend against the French and fearful of further escalation, turned to Congress and asked the legislature to provide him with the forces necessary to meet this aggression.⁵⁴ Pro-French Republicans in Congress initially resisted the military buildup and pressured the Adams administration to release the contents of its private negotiations with France, but those papers—many of them penned by future Chief Justice John Marshall—revealed the arrogance of the French negotiators and incited public passions in the direction of war.⁵⁵

Over the course of the next few years, Congress—without ever declaring war—authorized John Adams to raise additional military units, purchase additional gunships, set up the Department of the Navy, and respond to the escalating problem with the French.⁵⁶ But Congress was wary of ceding too much control to the President. The statutes included specific terms to limit the scope of the conflict, proscribing the newly-created naval forces from use except in “particular sorts of actions against French vessels, in particular locations, for particular purposes.”⁵⁷

Two interpretations of the Quasi-War with France—relying on similar substance but contrasting in their focus—are often offered. One emphasizes that Congress never declared a war, but John Adams nevertheless prosecuted one.⁵⁸ The second emphasizes that Congress passed several statutes initiating and limiting the scope of war, limits that Adams and the courts deferred to.⁵⁹ At this point, there is no necessary tension between the two factually accurate descriptions. But they quickly begin to diverge. The Quasi-War, given an adversarial framing by modern academics, turns into a study of which of the political branches has relatively more

53. GORDON S. WOOD, *EMPIRE OF LIBERTY: A HISTORY OF THE EARLY REPUBLIC, 1789-1815*, at 239 (David M. Kennedy ed., 2009).

54. *Id.* at 240 (“President Adams called a special session of Congress . . . [and] urged a buildup of American military forces, especially the navy.”).

55. See JOEL RICHARD PAUL, *WITHOUT PRECEDENT: JOHN MARSHALL AND HIS TIMES 169-81* (2018).

56. See David J. Barron & Martin S. Lederman, *The Commander in Chief at the Lowest Ebb: A Constitutional History*, 121 HARV. L. REV. 941, 964-67 (2008). At times during the Quasi-War, Congress—especially Federalists in Adams’s own party—took an even more aggressive stance toward France than the President himself. See William Michael Treanor, *Fame, the Founding, and the Power to Declare War*, 82 CORNELL L. REV. 695, 749-52 (1997).

57. Barron & Lederman, *supra* note 56, at 967.

58. See John C. Yoo, *The Continuation of Politics by Other Means: The Original Understanding of War Powers*, 84 CALIF. L. REV. 167, 292 (1996) (“The Quasi-War further supports the conclusion that a declaration of war was not understood as necessary for authorizing combat. . . . Not seeking a declaration was a deliberate decision of President John Adams As we have seen, the Framers left the crucial decisions in war to the President . . .”).

59. See FISHER, *PRESIDENTIAL WAR POWER*, *supra* note 35, at 17-18 (“Much has been made of the President’s authority to engage the country in undeclared wars, such as the “quasi-war” with France . . . but the reference to the war in France is clearly false. Congress debated the prospect of war openly and enacted a number of bills to put the country on a war footing. . . . In authorizing war, Congress may place limits on what Presidents may and may not do.”).

potent constitutional powers to dictate the contours of war. Either affirmative answer ends up unhelpfully heavy-handed.⁶⁰ The precedent of the Quasi-War is better understood by beginning with a more prosaic question about what actually took place: Did Congress and the President exercise their powers counter to each other until one branch won out over the other, or did the two branches reach a cooperative posture and develop a robust and lawful national response?

As discussed previously, Congress's main powers are constitutive. Meanwhile, the nation's 1798 military apparatus was meager. Thus, the statutes passed by Congress—although imposing legal limits—were substantial affordances of practical power to President Adams.⁶¹ One might call this a show of congressional preeminence, but Congress was able to impose legal limits on Adams only in concert with the clearly constitutive, pro-executive decision to create the military that Adams had requested. Or one might call it a show of presidential preeminence, but the President's newfound *de facto* command over military forces was dependent on a specific, demanding exercise of congressional constitutive powers. So, a more even-handed synthesis: the Quasi-War did not subtly reveal which branch has the predominant constitutional powers. Instead, it showed the legislature and executive exercising their relative competencies: Congress creating and the President commanding.

Beyond that, the Quasi-War shows how the exercise of those competencies is affected by context. If the object of command is only available to the President when Congress first creates bespoke forces, then we can expect that congressional influence on the range of command choices available to the President will be heightened. Furthermore, the Quasi-War demonstrated the vitality of the constitutional process that was implicit in the text and fast becoming explicit through practice. The President recognized an emerging threat to the nation, Congress and the public agreed that the President needed more options to meet that threat, and so Congress cautiously created additional military forces for the President to command.⁶²

The President, in good faith, made use of those capabilities and respected their limits.⁶³ The Quasi-War evinces that, from the start, the Constitution has encouraged the executive and legislative branches to be active participants in a collaborative process of national security calibration rather than locked in a constitutional wrestling match.⁶⁴ We should not overemphasize the partisan aspects of the Quasi-

60. Especially those who describe the Quasi-War in unflinchingly pro-Congress terms. *See, e.g.*, Louis Fisher, *Basic Principles of the War Power*, 5 J. NAT'L SEC. L. & POL'Y 319, 329 (2012) ("The Quasi-War of 1798 underscored the primary authority of Congress over war."). Contrary to Fisher, I believe the Quasi-War underscores the primary authority of Congress over a particular *aspect* of war—creating and funding military forces.

61. *See generally* BARRON, *supra* note 5, at 41-53. Barron writes that Congress originally kept firm ownership over its "right to declare war" by "simply refus[ing] to create a military." *Id.* at 43. Congress realized, and worried, that granting Adams's request for a "large-scale military establishment" to contest the French would give him the ability to choose war "in practice if not in law." *Id.* at 44.

62. *Id.* at 52-53 ("Together, the new laws created an intricate legal framework of power but also constraint.").

63. *Id.* at 53 ("Adams and his men did their best to navigate the legal maze.").

64. This collaborative spirit is visible even after the courts were called in. The judiciary had its first moment in the national security sun during the Quasi-War, and it approved of both the nation's

War response in order to draw ill-fitting conclusions about relative constitutional supremacy and ‘settle’ the score of modern debates.

C. Thomas Jefferson and the Barbary Pirates

A third, and for present purposes final, case study of early national security practice features the nation’s third president. Thomas Jefferson was a distinct constitutional interpreter. His approach to the Constitution was avowedly historical⁶⁵ rather than textual, in contrast with Justice Story.⁶⁶ And Jefferson was interested in individual clauses rather than overall structure, in contrast with Justice Marshall.⁶⁷ Jefferson’s constitutional approach, in sum, purported to care more about what particular words *meant* and much less about what the whole of the text *did*. Further, Jefferson, writing to his friend and ally James Madison in 1789, praised the new Constitution for its “effectual check to the Dog of war by transferring the power of letting him loose from the Executive to the Legislative body.”⁶⁸ So, out of all our Founding Father presidents, one would most expect Jefferson to recoil from participation in an interbranch “constitutional process” that went beyond the simple, stable powers he understood to exist in the original document.

But Jefferson, as President, was not quite so austere a Commander in Chief. Pirates from the Barbary States of North Africa—Tunis, Tripoli, Morocco, and Algiers—had long plagued the commercial conduct of merchants in the Mediterranean Sea.⁶⁹ In the period before Jefferson came into office, the policy of the United States had been to pay tribute to these nation-state pirates (privateers) in

capacity to wage war without declaring war and Congress’s power to define the scope of such a war. In the leading case of *Little v. Barreme*, the Court held an American naval captain liable for damages for following an executive branch order to attack ships going to *or from* French ports in contravention of Congress’s authorization to attack ships only going *to* French ports. 6 U.S. (2 Cranch) 170 (1804). But Congress, in keeping with the collaborative spirit of the Quasi-War, responded to this decision by passing a statute that indemnified Captain Little for his misdeeds.

65. Specifically, Jefferson’s approach to the Constitution was historical in the sense of the constitutional modalities. PHILIP BOBBITT, *CONSTITUTIONAL FATE: THEORY OF THE CONSTITUTION* 7 (1982) (“*Historical argument* is argument that marshals the intent of the draftsmen of the Constitution and the people who adopted the Constitution.”). Many associate this mode of analysis with originalism. Then, Jefferson is the original originalist.

66. JOSEPH STORY, 1 *COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES* § 407, n.8 (1833) (“[Jefferson’s] second canon is, ‘On every question of construction [we should] carry ourselves back to the time, when the constitution was adopted; recollect the spirit manifested in the debates; and instead of trying, what meaning may be squeezed out of the text, or invented against it, conform to the probable one, in which it was passed.’ Now, who does not see the utter looseness, and incoherence of this canon. How are we to know, what was thought of particular clauses of the constitution at the time of its adoption? . . . The people adopted the constitution according to the words of the text in their reasonable interpretation, and not according to the private interpretation of any particular men.”)

67. See AMAR, *UNWRITTEN CONSTITUTION*, *supra* note 9, at 22-31 (describing Marshall’s “trademark brand of holistic analysis” exemplified by his decision in *McCulloch v. Maryland*); POWELL, *supra* note 40, at 26-31 (“In addressing [*McCulloch v. Maryland*], Jefferson presupposed that the answer could only be found through a clause-by-clause examination.”).

68. Letter from Thomas Jefferson to James Madison (Sept. 6, 1789), in 15 *THE PAPERS OF THOMAS JEFFERSON* 392-98 (Princeton Univ., eds., 1958). Note however, that this remark was in reference to Congress’s appropriations power rather than its declare war power. *Id.*

69. See WOOD, *EMPIRE OF LIBERTY*, *supra* note 53, at 634-36.

exchange for the unmolested passage of its ships.⁷⁰ Even when tribute demands ballooned to consume twenty percent of the federal budget, the Adams administration continued to pay rather than fight back.⁷¹

Jefferson disapproved of this passive tact, and he assumed presidential office ready to switch strategies.⁷² In short order, the President dispatched a squadron of gunships across the Atlantic Ocean without obtaining specific congressional authorization for the mission.⁷³ Some scholars claim that Jefferson's actions were nothing more than restrained defensive measures⁷⁴ and that he later had to be compelled by Congress to take on the pirates in a committed, aggressive fashion.⁷⁵ Yet this eagerly pro-Congress view misses the forest through the trees. Jefferson—an originalist with an avowedly skeptical view of the executive branch—sent gunships across the Atlantic to battle against North African pirates without congressional authorization as soon as he had the power to do so: the power of the presidency. One can certainly call this defensive, as Jefferson did in public. But it was a notable innovation in defensive action that brought executive branch-initiated, global deployments of military force within the ambit of national defense.

The history of political branch machinations during the conflict with the Barbary pirates makes almost no sense from the perspective of a modern reader searching for the victor in an interbranch competition. A Republican President came to office dissatisfied with the Federalist administration's policy of appeasement and sent out gunships without obtaining congressional authorization. But, because the President was acting too defensively, Federalists in Congress soon pounced on the President's reticence and forced Republicans in Congress to grant him additional powers. It is as if every other word has been randomly generated.

This bizarre political narrative returns to the realm of sensibility if the First Barbary War is viewed as a sequential, executive-driven response to new strategic developments rather than a breadcrumb indicating presidential or congressional war powers supremacy. First, the two strategic developments that prompted Jefferson to act as he did: (1) Congress had created a more robust standing navy during the Adams administration, and (2) American economic interests now required the global deployment of U.S. forces in order to rebuff increasingly rapacious predators.⁷⁶

Second, Jefferson exaggerated how defensive a stance he had asked the naval

70. *Id.* at 635-36.

71. *Id.* at 636.

72. *Id.* (“President Jefferson came to office . . . apparently determined to change American policy.”).

