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RESPONSES TO THE TEN QUESTIONS

Aziz Rana†

4. HAS OBAMA IMPROVED BUSH'S NATIONAL SECURITY POLICIES?

For decades, civil libertarians and legal scholars have raised the specter of an "imperial president" hanging ominously over American constitutional politics. The term itself was famously coined by Arthur Schlesinger to describe presidential leadership during the era of Watergate and Vietnam. Writing of executive authority in 1973, he concluded, "in our own time it has produced a conception of presidential power so spacious and peremptory as to imply a radical transformation of the traditional polity. . . . The constitutional Presidency . . . has become the imperial Presidency and threatens to be the revolutionary Presidency."[1] In the years immediately following the events of September 11, 2001, fears of an imperial President only intensified. The Bush White House unilaterally pursued multiple armed conflicts, established a global prison system with thousands of individuals arrested and detained, and asserted inherent (and near limitless) constitutional powers. In domestic affairs, this involved attaching signing statements to countless legislative bills, which claimed the right to implement such laws in keeping with presidential commitments and regardless of express congressional stipulations. Writing of Bush administration practices, constitutional scholar—and current

† Assistant Professor of Law, Cornell Law School. I would to thank everyone at the *Journal of the National Security Forum* for all their hard work on this piece, especially my principal editor Anders Erickson.

1. ARTHUR M. SCHLESINGER, JR., THE IMPERIAL PRESIDENCY viii (1973).

Obama administration Acting Solicitor General—Neal Katyal declared in 2006 that the Presidency had become "the most dangerous branch," one that "subsumes much of the tripartite structure of government."[2] Similarly, Bruce Ackerman went so far as to argue that Bush administration "lawyers [were] building the constitutional foundation for military despotism."[3]

Thus, for many legal critics of executive power, the election of Barack Obama as President appeared to herald a new approach to security concerns and even the possibility of a fundamental break from Bush-era policies. These hopes were immediately stoked by Obama's decision before taking office to close the Guantanamo Bay prison.[4] Over two years later, however, not only does Guantanamo remain open, but through a recent executive order Obama has formalized a system of indefinite detention for those held there and also has stated that new military commission trials will begin for Guantanamo detainees.[5] More important, in ways small and large, the new administration remains committed to core elements of the previous constitutional vision of national security. Just as their predecessors, Obama officials continue to defend expansive executive detention and war powers and to promote the centrality of state secrecy to national security.

The Justice Department has presented sweeping arguments about executive privilege in order to challenge the ability of courts to compel the release of classified information.[6] In the context of the widening war in Afghanistan, the military has increasingly

2. Neal Kumar Katyal, *Internal Separation of Powers: Checking Today's Most Dangerous Branch From Within*, 115 YALE L.J. 2314, 2316 (2006) (discussing the power of the executive branch after September 11, 2001).

3. BRUCE ACKERMAN, BEFORE THE NEXT ATTACK: PRESERVING CIVIL LIBERTIES IN AN AGE OF TERRORISM 26 (2006).

4. *Obama Team Crafts Plan to Close Gitmo*, CBS NEWS (Nov. 11, 2008), http://www.cbsnews.com/stories/2008/11/11/politics/main4591241.shtml?source=RSSattr=Politics_4591241.

5. Peter Finn & Anne E. Kornblut, *Obama Creates Indefinite Detention System for Prisoners at Guantanamo Bay*, WASH. POST, Mar. 8, 2011, http://www.washingtonpost.com/wp-dyn/content/article/2011/03/07/AR2011030704871.html?hpid=topnews.

6. *See* Josh Gerstein, *Obama Takes Stand for Secrecy, Executive Power*, POLITICO (Sept. 3, 2009, 7:58 AM), http://www.politico.com/blogs/joshgerstein/0909/Obama_takes_stand_for_secrecy_executive_power.html. One plaintiff's lawyer in a case alleging illegal CIA surveillance told reporters, "With respect to national security litigation and plaintiffs' ability to challenge government misconduct, virtually nothing has changed since President Obama took office. The Executive Branch has continued to seek to ensure its power remains absolute and subject to no outside oversight." *Id.*

employed drone attacks to target and kill perceived enemies. As in the case of one Muslim American cleric living in Yemen, those potentially subject to attack have even included American citizens residing outside the battlefield and who deny any involvement in terrorist activities.[7] Defending the legality of these practices, State Department lawyers have asserted a broad reading of self-defense in order to justify the summary lack of process entailed by extrajudicial killings.[8] And while Obama famously issued an executive order banning torture,[9] he has nonetheless maintained policies of rendition, which allow intelligence and military personnel to seize suspects and move them to foreign countries where they will be interrogated—likely through banned methods.

As for the administration's international prison scheme, Obama officials also maintain that prisoners captured in Afghanistan (and held at Bagram Air Force Base) do not have the legal right to challenge their detention in federal court. Even more strikingly, Obama himself has gone on record to endorse a general scheme of indefinite preventative detention (beyond the Guantanamo detainees)—based on neither past violations of law nor proven crimes—for those that the executive deem to be security threats.[10] In line with such views, policymakers in the Defense Department have called for a regularized overseas detention framework for holding a small number of suspects indefinitely and without trial, after an initial Pentagon designation as unprivileged enemy belligerents.[11] In fact, officials offer as a rationale for such detention that at least it provides more process

7