73. See Alex J. Whitman, *From the Shores of Tripoli to the Deserts of Iraq: Congress and the President in Offensive and Defensive Wars*, 13 U. OF PA. J. CONST. L. 1363, 1375 (2011).

74. See FISHER, PRESIDENTIAL WAR POWER, *supra* note 35, at 27 (“For purely defensive operations, Jefferson retained the right to act first and seek congressional approval later.”).

75. See *id.* at 25 (“Hamilton believed that Jefferson had defined executive power too narrowly.”); WOOD, EMPIRE OF LIBERTY, *supra* note 53, at 637 (“The Federalists, led by Hamilton in the press, pounced on this reluctance and forced the Republican Congress in 1802 to grant the president authority to use all means necessary to defeat the Tripolitan pirates.”).

76. See WOOD, EMPIRE OF LIBERTY, *supra* note 53, at 634 (“[Before America's independence, it] had been protected by the British flag. But with independence, America's merchant ships became easy prey for these Barbary pirates.”).

forces to take in a performative show of fidelity to Congress.⁷⁷ Third, Congress responded positively to this display of restraint by expressly authorizing Jefferson to “fully equip, officer, man, and employ such of the armed vessels of the United States as may be judged requisite” and to “instruct the commanders of the respective public vessels aforesaid to subdue, seize, and make prize of all [Tripoli ships and assets.]”⁷⁸ This was, yet again, a delegation of Congress’s constitutional powers to the President. Jefferson, just like Washington and Adams before him, accrued additional legal powers and military capacities to deal with a novel threat to the nation because he highlighted his faithful acquiescence to congressional authority.

In total, these three early examples demonstrate several of the early features, and outcomes, of the Constitution’s national security order. The political branches—starting from their core constitutional powers and comparative advantages—collaborated more than they clashed, and they used the flexibility afforded by the Constitution to augment the presidential role. As previously summarized, the period was characterized by presidential practice that *satisfied* congressional limits and *amplified* executive power. Congress did not rely on its power to declare war as an on-off switch, and the body’s most debated and crucial decisions were over whether it should create and fund forces.

Congress repeatedly ceded its control over war by providing the President military forces to command and even by delegating its creative powers directly to him. In addition, presidents took defensive actions—a broader category than simply repelling direct foreign attacks on the continent—without specific congressional pre-approval or even funding. Nonetheless, these expansions of presidential power were accompanied by careful adherence to exacting and specific congressional authorizations. Partisans of the executive or legislative branch might be able to pull this or that flashy quote or example to support a broad, polarized reading of textual *powers*. But the straightforward precedent of the era is that the logic and structure of the Constitution enabled, even demanded, political branch participation in a collaborative *process* focused on prudently addressing new threats—a process that yielded a more active executive.

IV. THE CIVIL WAR: THE EXISTENTIAL CHALLENGE OF INSURRECTION

The story of the Civil War is undoubtedly a story of slavery, federalism, and the original sins of the Constitution. But there is also no doubt that the Civil War was the single greatest threat to the Founders’ national security vision in American history. The security of America had been built on the foundational precept of a unified nation set safely apart from the rest of the world’s major powers across the vast Atlantic Ocean. Yet, suddenly, there was an existential threat to America rampaging within its own borders. Just as shocking, this internal threat came not from the overreach of a despotic military junta but from a gathering coalition of

77. Abraham D. Sofaer, *The Power Over War*, 50 U. MIAMI L. REV. 33, 44 (1995) (“Jefferson claimed [to Congress] that . . . under the Constitution, [the naval captain] could not go beyond the line of defense Jefferson’s Cabinet felt that America was authorized to act offensively if attacked by vessels of a State that declared or made war upon the United States Jefferson’s statement [to Congress] was therefore factually erroneous and legally baseless.”).

78. Act of Feb. 06, 1802, ch. 4, § 1-2, 2 Stat. 129, 129-30.

rebellious states. Thus, the syllogistic strength of the Constitution's original geostrategic conclusion fell apart as the Civil War rendered its premises false.

As the Constitution's geostrategic plan faltered, it became apparent that a minimal conception of its wartime legal order—comprised of orderly and static distinctions between those few powers which were clearly vested with Congress or the President—was likewise insufficient.⁷⁹ The Civil War accelerated the participation of the political branches in the process of recalibrating national security powers and firmly supplemented the minimal conception with additional legal tools:⁸⁰ aggressive executive branch use of pre-existing legislation, the capacity for the President to act as a temporary agent of Congress in certain situations, and robust presidential emergency defense powers. These tools are all variations of the same theme: if a substantial threat apprehends the nation when Congress has not yet used its constitutive powers to address the threat, then it is appropriate for the President—due to the active design of that office—to *bridge the gap* between those constitutive shortfalls and the President's own directory powers. Although the Civil War prompted vast legal developments, these developments were rooted in the Constitution's text, in early American practice, and in the recognition that law and war must remain mutually reinforcing constitutional partners.

Unfortunately, the story of presidential action and the Civil War begins before Abraham Lincoln enters the picture. James Buchanan, in office from 1857 to 1861, was a notoriously ineffective Commander in Chief. Buchanan was recklessly passive, and his passivity allowed the emboldened pro-slavery South to gather strength throughout his term.

Buchanan's executive reticence reached an apex during the critical, feeble months at the end of his presidential tenure. During this crucial time, the executive branch convinced itself that it was enough to simply proclaim secession illegal while refusing to take any actions to resist it.⁸¹ When South Carolina seceded in December 1860, Buchanan made essentially no defense of the union and stood by as rebels laid siege to Fort Sumter.⁸² If actions were in short supply, so too were words. The most forceful statement Buchanan could muster about the situation as he left office was

79. See KENT & MORTENSON, *supra* note 4, at 272 (“The existential crisis of the Civil War and expansive constitutional vision of the presidency held by Abraham Lincoln inaugurated a new era in executive-congressional relations and a new approach for the executive toward the problem of authorization [for the use of military force].”).

80. See generally JAMES G. RANDALL, CONSTITUTIONAL PROBLEMS UNDER LINCOLN (1926). Randall described three archetypical positions in the Civil War era war powers debate: (1) those who thought a “strict interpretation... should be adopted which would disallow many of the measures taken by the Government,” (2) those who thought “the Constitution is not operative during such a crisis as the Civil War[,]” and (3) those who thought the Constitution remained binding but “sanctions extraordinary powers.” *Id.* at 30-31. Randall ends this section by writing: “[i]t would be safe to sum up the prevailing views of our judges by saying that the war powers are entirely consistent with the Constitution, and that these war powers include all that is essential to the nation’s preservation.” *Id.* at 33.

81. BARRON, *supra* note 5, at 129 (“[Attorney General] Black and Buchanan clung to the view that the cautious strategy they had pursued was wise. Secession remained illegal as a matter of official policy.”).

82. Although Buchanan—under threat of an exodus of pro-Union members from his cabinet—refrained from ordering Major Anderson to abandon Fort Sumter, he “refused to retaliate when a steamer sent to supply Anderson was turned away under fire.” *Id.* at 123-27.

directed against the North. Buchanan accused abolitionists of inciting slave revolts, and conspiracy theories that repeated the charge soon swept across the South.⁸³ Buchanan's timidity and sectional partiality demonstrate the danger of a President who fails to react to urgent strategic developments and scrupulously denies the opportunities for executive vigor in our constitutional system.⁸⁴

And then came Abraham Lincoln. By the time he took office in March of 1861, seven states had already purported to secede from the Union. Lincoln, in his ringing First Inaugural, defended the great and perpetual nature of the United States of America and emphasized his duty as President to make sure that its law would be faithfully executed, even in the South.⁸⁵ Still, Lincoln showed restraint, offering the gathering Confederacy a final chance to peaceably return to the beneficial embrace of the Union.⁸⁶ But when Lincoln attempted to send provisions to the besieged federal troops at Fort Sumter, militiamen from South Carolina stormed the outpost before the provisions could arrive and forced the Union garrison to surrender.⁸⁷ April was not yet halfway through, and the Civil War was joined. Congress was out of session at the time, enjoying its customary spring recess. Thus, the nation's survival fell to Lincoln and, through a series of crucial actions, he both saved the Union and initiated a drastic, executive branch-centered recalibration of constitutional national security.⁸⁸

President Lincoln's first move was to supplement the woefully underprepared U.S. military with additional fighting men. The day after Fort Sumter fell, Lincoln called forth 75,000 militiamen to help suppress the secessionist states.⁸⁹ His April 15th proclamation decried the belligerence of the rebels and named their refusal to allow the laws of the United States to be executed a "combination[] too powerful to be suppressed by the ordinary course of judicial proceedings."⁹⁰ In the same proclamation, Lincoln requested that Congress meet for an emergency session on

83. JOHN FABIAN WITT, *LINCOLN'S CODE: THE LAWS OF WAR IN AMERICAN HISTORY* 201 (2012).

84. See DANIEL FARBER, *LINCOLN'S CONSTITUTION* 94-99 (2003) (calling the Buchanan administration's analysis, which concluded that armed opposition to secession was unconstitutional, "simply untenable—less defensible, even, than secessionism").

85. Abraham Lincoln's First Inaugural (Mar. 4, 1861). After arguing that the "union is perpetual," Lincoln continued on to say that:

acts of violence, within any State or States, against the authority of the United States, are insurrectionary or revolutionary, according to circumstances. I therefore consider that, in view of the Constitution and the laws, the Union is unbroken; and to the extent of my ability I shall take care, as the Constitution itself expressly enjoins upon me, that the laws of the Union be faithfully executed in all of the States.

Id.

86. *Id.* ("The Government will not assail *you*. You can have no conflict without being yourselves the aggressors. . . . We are not enemies, but friends. We must not be enemies.")

87. FARBER, *supra* note 84, at 116.

88. A recalibration that was foreseen at least by Hamilton, who from the beginning argued that "the energy of the Executive is the bulwark of the national security." FEDERALIST NO. 70 (Alexander Hamilton).

89. Abraham Lincoln, A Proclamation (Calling Forth the Militia) (Apr. 15, 1861). See also DORIS KEARNS GOODWIN, *TEAM OF RIVALS: THE POLITICAL GENIUS OF ABRAHAM LINCOLN* 348 (2005).

90. *Id.* This is the exact language of the 1795 Militia Act, which requires the President to call forth the militia through such a proclamation. Militia Act of 1795, ch. 36, §§ 2-3, 1 Stat. 424, 424.

July 4th.⁹¹ Following Lincoln's proclamation, Simon Cameron—the Secretary of War—sent out a telegram to the various state governors citing the Calling Forth Act of 1795 as statutory authority and asking for specific troop requisitions from each state.⁹²

Lincoln's initial response to the outbreak of the Civil War was, therefore, a lawful exercise of congressionally-delegated constitutive powers. Although not following the original legal order established by the Constitution, his actions did follow the statutory national security precedents set by George Washington and the 1795 Congress after the Whiskey Rebellion.

A. Abraham Lincoln's Blockade of the South

Only a few days after calling forth the militia, on April 19th, Lincoln took further action and enacted a blockade on the southern ports ranging between South Carolina and Texas.⁹³ Shortly thereafter, he extended the blockade to encompass the ports of North Carolina and Virginia.⁹⁴ At first, one might think this blockade posed no difficult questions about the scope of presidential initiative. The authority to respond defensively to a sudden attack is at the core of the president's allotment of constitutional war powers. Furthermore, the 1807 Insurrection Act had already provided congressional authorization for the President to use "such part of the land or naval force of the United states, as shall be judged necessary" to help put down any insurrection that the militia had—pursuant to the 1795 Militia Act—been called forth to suppress.⁹⁵

But there was some difficulty. A blockade is an act of war: the type of military action typically carried out only against a foreign state as part of a full war. Enacting a blockade against the secessionist states as if they were a foreign enemy, therefore, put pressure on Lincoln's claim that the states remained in the Union and highlighted that Congress had not declared a state of war with the South.⁹⁶ The legal complexity of the Civil War was already beginning to rear its head.

Nonetheless, the President's blockade of the Confederate states was soon approved by Congress and then upheld by the Supreme Court. The President's authority to use federal war powers in response to an attack on the United States—even if lacking a congressional declaration of war⁹⁷ and facing a novel type of adversary—was firmly incorporated into the constitutional order. The 37th

91. Lincoln, A Proclamation, *supra* note 89.

92. Simon Cameron, Telegram to State Governors (Apr. 15, 1861) ("I have the honor to request [from your state] the quota designated in the table below, to serve as infantry or riflemen, for the period of three months, unless sooner discharged.").

93. WITT, *supra* note 83, at 145; FARBER, *supra* note 84, at 117.

94. WITT, *supra* note 83, at 145. The blockade was extended after Virginia and North Carolina, as well as Tennessee and Arkansas, responded to the call for militiamen by seceding and joining the Confederacy. See FARBER, *supra* note 84, at 117.

95. Insurrection Act of 1807, ch. 39, 2 Stat. 443.

96. See WITT, *supra* note 83, at 144-49.

97. As discussed earlier, the Civil War was hardly the first conflict waged without a congressional declaration of war. See, e.g., Philip Bobbitt, *Youngstown: Pages from the Book of Disquietude*, 19 CONST. COMMENT. 3, 15 (2002) ("[The Quasi-war] was fought without benefit of a declaration of war, a fact that should give some pause to those who think they have an unshakeable picture of the framers' and ratifiers' requirements on this matter.").

Congress, during its special summer session, specifically authorized the President to stop “all commercial intercourse” between secessionists and the Union;⁹⁸ further authorized him to seize all goods, merchandise, and vessels coming or leaving the Confederacy “by land or water;”⁹⁹ and even authorized him to seize “any ship or vessel belonging in whole or in part to any citizen or inhabitant of said [secessionist] State[.]”¹⁰⁰ All of these were to be enforced using any “suitable vessels” that the President thought appropriate for the task.¹⁰¹

Congress, rather than attempting to curtail the blockade, enthusiastically endorsed Lincoln’s ability to take such a measure. Near the end of the summer, Congress passed a further resolution that declared Lincoln’s pre-July actions “respecting the army and navy of the United States . . . hereby approved and in all respects legalized and made valid . . . as if they had been issued and done under the previous express authority and direction of the United States.”¹⁰² Again, we see the process of constitutional calibration at work. Despite some tension between the new threat facing the nation and the defensive options available to the political branches, an assertive presidential response forcefully rebuffed the danger and was then affirmed by Congress.

In this instance, however, Congress’s approval was likely superfluous as a constitutional matter.¹⁰³ Although Congress went out of its way to bolster Lincoln’s authority to enact blockades going forward, Lincoln maintained that the blockade was “strictly legal” from the start.¹⁰⁴ And the Supreme Court, in *The Prize Cases*,¹⁰⁵ agreed. The Court held that, as a general matter, the President was empowered—even duty-bound—to respond when the nation was attacked by a “hostile party” and thereby dragged into war.¹⁰⁶ In this situation, the Court held that war had in fact been forced upon the nation by the secessionist states.¹⁰⁷ Thus, Lincoln’s defensive blockade was constitutional.¹⁰⁸

Importantly, the Court avoided any too-clever paradoxes—such as holding that

98. Act of July 13, 1861, ch. 3, § 5, 12 Stat. 255, 257.

99. *Id.*

100. *Id.* § 6.

101. *Id.* § 7.

102. Act of Aug. 6, 1861, ch. 63, § 3, 12 Stat. 255, 326.

103. See, e.g., Geoffrey Corn, *Presidential War Power: Do the Courts Offer Any Answers?*, 157 MIL. L. REV. 180, 215 (1998) (“Unlike the cases generated by the undeclared war with France, the President derived the authority to issue the blockade orders exclusively from Article II.”). But it still matters, of course, that Congress approved of Lincoln’s use of war powers. Congress’s many military appropriations during the summer of 1861 were crucial to the war effort, and Congress might not have been nearly so forthcoming if it had disapproved of Lincoln’s blockade. See generally Act of Aug. 6, 1861, ch. 63, 12 Stat. 255.

104. Abraham Lincoln, July 4th Message to Congress (1861).

105. 67 U.S. (2 Black) 635 (1862).

106. *Id.* at 668 (“[The President] does not initiate the war, but is bound to accept the challenge without waiting for any special legislative authority . . . whether the hostile party be a foreign invader, or States organized in rebellion . . .”). See also *The Protector*, 79 U.S. (12 Wall.) 700, 702 (1871) (“[The] executive department, which may be, and, in fact, was, at the commencement of hostilities, obliged to act during the recess of Congress.”).

107. *The Prize Cases*, 67 U.S. (2 Black) at 667 (“[The Civil War’s] actual existence is a fact in our domestic history which the Court is bound to notice and to know.”).

108. *Id.* at 671 (“[T]he President had a right, *jure belli*, to institute a blockade of ports in possession of the States in rebellion . . .”).

the conflict with the secessionists could not be treated as a war unless the United States recognized the Confederate states as a sovereign nation—that would cripple the Union effort and throw the Civil War into a legal grey zone with no clear laws for the conflict at all.¹⁰⁹ The Court squarely held that the conflict with the southern states should be treated as a war for legal purposes even if the federal government continued to deny that those states had independent sovereignty.¹¹⁰ Lincoln was fully vindicated by the Supreme Court. The federal government, with the executive branch at the tip of the spear, could reject the possibility of secession and still use the full gamut of war powers to defend itself.¹¹¹

President Lincoln's aggressive decisions to call forth the militia and enact a blockade on Confederate ports were lawful outgrowths of the Constitution's vision of an energetic, emergency-ready presidency and of early American adjustments that reallocated additional powers to the President by statute. His next two steps, however, reflected a more ambitious assumption of presidential authority to step into the shoes of Congress and *create* additional, unfunded military forces.

First, on April 20th, Lincoln privately authorized a trio of expenditures with no corresponding congressional appropriation: naval commanders were permitted to purchase several steamships, the Secretary of War allowed New York state officials to transport troops and munitions, and the Treasury Secretary advanced two million dollars to private New York citizens to spend funds on necessary "military and naval measures."¹¹² Then, on May 3rd, Lincoln publicly proclaimed that "existing exigencies demand immediate and adequate measures for the protection of the [Constitution and nation.]"¹¹³ He called for 42,000 additional three-year volunteers, increased the army by more than 22,000 enlisted men and officers, and directed the enlistment of 18,000 more men into the navy.¹¹⁴ At the end of the proclamation, Lincoln wrote that these military enlargements would be "submitted to Congress as soon as assembled."¹¹⁵ Both of Lincoln's actions were boldly constitutive in nature, stepping outside the typical frame of the presidential role. Yet they are not equal in other important constitutional respects.

Crucially, President Lincoln did not disclose the April expenditures publicly either at the moment when he authorized them or to Congress when the representatives met for their special session in July.¹¹⁶ It was not until early in the

109. *Id.* at 669-70 ("[Plaintiffs] cannot ask the Court to affect a technical ignorance of the existence of a war . . . and thus cripple the arm of the Government and paralyze its power by subtle definitions and ingenuous sophisms.").

110. *Id.* at 666 ("A war may exist where one of the belligerents, claims sovereign rights as against the other.").

111. *See also, e.g.,* *Texas v. White*, 74 U.S. (7 Wall.) 700 (1868). In this, a case where the Reconstruction government of Texas sought to enjoin defendants from cashing in bonds issued by the rebel government, the Court held that Texas had never actually seceded because "[t]he Constitution, in all of its provision, looks to an indestructible Union, composed of indestructible States." *Id.* at 725-26. Therefore, Texas never became "foreign" and so the Civil War was a "a war for the suppression of rebellion." *Id.* at 726.

112. Barron & Lederman, *supra* note 56, at 1001-02.

113. Abraham Lincoln, Proclamation (Increasing the Size of the Army and Navy) (May 3, 1861).

114. *Id.*

115. *Id.*

116. Barron & Lederman, *supra* note 56, at 1001-02.

next year that Congress became fully aware of the expenditures and the secretive cabinet deliberations that had preceded them.¹¹⁷ In April of 1862, Congress censured the former Secretary of War, Simon Cameron, for, among other misdeeds, his role in the expenditures.¹¹⁸ Lincoln wrote to Congress on Cameron's behalf the next month and defended the necessity of what had been done, but he did not argue that it had been lawful: "I believe that by these and other similar measures taken in that crisis, some of which were without any authority of law, the government was saved from overthrow."¹¹⁹

Given the circumstances, there is no avoiding the conclusion that Lincoln's April expenditures were unconstitutional usurpations of congressional power and, rightfully, the type of presidential behavior that has not been adopted into the national security order. The fundamental problem is less that the President briefly infringed on a congressional prerogative and more so that he did it in a decidedly undemocratic way. The decisions were made during private cabinet discussions and then carried out through private channels that avoided congressional or public review. The process of constitutional calibration cannot be activated if one political branch works in secret to invade the core national security powers of the other—here, Lincoln invading Congress's appropriations power.

The President's unconstitutional April expenditures can be safely contrasted with his May army and navy increases. Although both acts were constitutive, the latter was done through a public proclamation with Congress out of session,¹²⁰ and Congress had an opportunity to respond soon afterwards. In this way, Lincoln was acting as a temporary agent of Congress during a moment of crisis—taking up a traditionally legislative power until Congress could ratify or reject his course of action. Still, if Congress's approval of the blockade had been more reassuring than strictly necessary, its response here was a crucial determinant of what would happen going forward. Congress took up the Lincoln line: it appropriated funds to pay arrearages to the new members of the army,¹²¹ navy,¹²² and others¹²³ for their recent service; funded those forces going forward;¹²⁴ and provided a blanket, retroactive

117. *Id.*

118. CONG. GLOBE, 37th Cong., 2d Sess. 1888 (1862). Congress voted 79-45 to censure Cameron for giving a private citizen money to purchase arms "without restriction" and entering into "a vast number of [illegitimate] contracts" on behalf of the government—conduct that was "highly injurious to the public service[.]" *Id.* It is worth noting that even this censure was later rescinded. See CONG. RECORD, 43rd Cong. 2d Sess. 2084 (1875) (rescinding the 1862 censure as "an act of personal justice to Mr. Cameron, and as a correction of [the House's] own records").

119. CONG. GLOBE, 37th CONG., 2d Sess. 2383 (1862). Lincoln elaborated that he and his cabinet had relied on private channels because they were concerned about the loyalty of public servants in Washington D.C.

120. Consider the language that Lincoln used: "[These acts] will be submitted to Congress as soon as assembled. In the meantime, I earnestly invoke the cooperation of all good citizens . . ." Lincoln, Proclamation, *supra* note 113. Lincoln's words were the model of a collaborative response.

121. Act of July 13, 1861, ch. 2, 12 Stat. 255, 255 (for pay); Act of July 17, 1861, ch. 6, § 2, 12 Stat. 255, 264 (for other logistical expenses).

122. Act of July 18, 1861, ch. 8, § 2, 12 Stat. 255, 267 (for pay and other logistical expenses).

123. Act of July 27, 1861, ch. 23, 12 Stat. 255, 279 (for "the Police organized by the United States for the City of Baltimore").

124. *Id.* § 1 (for the navy); Act of July 16, 1861, ch. 6, § 1, 12 Stat. 255, 261-64 (for the army and forts).

validation of Lincoln's actions "respecting the army and navy of the United States."¹²⁵

An observer with a strict approach to separation of powers analysis might still come to the conclusion that Lincoln acted unconstitutionally and then Congress gave him a political pass. This Article argues otherwise. It was apparent that presidents had limited constitutive powers in emergency circumstances ever since George Washington put down the Whiskey Rebellion without the benefit of congressional appropriations to do so.¹²⁶ To call all presidential use of this temporary constitutive power unconstitutional would flatten the meaningful distinctions that exist between, as we have just seen, President Lincoln's April and May actions.¹²⁷ The democratic characteristics of those actions are a world apart, and the Constitution need not be made so blind as to miss that fact.¹²⁸ In April, Lincoln acted secretly and improperly to displace Congress. In May, he acted publicly and temporarily in the stead of Congress, and the body's subsequent response allowed Lincoln's wisely chosen course to continue forward.¹²⁹

B. Abraham Lincoln's Suspension of Habeas Corpus

Finally, no discussion touching on national security, constitutional law, and the Civil War can take place without considering President Lincoln's suspension of habeas corpus. In the spring of 1861, border states between the North and South teetered on the edge of loyalty to the Union, as seen when Virginia, North Carolina, and other states responded to Lincoln's call for militiamen by themselves seceding.¹³⁰ After Virginia seceded, Washington D.C. was nearly surrounded by Confederates. The capital was tenuously connected to the rest of the Union only

125. Act of Aug. 6, 1861, ch. 63, § 3, 12 Stat. 255, 326.

126. This power was also used by Thomas Jefferson during an episode this Article does not discuss, the *Chesapeake* affair. See Rosen, *supra* note 52, at 105-07. But Rosen thinks of the power differently, writing that "President [Jefferson] acted outside the Constitution, gambling that Congress would later bless his actions." *Id.* at 107.

127. *But see* FARBER, *supra* note 84, at 137 ("Lincoln's diversion of appropriated funds does not [pass constitutional muster]. Although not quite as clear a case, the same is probably true of his expansion of the regular military.").

128. It is unhelpful to interpret the respect that Washington, Jefferson, and, here, Lincoln showed Congress while using temporary constitutive powers as proof that their actions were unconstitutional to begin with. Taking seriously the importance of process to national security powers, it is in fact their very public and scrupulous attention to legality that makes those presidents' actions constitutional. Their deference to Congress is also a sign of their wisdom; they realized Congress, with its firmer constitutive powers, could undoubtedly reverse the course each had taken if it had wanted to.

129. Today, a presidential invocation of a *constitutional* appropriations power justified by emergency would be much more suspect because Congress has already *statutorily* provided the president with flexible and/or emergency funds in many circumstances. See CONG. RSCH. SERV. REP. 98-505, *National Emergency Powers*, at 3 (updated Mar. 23, 2020) ("There are various standby laws that convey special emergency powers once the President [declares one.] In 1973, a Senate special committee [identified] 470 provisions of federal law . . ."). Congressional authorization, once again, can *create* limits.

130. FARBER, *supra* note 84, at 117.

through the border state of Maryland.¹³¹ And Maryland too was up against the sharp edge of secession. Insurgent Marylander mobs attacked Union militiamen traveling through the state and insurgent saboteurs cut train and telegraph lines.¹³²

In late April, with Congress still out of session, Lincoln ordered General Winfield Scott to suspend the writ of habeas corpus as necessary “in the vicinity of any military line . . . between the city of Philadelphia and the city of Washington.”¹³³ Pursuant to this authorization, military commanders in Maryland arrested and detained John Merryman, a Baltimore farmer and alleged secessionist militiaman, without bringing any charges against him.¹³⁴

Chief Justice Taney, sitting as a circuit judge in Maryland, attempted to take up the case. His opinion in *Ex parte Merryman* castigated Lincoln and the military after the commander of Fort McHenry—where Merryman was held—invoked the suspension of habeas corpus and refused to appear in court to produce the prisoner or justify his detention.¹³⁵ Taney wrote that the Suspension Clause was a limit on the legislative power to suspend habeas corpus that instructed Congress to use “extreme caution” before suspending the writ,¹³⁶ and that the President could absolutely not “in any emergency, or in any state of things, . . . authorize the suspension of the writ of habeas corpus.”¹³⁷ Yet Taney made no formal order of release for Merryman, instead sending copies of his opinion to Washington, D.C. and lamenting that his judicial power was “resisted by a force too strong for me to overcome.”¹³⁸ Lincoln did not answer Taney directly, but he did take up the issue of habeas corpus in his July 4th address to Congress on the first day of its special session.

In his address, President Lincoln forcefully proclaimed that the suspension had been lawful, and that, even if not, it had been a necessary, nation-preserving choice in the face of constitutional conflict.¹³⁹ Lincoln’s legal argument took a structural and prudential approach to the Constitution, layering pragmatic considerations onto the text. Given that habeas corpus could be suspended in “cases of rebellion or invasion, [when] the public safety does require it,” and that there was such a case of rebellion now, the remaining question was simply whether Congress or the President was vested with the power to enact the suspension.¹⁴⁰

Lincoln answered that the provision “was plainly made for an emergency” and that it would be illogical if suspension must wait “until Congress could be called

131. Seth Barrett Tillman, *Ex Parte Merryman: Myth, History, and Scholarship*, 224 *MIL. L. REV.* 481, 483 (2016) (“Even Washington . . . was threatened by Confederate armies, disloyal state militias . . . irregular combatants . . . disloyal civilians, assassins, and spies.”).

132. *Id.* at 483-85.

133. Abraham Lincoln, Order to Suspend Habeas Corpus Between Philadelphia and Washington (Apr. 27, 1861). This delegation was later extended, on July 2, to encompass New York to Washington. See Abraham Lincoln, Order to Suspend Habeas Corpus Between New York and Washington (July 2, 1861).

134. Tillman, *supra* note 131, at 486-87, 493.

135. See *Ex parte Merryman*, 17 F. Cas. 144, 147-148 (Cir. D. Md. 1861) (No. 9,487).

136. *Id.* at 148.

137. *Id.* at 149.

138. *Id.* at 152.

139. Lincoln, July 4th Message to Congress, *supra* note 104.

140. *Id.*

together” when the emergency might well prevent “the very assembling” of Congress.¹⁴¹ Therefore, the President himself must have the provisional power to suspend habeas corpus. In the alternative, Lincoln’s necessity argument cited the Take Care Clause, which might force him to weigh allowing all of the federal laws in the secessionist states to go unexecuted against violating the privilege of habeas corpus “to a very limited extent.”¹⁴² Lincoln further stated that the “official oath [would] be broken” if a President allowed the government to be overthrown because of rigid adherence to any “single law.”¹⁴³ His arguments thus made, he called for a congressional response—inviting Congress into the process of constitutional calibration.¹⁴⁴

If one accepts—as I do—Lincoln’s primary argument that the President can lawfully suspend habeas corpus during an emergency that prevents Congress from doing so, then one should also expect this provisional authority to expire when Congress convenes and is able to make a decision for itself. But what if Congress convenes and makes no decision?

After its July 4th session began, Congress could have acted—right then in 1861—to either support or supplant Lincoln’s suspension of habeas corpus.¹⁴⁵ Instead, Congress did neither. It was nearly two years later when Congress finally chose to support the suspension with the 1863 Habeas Corpus Act.¹⁴⁶ The intervening period between July 4, 1861 and March 3, 1863 was a breakdown in the process of constitutional calibration and interbranch cooperation, and Congress’s inaction caused a situation where Lincoln had little choice but to violate the Constitution. This dovetails neatly with Lincoln’s secondary argument that the Oath of Office and Take Care Clause might create a constitutional conflict between enforcement of the many laws and strict respect for the one law. Lincoln thought that it would be proper, if supra-constitutional, for the President to choose the many laws in that instance.¹⁴⁷

Given the arguments made in this Article, such a conflict is possible—but *not* inevitable—in the Constitution, which is flexible enough to bring constitutional legality to bear in an incredible range of extraordinary circumstances *as long as* the political branches actually participate in the national security process envisioned by the Constitution. The importance of constitutional calibration through active interbranch participation is further emphasized by what happened when Congress finally did act. Similar to many of the episodes previously discussed, eventual congressional authorization of the suspension of habeas corpus enabled Congress to

141. *Id.* This argument for executive initiative aptly describes the actual situation, where Lincoln acted to keep Maryland in the Union and preserve the nation’s capital.

142. *Id.*

143. *Id.*

144. *Id.* (“[A]ny legislation upon the subject . . . is submitted entirely to the better judgment of Congress.”).

145. See David P. Currie, *The Civil War Congress*, 73 U. CHI. L. REV. 1131, 1136-40 (2006). Currie writes about congressional deliberations during the 1861 summer session, noting that much of the “heaviest artillery” lobbed by critics of Lincoln was directed at his suspension of habeas. *Id.* In the end, Congress did not directly address habeas. *Id.*

146. Act of Mar. 3, 1863, ch. 81, 12 Stat. 255, 755.

147. The preamble supports this choice, and Art. II, § 4 provides the remedy—impeachment—if the President is adjudged to be wrong. See U.S. CONST. pmbl.; U.S. CONST. art. II, § 4.

exert *more* control over subsequent presidential conduct.¹⁴⁸ In other words, the President—and the nation—do not have the option to stand frozen on critical matters of national security. Congress, therefore, must also actively exercise its robust war powers in order to exert a sensible effect on policy and keep constitutional law afloat.

The Civil War and Reconstruction were the source of two great conceptual revolutions in the inextricably intertwined fields of rights and security. One of these revolutions is well-known in law schools and legal culture. It is the nationalist ethos of the Reconstruction Amendments and the full realization that—even in our federalist system—the most potent protector of human and civil rights is not the states, but the federal government and the federal Constitution.¹⁴⁹ The second revolution is closely connected to the first, but of less profile.¹⁵⁰ It is the upheaval of the Constitution's national security order, an upheaval that underscored the security-preserving *and* liberty-protecting role of a decisive President who will bridge the gap between constitutive and directory powers when the situation demands it.¹⁵¹ That is, as long as the President acts publicly, identifies reasonable legal grounds for his action, and affords a willing Congress the opportunity to respond by using its core powers to alter the nation's course of conduct. This latter legal revolution has not been as obviously affirmed in formal constitutional amendments or the Supreme Court's written decisions. But we should not forget that first the Civil War was fought and won, and only then did we get the Thirteenth,

148. Section 2 of the Act of March 3, 1863, required the President to submit the names of federal prisoners to the local courts. Furthermore, the executive branch was required to release prisoners if a grand jury failed to return an indictment and the prisoner swore an oath of allegiance to the Union. See ch. 81, § 2, 12 Stat. 255, 755-56. See also *supra* text accompanying note 64 (discussing *Little v. Barreme*).

149. See ERIC FONER, *FREE SOIL, FREE LABOR, FREE MEN: THE IDEOLOGY OF THE REPUBLICAN PARTY BEFORE THE CIVIL WAR* 73-83 (1995) (describing the Republican's "freedom national, slavery local" view of the Constitution); Michael Stokes Paulsen, *The Civil War as Constitutional Interpretation*, 71 U. CHI. L. REV. 691, 692 (2004) ("The War worked a fundamental transformation in the legal status of slavery under the U.S. Constitution, and it defined (some would say redefined) American federalism."). This concept of federally-ensured liberty has been central to 20th and 21st century American legal culture and rights movements. To the point that: "[I]nterference with national government function shades off into the concept of interference with rights created and protected by the national government. These concepts are bound together by the fact that the creation and protection of individual rights is the highest function of any government." CHARLES L. BLACK JR., *STRUCTURE AND RELATIONSHIP IN CONSTITUTIONAL LAW* 25 (1969).

150. See AMAR, *AMERICA'S CONSTITUTION*, *supra* note 2, at 380. Amar writes about the broad implications of the Reconstruction Amendments beyond their text. He describes "a new constitutional narrative" that encompassed the notion that "[l]iberty would no longer be automatically associated with localism" and recognized that the central government and federal army were the "heroes" of the war effort. *Id.*

151. *But see* KOH, *supra* note 9, at 85 ("As activist as Lincoln's wartime presidency was, it did not amend the National Security Constitution. For Lincoln had not exercised his power in foreign affairs against the insurrectionist southern states; instead, he had expansively employed his domestic statutory and constitutional powers."). Much of Koh's work is excellent, but I disagree with him here. Koh constructs a division between "foreign affairs" and "domestic statutory and constitutional powers" that takes Lincoln's precedents out of the realm of national security. Given what I have written about the constitutional tenets of American national security strategy and law—and the complex nature of the Civil War itself—I cannot agree that any such distinction is plausible. For example, as the blockade against the secessionist states demonstrates, the methods of nation-state war and those of domestic security were significantly blended during the Civil War.

Fourteenth, and Fifteenth Amendments.

V. THE POST-WAR 20TH CENTURY: AMERICA THE GLOBAL SUPERPOWER

Less than eighty years after the ratification of the Constitution, the Civil War disrupted American geostrategy and showed the nation that there need not be a menacing foreign foe for the United States to confront an existential threat at home. Less than a hundred years after the Civil War, America emerged from World War II as a global superpower with far-flung geostrategic interests and novel vulnerabilities at home—a boisterous nation flush with new commitments and concerns.¹⁵² In this Part, I begin by discussing a set of three critical strategic and legal developments that came about shortly after the close of World War II: (1) the growth of the U.S. military, (2) the commencement of the Korean War, and (3) the *Youngstown* decision. Then, I address how the War Powers Resolution (“WPR”)—an important framework statute passed after the Vietnam War—fits into the constitutional process of national security calibration.

The Vietnam War emphasized the extent to which Congress’s traditional national security role had been diminished by earlier 20th century strategic developments, and the WPR was the crowning statute of Congress’s effort to reestablish the body’s energy and relevance.¹⁵³ This congressional enterprise, however, should not be roundly applauded until it has been examined. Although Congress’s abstract aims were commendable, the WPR is rife with issues. Overall, this period of American national security highlighted the difficulty of finding proactive, cooperative roles for the President and Congress, as well as the dangers of failing to do so. In particular, the political branches struggled to deliver a coherent two-step solution: (1) providing the executive branch with a flexible and potent array of options to bring to bear against new strategic pressures while, (2) ensuring assertive and impactful congressional participation in the lawful exercise of those options.

A. Expansion of the U.S. Military

The first major development in the post-war 20th century was the substantial increase of the size, variety, and preparedness of the peacetime U.S. military following the close of World War II.¹⁵⁴ The novel phenomenon of a large, professional military ready to be deployed at all times undermined the key

152. This intervening period of time included World War I, World War II, and a host of other important wars, conflicts, and national security incidents as the United States grew from regional power to global superpower. Still, for the level of granularity appropriate for this Article, the course of constitutional national security can be charted without delving into events from 1865-1945.

153. See S. REP. NO. 91-129, at 7, 7-8 (1969) (“[T]he executive has acquired virtual supremacy over the making as well as conduct of the foreign relations of the United States. The principle cause has been [American involvement] in a series of crises which have revolutionized and are continuing to revolutionize the world of the 20th century.”).

154. See, e.g., Robert L. Goldich, *American Military Culture from Colony to Empire*, 140 DAEDALUS 58, 61-62 (2011). And after World War II, just as millions of men flooded into the military and stayed there, military leaders flooded out of the military into civil government and businesses. This exchange further cemented the central role of the post-World War II military in politics and society. See SAMUEL P. HUNTINGTON, *THE SOLDIER AND THE STATE* 355-66 (1957).

constitutive valve Congress had historically used to maintain preclusive control over military action: the decision whether to create military forces at all.¹⁵⁵ Presidents after World War II had a vast array of credible military options to command at any given time without, as a practical matter, needing overt congressional approval for the particular mission.¹⁵⁶

In addition, Congress, through the National Security Act of 1947, exercised its legislative powers to restructure America's national security apparatus so that it would be subject to "authoritative coordination and unified direction under civilian control."¹⁵⁷ Congress created the Central Intelligence Agency, the Air Force, and the National Security Council, and it brought the nation's now-expansive military and intelligence infrastructure squarely under the centralized control of the executive branch.¹⁵⁸ Following the passage of the 1947 Act, presidents could not only deploy the military widely but could also initiate a range of covert and tactical operations to vindicate specific national interests.

Congress—responding to the military lessons of World War II and recognizing its duty to ratify complementary legal frameworks¹⁵⁹—had purposefully provided these capabilities to the executive branch to ensure that laws would not be so "restrictive and inflexible" that they would thwart the strategic and political aims of the nation.¹⁶⁰ On the other hand, however, opponents of the 1947 Act immediately decried the measures as an abdication of Congress's constitutional role.¹⁶¹ Finally, in addition to traditional or covert armed forces, the invention of nuclear weapons further contributed to the need for and provision of greater presidential control—

155. For instance, as discussed earlier, the main source of congressional opposition to John Adams during the Quasi-War with France had been concern that expansion of the navy would undermine Congress's functional control over military actions. See BARRON, *supra* note 5, at 43 ("[The lack of a standing military] ensured that Congress retained *de facto* control over the commander in chief. With no standing forces to command, the president had no choice but to seek permission to conduct any particular military operation, big or small, that he might favor.").

156. CHAFETZ, *supra* note 22, at 74 ("[I]n many circumstances, the president's decision whether or not to go to war in the first place as well as her decision about what sort of war to prosecute are made in light of the military she has. And, of course, what kind of military she has is a function of the sort of military Congress chooses to fund.").

157. National Security Act of 1947, ch. 343, § 2, 61 Stat. 495, 496.

158. *Id.* §§ 101(a), 102(a), 207(a); see also KOH, *supra* note 9, at 101-04 ("[T]he National Security Act of 1947 formalized the principle of accountable, centralized presidential *management* of the external acts of [military and intelligence] officials.").

159. H.R. REP. NO. 80-961, at 2 (1947) ("The experiences of the war just concluded have proven conclusively that we must maintain in time of peace an adequate organization of the national defense readily adapted to the needs of war on short notice. . . . Since we are a people governed by laws and not by men. . . . One of the purposes of the bill is to give statutory effect to certain organizational features developed during the war and which have proven to be desirable. . . .").

160. *Id.*

161. The chairman of the Committee on Expenditures in the Executive Departments, Clare E. Hoffman, appended his contrasting views to the Committee Report. Hoffman wrote that:

[T]he proposed legislation does not conform to the procedure for the national defense as outlined in the Constitution. . . . It is no answer to say these new agencies . . . must come [to Congress] to implement their plans. . . . It is a matter of common knowledge that all too often the Congress and the Nation are whipped into line, compelled to support plans and policies promulgated [by the executive branch]

Id. at 7.

especially as the logic of nuclear deterrence matured.¹⁶² The rise of the executive branch in the atomic age was a conscious, cooperative reaction to new strategic demands and to the softening distinction between times of war and peace.¹⁶³

B. *The Korean War*

America's new balance of war powers was soon elaborated upon by Harry Truman. In the spring of 1950, the Truman administration produced a strategic planning document, NSC 68, to govern the nation's Cold War efforts.¹⁶⁴ The plan called for a "concerted build up" of the nation's economic, political, and particularly military strength so that the "moral and material strength of the free world" could be projected into the "Soviet world in such a way as to bring about an internal change in the Soviet system."¹⁶⁵ War—certainly, offensive war—was not the aim of this plan, but NSC 68 emphasized that America had to treat "the cold war [as] in fact a real war" and remain prepared to make remarkable investments to defend its vital interests whenever necessary.¹⁶⁶ At first, it was no certainty that Truman would adopt the conclusions of the report, but any doubt on the matter was resolved when North Korea crossed the 38th Parallel just weeks later.¹⁶⁷ North Korean troops struck a surprise blow against its southern neighbor in late June of 1950, and the President rapidly deployed troops to defend South Korea without obtaining specific congressional authority.¹⁶⁸

The State Department, in a brief memorandum written on July 3, 1950, delivered the legal rationale of the Truman administration.¹⁶⁹ In particular, the memo argued that North Korea's defiance of a pair of Article 39 U.N. Security Council resolutions posed a threat to the "peace and security of the United States."¹⁷⁰ This threat created a national interest which the President, as Commander in Chief, could lawfully act to protect.¹⁷¹ An earlier statute that had limited the President's domestic authority to deploy U.S. troops pursuant to U.N. authorization was not triggered because that statute pertained only to military support obliged by a "special agreement" with the

162. See Act of Aug. 4, 1946, ch. 724, § 6, 60 Stat. 755, 763 ("The President from time to time may direct the Commission (1) to deliver such quantities of fissionable materials or weapons to the armed forces for such use as he deems necessary in the interest of national defense . . .").

163. See Matthew C. Waxman, *The Power to Threaten War*, 123 YALE L. J. 1626, 1685 (2014) ("[The Cold War strategy] of deterrent and coercive force . . . rested on a foundation of executive-congressional collaboration and dialogue that played out over decades.").

164. See generally NAT'L SEC. COUNCIL, NSC-68: A REPORT TO THE NATIONAL SECURITY COUNCIL BY THE EXECUTIVE SECRETARY ON UNITED STATES OBJECTIVES AND PROGRAMS FOR NATIONAL SECURITY (1950).

165. *Id.* at 64.

166. *Id.* at 65.

167. See DAVID MCCULLOUGH, TRUMAN 772-75 (1992).

168. BARRON, *supra* note 5, at 296.

169. U.S. DEP'T OF STATE, DEP'T ST. BULL., PUB. NO. 3926 AUTHORITY OF THE PRESIDENT TO REPEL THE ATTACK IN KOREA 173, 173 (1950).

170. *Id.* at 177. North Korean defiance first posed a threat to the U.N.'s effectiveness, and through that to "international peace and security," and through that to the United States. *Id.* at 176-77.

171. *Id.* at 177-78 (arguing that the President's deployment of troops was "within his authority as Commander in Chief" and providing 85 past examples of when the United States "used its land and naval forces in foreign territories during peacetime").

U.N., and the deployment here was a voluntary decision by Truman.¹⁷² Although the President lacked express congressional authorization, Congress was kept abreast of Truman's intentions from the start and the war had many legislative supporters.¹⁷³ The lack of any official authorization was, to a great extent, a result of international politics and Truman's desire to avoid the appearance of a potential World War III coming so hot on the heels of World War II.¹⁷⁴ And, even more to the point, Congress overwhelmingly voted to provide appropriations for the war and renewed selective service laws so that the draft would continue to support the war effort.¹⁷⁵ Nonetheless, Congress had a relatively hands-off approach to the Korean War compared to previous conflicts of similar scale—especially with regard to initiation of the conflict.

The Korean War is yet another event supporting the proposition that major armed conflicts do not necessarily require a declaration of war, which at this point should not come as particularly surprising or troubling.¹⁷⁶ The war does, however, point to the opening of a more troublesome gulf—in time and of purpose—between the legal acts of the President and Congress. Both branches, relying on Congress's substantial constitutive actions in the years prior to the Korean War, were willing to let the war effort itself rest on vigorous presidential initiative with only minimal contemporaneous congressional input.

The war's lack of active constitutional process, therefore, cannot be attributed to a spontaneously generated imperial presidency. Although Truman contributed to an emerging shift in war powers process, his contributions were neither unprompted nor unilateral.¹⁷⁷ The infirmity of deliberative interbranch activity during the Korean War had significant strategic and structural causes, and so any remedy would need to be something more creative and practical than an undifferentiated call for greater external constraints on the President.

C. Youngstown Sheet & Tube Co. v. Sawyer

The Supreme Court did not have to grapple directly with any constitutional questions about the initiation of the Korean War, but in 1952 the Court was tasked

172. See Jane E. Stromseth, *Understanding Constitutional War Powers Today: Why Methodology Matters*, 106 YALE L. J. 845, 868-69 n.125 (1996).

173. See Barron & Lederman, *supra* note 56, at 1059 (“When Truman made his unilateral moves in Korea in 1950, there was little opposition in Congress because the legislature largely favored what he had done.”); MCCULLOUGH, *supra* note 167, at 781 (“In the Senate, Republican William Knowland called for ‘overwhelming support’ for the President from all Americans regardless of party.”).

174. See BARRON, *supra* note 5, at 298.

175. Curtis A. Bradley & Jack L. Goldsmith, *Congressional Authorization and the War on Terrorism*, 118 HARV. L. REV. 2047, 2060 n.43 (2005); MCCULLOUGH, *supra* note 167, at 781 (“By a vote of 315 to 4, the House promptly voted a one-year extension of the draft law.”).

176. Bradley & Goldsmith, *supra* note 175, at 2050 (“[M]ost uses of military force in U.S. history, including significant military engagements such as the Korean War and the Kosovo bombing campaign, have been initiated without express congressional authorization.”).

177. After all, Congress's defense spending spree continued, with defense spending growing from ~2% of GDP in the years prior to World War II, to ~8% of GDP in the early post-war Truman administration, and then to nearly 15% by the end of the Truman administration. Defense Spending Charts, U.S. GOV'T SPENDING, https://www.usgovernmentspending.com/defense_spending_analysis [<https://perma.cc/ES4W-UVKM>] (last visited Apr. 12, 2021).

with deciding an important domestic case that implicated the wartime division of political branch powers. That case, of course, is now the favorite child of many a constitutional or national security law casebook: *Youngstown Sheet & Tube Co. v. Sawyer*.¹⁷⁸

Youngstown, often called the “Steel Seizure Case,” concerned President Truman’s seizure of steel mills to keep them running after long-simmering labor disputes boiled over into a national strike during the Korean War.¹⁷⁹ Truman acted through an Executive Order authorizing the Secretary of Commerce to take over the steel mills, but he twice wrote to Congress asking for it to affirm or reject his action.¹⁸⁰ Congress made no response.¹⁸¹ In the end, the Supreme Court held 6-3 for the mill owners against the President, with each Justice in the majority writing his own opinion.

The many opinions in *Youngstown* exhibit a range of constitutional methodologies.¹⁸² Of these, Justice Robert Jackson’s sophisticated structural approach to analyzing the constitutional validity of presidential action has garnered the most attention. Jackson’s description of the extent of executive power is a nuanced and outstanding piece of constitutional analysis, and this Article often follows—at least attempts to follow—in the footsteps of Justice Jackson.¹⁸³

Although Jackson’s *Youngstown* framework is typically described as tripartite,¹⁸⁴ the framework actually depends on two distinct, substantive questions, each with three possible answers. First, has Congress authorized, remained neutral toward, or denied the President’s action? Second, is the President’s action supported by an exclusively executive, an overlapping, or a legislative power? Thus, nine possible results arise out of the Jackson framework. Many of these results provide conclusive answers to the constitutional question, while a few invite further—and particularly difficult—analysis.

178. 343 U.S. 579 (1952).

179. *Id.* at 584.

180. AMANDA DI PAOLO, ZONES OF TWILIGHT: WARTIME PRESIDENTIAL POWERS AND FEDERAL COURT DECISION MAKING 21 (Lexington Books, 2010).

181. *Id.*

182. See generally Bobbitt, *Youngstown*, *supra* note 97 (discussing the rich, modal qualities of the various *Youngstown* opinions).

183. Of course, this Article is primarily concerned with political branch perspectives on the separation of powers, while Justice Jackson obviously takes a judicial perspective.

184. See, e.g., KOH, *supra* note 9, at 108-10 (noting Jackson’s “three-tiered hierarchy . . . now so familiar to first-year law students[.]” Jackson’s “three-part schema[.]” and Jackson’s “tripartite analysis”).

T-1. The Matrix Account of Justice Jackson's *Youngstown* Framework

	Congress Denies Authorization	Congress Remains Neutral	Congress Provides Authorization
President Has Exclusive, Independent Power	Congress's statute is unconstitutional.	The President's act is constitutional.	There is no issue.
President and Congress Have Overlapping or Uncertain Powers	The President is at the "lowest ebb" and the act merits skeptical judicial review.	The President is in the "zone of twilight" and the act merits fact-intensive review.	There is no issue, and Congress's authorization may impose limits.
President Does Not Possess Independent Power	The President's act is unconstitutional.	The President's act is likely unconstitutional. ¹⁸⁵	There is no issue as long as Congress has the necessary power.

There are several important consequences of viewing Jackson's framework as a nine-cell matrix rather than a three-category schema. First, we see that separation of powers analysis branches out according to multiple initial inputs, and it will proceed on to more difficult constitutional questions only as the straightforward possibilities for resolution disappear.

Second, we observe that the most demanding form of constitutional analysis is typically required only where powers overlap and Congress has either remained neutral toward or rejected the President's action. It is in these instances that interbranch constitutional process is either still ongoing or has broken down. Neither text,¹⁸⁶ nor history,¹⁸⁷ have conclusively settled the issue. Constitutional structure,¹⁸⁸

185. Justice Jackson, in a footnote, notes Lincoln's suspension of habeas as an instance where the President made a contested claim to provisional powers in the face of judicial resistance and then received after-the-fact congressional approval. *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 637 n.3 (1952) (Jackson, J., concurring). But Jackson is cautious here, and his later arguments suggest he does not agree with the argument I have defended—see *supra* text accompanying notes 120–29 and 139–47—that the President may constitutionally exercise legislative power for a limited time during emergencies where congressional authorization is precluded.

186. *Id.* at 635 (Jackson, J., concurring) (“The actual art of governing under our Constitution does not and cannot conform to judicial definitions of the power of any of its branches based on isolated clauses or even single Articles torn from context.”).

187. *Id.* at 634 (Jackson, J., concurring) (“Just what our forefathers did envision, or would have envisioned had they foreseen modern conditions, must be divined from materials almost as enigmatic as the dreams Joseph was called upon to interpret for Pharaoh.”).

188. *Id.* at 635 (Jackson, J., concurring) (“[The Constitution] enjoins upon its branches separateness but interdependence, autonomy but reciprocity. Presidential powers are not fixed but fluctuate, depending upon their disjunction or conjunction with those of Congress. We may well *begin* by... [the Justice Jackson framework.]”) (emphasis added).

therefore, drives the Court toward additional prudential,¹⁸⁹ precedential,¹⁹⁰ and ethical considerations,¹⁹¹ and their merits then guide the analysis forward to its conclusion. We can distinguish between “lowest ebb” and “zone of twilight” analysis by noting that a presumption against the President’s arguments applies in the former instance,¹⁹² whereas prudential considerations—likely favoring the President—dominate the latter.¹⁹³

Third, we are reminded that this analytical framework for judicial review is only that. Jackson’s concurrence describes a judicial methodology for sorting and evaluating the actions of the political branches that, even as an after-the-fact exercise, does not necessarily lead to conclusive constitutional answers by itself. Jackson did not provide any sort of predetermined roadmap for executive-congressional relations and specifically admonished Congress with Napoleon’s maxim that “[t]he tools belong to the man who can use them.”¹⁹⁴

But Jackson’s *Youngstown* concurrence, which is an exemplar of thoughtful judicial analysis, has often been mistaken for a guide to legislative action. The mistaken takeaways from the Korean War—if viewed as an episode of *sua sponte* presidential aggrandizement with no underlying congressional or strategic causes—and *Youngstown*—if viewed as a prescription for Congress to register expressive judgments on presidential action in anticipation of future judicial input—together led to a fundamental and problematic shift in how congressional war powers were viewed.¹⁹⁵ The constitutive role of Congress was minimized, and the specificity and rigor of its *ex ante* decision-making about national security issues was similarly diminished.¹⁹⁶ Instead, Congress began to act as a department that intermittently weighed in on the propriety of actions taken by the executive branch after the dust

189. *Id.* at 640 (Jackson, J., concurring) (“[I] give to the enumerated powers the scope and elasticity afforded by what seem to be reasonable, practical implications instead of the rigidity dictated by a doctrinaire textualism.”).

190. *Id.* at 653 (Jackson, J., concurring) (“Vast accretions of federal power, eroded from that reserved by the States, have magnified the scope of presidential activity. Subtle shifts take place in the centers of real power that do not show on the face of the Constitution.”).

191. *Id.* at 644 (Jackson, J., concurring) (“That military powers of the Commander in Chief were not to supersede representative government of internal affairs seems obvious from the Constitution and from elementary American history.”).

192. *Id.* at 638 (Jackson, J., concurring) (“Presidential claim to a power at once so conclusive and preclusive must be scrutinized with caution.”).

193. *Id.* at 637 (Jackson, J., concurring) (“[A]ny actual test of power is likely to depend on the imperatives of events and contemporary imponderables rather than on abstract theories of law.”).

194. *Id.* at 654 (Jackson, J., concurring).

195. A further mistake made with *Youngstown* is to interpret it as a case applying as forcefully to foreign affairs as it does to internal affairs. Justice Jackson repeatedly emphasized the fact that *Youngstown* was about control over internal affairs. Specifically, he noted that the Court:

[S]hould indulge the widest latitude of interpretation to sustain [the Commander in Chief’s] exclusive function to command the instruments of national force, at least when turned against the outside world for the security of our society. But, when it is turned inward, not because of rebellion but because of a lawful economic struggle between industry and labor, it should have no such indulgence.

Id. at 645 (Jackson, J., concurring).

196. Waxman, *supra* note 163 at 1626 (“At least by the Cold War, however, Presidents began exercising this power [to engage in hostilities] unilaterally in a much wider set of cases, and Congress mostly allowed them to do so.”).

had settled.¹⁹⁷ Thus, as the nation emerged from the deeply divisive experiences of the Vietnam War and Nixon presidency just a few short decades after *Youngstown*, Congress passed an infamous statute that sought to reassert the legislature's national security relevance by carving out an improper, quasi-judicial role for itself.¹⁹⁸

D. The War Powers Resolution

In the waning months of 1973, Congress passed the War Powers Resolution over President Nixon's emphatic veto.¹⁹⁹ The country was in the final stages of extricating itself from the Vietnam War, a conflict that had been extremely unpopular but consistently supported by congressional appropriations and authorizations.²⁰⁰ Although the war eventually wound down in part due to congressional funding cutbacks,²⁰¹ the legislature nonetheless emerged from the experience feeling that its existing institutional tools were insufficient.²⁰² At first, the Senate and House were unable to find an approach to war powers reform that satisfied both bodies, and several bills preceding the WPR floundered and failed.²⁰³ The WPR Congress clashed over whether to adopt a bright-line, definitional approach—as the Senate preferred—or a procedural approach—as the House preferred.²⁰⁴

In the end, the House approach won out.²⁰⁵ Nixon vetoed the resolution, criticizing the passive nature of its procedure for congressional termination of U.S. involvement in hostilities.²⁰⁶ Although some members of Congress accepted the President's concerns,²⁰⁷ the bulk of the membership felt the WPR provided a healthy

197. John Hart Ely, *Suppose Congress Wanted a War Powers Act That Worked*, 88 COLUM. L. REV. 1379, 1379-80 (1988) (writing of congressional self-perception in the 1970s that, since 1950, "it had lain back, neither approving presidential military ventures nor very explicitly approving them, trusting the President to take the lead and waiting to see how the war in question played politically").

198. See, e.g., Robert F. Turner, *The War Powers Resolution at 40: Still an Unconstitutional, Unnecessary, and Unwise Fraud that Contributed Directly to the 9/11 Attacks*, 45 CASE W. RES. J. INT'L L. 109, 116-19 (2012).

199. Ely, *supra* note 197, at 1379.

200. *Id.* at 1391 (noting that the Vietnam War "had been congressionally authorized—albeit not in the most responsibly way. . .").

201. See Bruce Ackerman & Oona Hathaway, *Limited War and the Constitution: Iraq and the Crisis of Presidential Legality*, 109 MICH. L. REV. 447, 485-88 (2011).

202. See Ely, *supra* note 197, at 1380 ("[T]he War Powers Resolution is designed to force a decision regarding matters that Congress has in the past shown itself unwilling to face up to.").

203. See Louis Fisher & David Gray Adler, *The War Powers Resolution: Time to Say Goodbye*, 113 POL. SCI. Q. 1, 2-3 (1998) ("In drafting the War Powers Resolution, the House and the Senate began with incompatible principles.").

204. See *id.* at 2; see also 119 CONG. REC. 24,655 (July 18, 1973) (statement of Rep. David Dennis) ("[W]hile ordinarily the President must have prior authorization to commit troops to combat abroad, I recognize that emergency situations may arise where that is not possible. I do not attempt, as the Javits bill does in the [Senate], to define what those emergency situations may be. . .").

205. Ely, *supra* note 197, at 1393.

206. H.R. DOC. NO. 93-171, at 2 (1973) ("I am particularly disturbed by the fact that certain of the President's constitutional powers . . . would terminate automatically . . . [T]he Congress is here attempting to increase its policy-making role through a provision which requires it to take absolutely no action at all.").

207. 119 CONG. REC. 36,204 (Nov. 7, 1973) (statement of Rep. Gerald R. Ford) ("We cannot deny that this bill does not really fashion a partnership. It makes us, the Congress, a partner by inaction. If

mix of flexibility for the President and ongoing oversight for Congress.²⁰⁸

Congress correctly chose to focus on interbranch procedure in the WPR rather than detailing necessary and sufficient conditions for presidential action, but Congress nonetheless misconstrued its role in the constitutional process of national security. The WPR is a brisk, ten section resolution that confidently states its purpose “to fill the intent of the framers of the Constitution.”²⁰⁹ Yet the resolution’s brevity papers over hundreds of years of constitutional debates, and the self-conscious result attempts to recast Congress as an expressive, adjudicative body.²¹⁰ Section 2(c)—the clearest vestige of the Senate’s definitional approach—sets out a purportedly exhaustive description of the President’s Commander in Chief power²¹¹ that fails to account for widely accepted uses.²¹² Section 3—on consultation between the President and Congress—is, although a laudable statutory goal, woefully underspecified and cannot be viewed as a serious attempt to increase interbranch deliberation despite the vague call for consultation “in every possible instance.”²¹³

Sections 4 and 5—the heart of the WPR—outline reporting requirements and specify procedures for the termination of U.S. involvement in hostilities. Section 4 requires the President to report to Congress within forty-eight hours when U.S. armed forces are introduced into a variety of circumstances.²¹⁴ Then, Section 5(b)—if reporting was made pursuant to Section 4(a)(1)—requires the President to withdraw armed forces from hostilities after sixty to ninety days unless Congress has specifically authorized the engagement.²¹⁵ Meanwhile, Section 5(c) develops a concurrent resolution procedure for Congress to require the removal of U.S. forces at any time.²¹⁶ Sections 6 and 7 create priority parliamentary procedures for resolutions arising out of the WPR.²¹⁷ Finally, Section 8 states several rules of

the Congress wants to assume a role that is essential for that partnership, we have to redesign this legislation.”).

208. 119 CONG. REC. 36,205 (Nov. 7, 1973) (statement of Rep. James Martin) (“[The WPR] allows quick, unencumbered Presidential response to crisis situations, but mandates congressional concurrence within a reasonable period of time.”).

209. War Powers Resolution, Pub. L. 93-148, § 2(a), 87 Stat. 555, 555 (1973) (codified at 50 U.S.C. § 1541(a)).

210. Cyrus R. Vance, *Striking the Balance: Congress and the President under the War Powers Resolution*, 133 U. PA. L. REV. 79, 85 (1984) (describing the WPR as “a procedure by which Congress can express its institutional judgment on [presidential action]”).

211. § 2(c), 87 Stat. at 555 (“[The President’s Commander in Chief powers] are exercised only 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.”).

212. See UNIV. OF VA. MILLER CTR OF PUB. AFFS., NATIONAL WAR POWERS COMMISSION REPORT 21 (2008) (“[E]ven ardent advocates of congressional power recognize that Section 2(c) of the Resolution too narrowly defines the President’s war powers . . .”).

213. § 3, 87 Stat. at 555. Despite the vague and minimal text in § 3 of the WPR, it has been relatively effective. See Ely, *supra* note 197, at 1400-01. I would argue that this is because § 3—almost uniquely in the WPR—correctly understands Congress’s proper role.

214. § 4(a), 87 Stat. at 555-56.

215. *Id.* § 5(b), 87 Stat. at 556 (extending the withdrawal clock from 60 to 90 days “if the President determines and certifies to the Congress in writing that unavoidable military necessity respecting the safety of United States Armed Forces requires the continued use of such armed forces”).

216. *Id.* § 5(c), 87 Stat. at 556-57 (“[F]orces shall be removed by the President if the Congress so directs by concurrent resolution.”).

217. *Id.* §§ 6, 7, 87 Stat. at 557-58.

interpretation for the statute, including a bar against inferring congressional authorization from implied sources—such as appropriations.²¹⁸

The WPR has been consistently panned as an unconstitutional infringement on the President's war powers. First, Section 2(c) does not recognize the President's authority to protect American people or property abroad, and it is separated by a vast chasm from the theory of presidential power embraced by modern presidents, which extends to "important national interest[s] protected by means short of war."²¹⁹ Second, the automatic withdrawal provision in Section 5(b) has been consistently contested by presidential administrations, and presidents almost never report under Section 4(a)(1), which is the only section that triggers 5(b) automatic withdrawal.²²⁰ Third, the concurrent resolution provision in Section 5(c) is likely an unconstitutional legislative veto after *INS v. Chadha*.²²¹ Fourth, the restriction against inferring authorization for the President from congressional appropriations is an undemocratic limit on the lawmaking options available to future Congresses.²²² Even those more sympathetic to the style of the WPR have criticized the resolution for being overfitted to the political climate of the early 1970s,²²³ failing to foresee technological and strategic change,²²⁴ and relying on ambiguous language at key points.²²⁵

But the fundamental failure of the WPR is that Congress abandoned its constitutive national security powers. Instead, Congress's WPR reimagines the Declare War power as an on-off switch—or at least a dimmer switch—that can be subtly manipulated through restrictive canons of interpretation, automatic withdrawal clocks, and congressional statements lacking the force of law. This view of Congress's role is blind to history, the constitutional process of national security,

218. *Id.* § 8(a)(1), 87 Stat. at 558 (“[Authorization is not to be inferred from] any provision contained in any appropriation Act, unless such provision specifically authorizes . . .”).

219. *See* Authority to Use Military Force in Libya, 35 Op. O.L.C. 1, 20 27-33 (2011).

220. *See* CONG. RSCH. SERV., R42699, *The War Powers Resolution: Concepts and Practice* 6 (2019) (“Every President . . . has taken the position that [the WPR] is an unconstitutional infringement on the President's authority as Commander in Chief.”); *id.* at 10 (“The report on the Mayaguez recapture was the only War Powers report to date to specifically cite Section 4(a)(1), but the question of the time limit was moot because the action was over by the time the report was filed.”).

221. *Id.* at 7-8 (noting the passage of 50 U.S.C. § 1546a – a “free standing” post-*Chadha* revision to the WPR process that “fill[s] the gap left by the possible invalidity of the concurrent resolution mechanism”). *See also* *INS v. Chadha*, 462 U.S. 919 (1983).

222. Authorization for Continuing Hostilities in Kosovo, 24 Op. O.L.C. 327, 341 (2000) (recounting the long history of congressional appropriations operating as authorization and adopting and crediting Philip Bobbitt's argument that “if one Congress could bind subsequent Congresses in this way, it would effectively enshrine itself in defiance of [an] electoral mandate” (quoting Bobbitt, War Powers, *supra* note 39, at 1399)).

223. *See, e.g.*, Michael J. Glennon, *Too Far Apart: Repeal the War Powers Resolution*, 50 U. MIAMI L. REV. 17, 18-21 (1995) (“The Resolution emerged from an aberrational political climate in 1973, and that climate was wrongly assumed to represent a sea-change in congressional-executive relations that would exist for years to come.”).

224. *See, e.g.*, Ackerman & Hathaway, *supra* note 201, at 449 (“[T]he War Powers Resolution, passed in the wake of Vietnam, continues to suppose that wars come in only two sizes . . . [and it] failed to acknowledge that modern war is limited war.”). This reflects the weakness of any overfitted view of national security and the separation of powers, whether that view is embedded in constitutional or statutory text. War changes, and so too must law.

225. *See, e.g.*, Vance, *supra* note 210, at 91-94 (proposing amendments to shore up the WPR's loose statutory language).

and contemporary strategic pressures. Predictably, the WPR has failed to lead to meaningful congressional involvement or more cooperative and open presidential decision-making. The WPR, and the other 20th century events discussed, do not tell us that Congress must transform itself in order to fight back against a runaway presidency that has trampled Congress and seized unmerited and unconstitutional power. Instead, the experience of the 20th century shows us that developments in the nation's geostrategy and national interests require the political branches to renew their mutual investment in affirmative, deliberative modes of *collaboration* on national security issues.

VI. CONCLUSION

This path through centuries of constitutional history is one of many routes through the thicket. Although I hope that my commitment to methodology has led me true, I am sure that a summary of my conclusions about the Constitution's approach to national security will help the reader correct me if—where—I have gone astray. So, the Constitution provides a rough silhouette of the relationship between legislative and executive national security powers, but it leaves the detail to be filled in by ongoing interbranch process.²²⁶ Detail was left unfinished not because the Founders lacked strategic insight—the Constitution was confidently endowed with a particular geostrategy well-suited for its day—but because they had the foresight to realize the nation's legal order required sufficient flexibility to address future strategic developments.

Therefore, while core textual powers structure and limit the flow of constitutional process, text alone cannot fully categorize the set of applicable rules or allow one to predict the constitutional calibrations that will occur in a given situation. Bearing this in mind, the value gained from carefully analyzing past experience and practice is substantial.²²⁷ The precedents of history are loaded with elaborations—at once legal and strategic—that shed light on the fundamental rules governing the constitutional process of national security calibration.²²⁸

At bedrock, we are consistently reminded that this constitutional process is how America keeps law alive in those stressful circumstances where the nation is threatened and democracy flickers. In these moments, we must defend either a constitutional system that allows for boundary-pushing theories of executive power

226. The existence of the process itself derives from: (1) *text*, the actual language that vests powers with Congress and the President, (2) *history*, the Founders' deep concern for well-calibrated geostrategy and national security policy, and (3) *structure*, the at times open-ended and at times overlapping nature of legislative and executive prerogatives.

227. See generally *NLRB v. Noel Canning*, 573 U.S. 513 (2014). Five members of the court, citing Justice Marshall in *McCulloch* and Justice Frankfurter in *Youngstown*, emphasized that practice was an important interpretative factor for settling questions about "the allocation of power between two elected branches of Government" even if the practice was "subject to dispute" and "began after the founding era." *Id.* at 524-26. Justice Scalia, concurring in the judgment with the last three Justices, agreed only if the Court was dealing with "an ambiguous constitutional provision" and the practice was "open, widespread, and unchallenged since the early days of the Republic." *Id.* at 594 (Scalia, J., concurring).

228. The rules of the process—bounded first by text, history, and structure—accrue additional detail from: (1) *prudence*, the efficiency and necessity of various templates for executive action, (2) *ethos*, the conscious renewal of the Founders' pairing of law and strategy, and (3) *doctrine*, the sedimentation of political branch practice, at times informed by judicial review.

that afford Congress an opportunity to later respond,²²⁹ or a constitutional system that demands illegal executive action that may or may not be ratified *ex post* by Congress.²³⁰

There is reason to be cautious about the precedent set by either, but I firmly support the former. The Constitution, and the nation, are better served by presidents who feel compelled to make careful constitutional arguments while wary of congressional rebuttal than they are by presidents who violate the law in the hopes of later finding 218 + 51 votes to ratify the action. We should, therefore, not attempt to invent a frozen analysis of war powers or a rigid separation of powers “settled” by falsely determinative constitutional text and history.²³¹ This rigidity would demand, and therefore normalize, presidential action that ignores so-called constitutional mandates. In contrast, the principled evolution of our Constitution to match the developments of the world is a triumph—not a defeat—of the rule of law.

On a closely related note, we repeatedly see that the process requires cooperative action to function properly—a rule that is both implied by the Constitution and impossible to miss in practice. Thus, cooperation between the political branches is not just a description of past experience—it is a normative dictate that every participant must respect today. This foundational rule takes on a more specific form for each branch. The President must always operate pursuant to open and honest policies even if, from time to time, he must act unilaterally or in secret.²³² Congress must act with conviction even if it could stand back instead, and the body must respect that it is a participant in—not an adjudicator of—national security decision-making.²³³ And, finally, the courts must establish incentives for good political branch behavior rather than abstain from judgment or endorse doctrines that might stunt cooperation in the future.²³⁴ It is these basic prescriptions that preserve and

229. See *supra* notes 120–29 and 139–47 and accompanying text.

230. See, e.g., FISHER, PRESIDENTIAL WAR POWER, *supra* note 35, at 87 (“In a genuine emergency, a President may act without congressional authority (and without express legal or constitutional authority), trusting that the circumstances are so urgent and compelling that Congress will endorse his actions and confer a legitimacy that only Congress, as the people’s representative, can provide.”).

231. *Contra* Fisher & Adler, *supra* note 203, at 9 (“The meaning of the war clause was thus settled at the dawn of the republic. . . . The Constitution grants to Congress the sum total of the nation’s power to commence hostilities. There was in the Convention no doubt about the limited scope of the president’s war power.”).

232. See Philip Bobbitt, *Inter Arma Enim Non Silent Legis*, 45 SUFFOLK U. L. REV. 253, 260-61 (2012) (“The rule of law is the civilian’s best bulwark not only against his own government but against those who would hold him hostage to their political objectives by threatening him with violence. . . . This feature of contemporary warfare imposes on governments a necessity to make the legal arguments for their operations.”); *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 655 (1952) (Jackson, J., concurring) (“With all its defects, delays and inconveniences, men have discovered no technique for long preserving free government except that the Executive be under the law, and that the law be made by parliamentary deliberations.”).

233. See Ackerman & Hathaway, *supra* note 201, at 495-96 (“We have come a long way from the Founding Era, when the president was obliged to gain fine-grained funding from Congress before he could engage in significant military action. Nowadays, Congress is playing catch-up.”); *Youngstown*, 359 U.S. at 654 (Jackson, J., concurring) (“I have no illusion that any decision by this Court can keep power in the hands of Congress if it is not wise and timely in meeting its problems. A crisis that challenges the President equally, or perhaps primarily, challenges Congress.”).

234. See KOH, *supra* note 9, at 184 (“[T]he role of judges is to define the rule of law by drawing the line between illegitimate exercises of political power and legitimate exercises of legal authority.”);

renew the vitality of the Constitution.

Yet, one wonders if these rules—and this process—will continue to be enough. As America has ventured out from the safe harbor of its original national security paradigm, it has become increasingly difficult to generate presidential and congressional roles that map sensibly onto modern security aims. In today's world, the combined complexity, scale, and stakes of national security threaten to overwhelm the ordered discipline of constitutional law. There are many causes of this strategic upheaval, but several stand out.

First, civilians can be targeted at scale in a multitude of different ways.²³⁵ Second, destructive—even catastrophic—power is widely distributed among states, non-state organizations, and even individuals.²³⁶ Third, it is increasingly difficult to confidently determine the perpetrator of an attack, whether that attack be cyber, biological, or otherwise.²³⁷ Fourth, the world is interconnected to such a degree that traditional geographic barriers are essentially porous or irrelevant.²³⁸ We now travel the cliffside path, balancing our need to prevent civilian carnage with our need for open democratic governance.²³⁹ At our heels come the dogs of war, of pandemic, of disabled power grids, of nuclear weaponry in a suitcase. Below us lays the plunge into lawlessness, into total surveillance, into suspicion, into the siren that never ceases to screech.

The constitutional process—for all its flexibility and enduring vitality—was designed to work best on an intermediate time horizon, where the political branches had an opportunity to jointly consider constitutive and directory responses to a *particular* threat. But, given the nature of modern vulnerabilities and the need for preclusive government action, the timing of national security interventions has necessarily morphed into a bimodal distribution.

At one end, Congress's constitutive powers must be exercised well in advance

Youngstown, 343 U.S. at 655 (Jackson, J., concurring) (“Such institutions [of rule by parliamentary law] may be destined to pass away. But it is the duty of the Court to be last, not first, to give them up.”).

235. GLOBAL TRENDS: PARADOX OF PROGRESS, NAT'L INTEL. COUNCIL 20 (Jan. 2017), <https://www.dni.gov/files/documents/nic/GT-Full-Report.pdf> [<https://perma.cc/E9M4-62RQ>] (“Future conflicts will increasingly emphasize the disruption of critical infrastructure, societal cohesion, and basic government functions . . . Noncombatants will be increasingly targeted.”).

236. *Id.* at 20-21 (“The threat posed by nuclear and other forms of weapons of mass destruction (WMD) probably will increase in the years ahead due to technology advances and growing asymmetry between forces. . . . The proliferation of advanced technologies, especially biotechnologies, will also lower the threshold for new actors to acquire WMD capabilities.”).

237. *Id.* at 216 (“[N]ew means for conducting conflicts and sowing instability . . . will often obfuscate the source of attacks impeding effective responses.”).

238. *Id.* at 25 (“Increasing global connectivity and changing environmental conditions will affect the geographic distribution of pathogens and their hosts, and, in turn, the emergence, transmission, and spread of many human and animal infectious diseases.”); LUCAS KELLO, *THE VIRTUAL WEAPON & THE INTERNATIONAL ORDER* 6 (2017) (“States and other actors use cyberspace to penetrate each other's most basic infrastructures. . . . [I]n the past, the enemy's presence in essential domestic terrains signaled the failure of security policy; today it is a starting axiom.”).

239. See BOBBITT, *TERROR & CONSENT*, *supra* note 3, at 137-38 (“One way to articulate this change is to say that developments have increased the role of *preclusion* in warfare. . . . The war aim is to protect civilians and their officials so that, behind this military shield, the political development of governance based on consent can take place . . .”).

of any particular threat arising—there is no time to wait.²⁴⁰ At the other end, the President’s directory powers must be exercised at the drop of a hat, springing into action without studied and open deliberation—there is no time to wait.²⁴¹ This temporal and epistemic divergence in political branch action is a significant development, and it poses a substantial challenge to our constitutional order. Even worse, while the Founders were uniquely talented constitutional architects, we must admit that our modern leaders are often something less than that.

But rather than closing on a defeatist note, I will offer some suggestions grounded in the lessons of past practice for how the constitutional process might yet rise to the challenge of today’s national security landscape. Most importantly, the fundamental ground rules previously discussed—of honest, collaborative, and strategy-sensitive deliberation between the political branches—must be followed. Beyond that, the various government departments must undertake a serious effort to reach out across the gap created by the now disparate timing of their core national security interventions.

The President, and the President’s vast assembly of lawyers, should create and publish proactive guidance on how the executive branch will use particular capabilities and respond to different emergency archetypes.²⁴² Some of this work would be fit for mass publication, some of it would be classified and provided to appropriate congressional committees, and some of it would—at the least—be created for internal use with a plan for broader release when possible. This practice would shift difficult questions about presidential directory power toward more public, proactive debates, even if the actual use of that power will frequently continue to be secret, sudden, or reactive.

Congress should strive to exercise its constitutive powers with as much specificity and foresight as possible and then rapidly revise its approach, as needed, when exigency strikes.²⁴³ This does not mean the body should undersupply national security tools or attempt to require that the President refer back to Congress before using capabilities the legislature developed. Rather, it means that presidential power should operate in the shadow of ongoing statutory authorizations, and that Congress should consult on and openly deliberate about presidential execution of the laws.²⁴⁴

240. See KENT & MORTENSON, *supra* note 4, at 283 (“[L]egislative authorization has now become so comprehensive and open-ended that, while presidential aggrandizement has certainly continued, it has more typically done so through assertion of statutory authority.”).

241. See Stromseth, *supra* note 172, at 890 (“[I]t is hard to imagine that [the Founders] would not have expected the President as Commander in Chief and Chief Executive to protect the country from serious external threats in emergency situations The nature of modern military technology, which confronts us with threats incomparable in their speed and destructive power to those faced in 1789, only reinforces such an understanding.”).

242. Democratic accountability is not necessarily eroded by a shift of practical war power from Congress to the President as long as citizens still know what the nation is doing. But, the potential for democratic breakdown is greater as the President’s role increases because Congress must act through public laws and the President may act through classified orders and legal opinions.

243. This is one of those sentences that deserves a book-length footnote. For now, I refer the reader to Philip Bobbitt’s preliminary proposals for a proactive approach to national security, many of them statutory. See BOBBITT, TERROR & CONSENT, *supra* note 3, at 412-26.

244. If these about the eclipse of legality by politicization are correct, then this will pose its own difficulties. See generally Daryl J. Levinson & Richard H. Pildes, *Separation of Parties, Not Powers*, 119 HARV. L. REV. 2311, 2311 (2006) (writing that “[f]ew aspects of the founding generation’s political

Thoughtful congressional authorization—much more so than inaction or retroactive disapproval—promotes security, imposes limits, and fosters legitimacy.²⁴⁵ Expanded presidential power and robust constraints on the use of that power, when both are supplied by an active legislature, can be mutually reinforcing features of the modern presidency.²⁴⁶

Finally, the courts would be greatly empowered by the additional legal and statutory products contemplated by these recommendations. Judges would have the underlying material to more confidently forgo the political question doctrine, and courts could settle debates first by considering whether the President and Congress had developed rules for the situation now at hand and, then, by the strength of what the political branches prepared. This increased judicial involvement would complement a trend already developing, where courts—sensing the complex nature of modern war and the need for law to apply—have begun to move away from categorical, formalist approaches to foreign affairs and national security cases.²⁴⁷ There is much more to add to these suggestions. Yet I hope this Article—by identifying and developing certain important themes of the constitutional process that shapes America’s national security—has made a small contribution that might prove worthwhile.

theory are now more clearly anachronistic than their vision of legislative-executive separation of powers. . . . The practical distinction between party-divided and party-unified government thus rivals, and often dominates, the constitutional distinction between the branches.”). But polarized party politics is a problem at once greater and meaner than the scope of this Article, and I will not yet accept it is an axiom of constitutional analysis.

245. In addition to Bobbitt’s suggestions, *supra* note 243, I refer the reader to Harold Koh’s guidelines for national security law reform. *See* KOH, *supra* note 9, at 161-84. Koh is more skeptical of the executive branch, and his proposals reflect this skepticism. Yet, regardless of one’s level of skepticism, many of his suggestions are wisely and appropriately designed to encourage interbranch dialogue, congressional activity, and public deliberation.

246. *See generally* JACK GOLDSMITH, *POWER & CONSTRAINT: THE ACCOUNTABLE PRESIDENCY AFTER 9/11* (2012) (describing how the expansion of executive national security powers can be—and has been—paired with additional oversight and monitoring by a multitude of internal and external actors).

247. *See generally* Andrew Kent, *Disappearing Legal Black Holes & Converging Domains: Changing Individual Rights Prots. in National Security & Foreign Affairs*, 115 COLUM. L. REV. 1029, 1032-33 (2015) (explaining that individual rights in national security and foreign affairs had been based on “categorical rules and boundary-drawing” but now “previously distinct boundaries are softening and previously distinct spheres are becoming more alike”).

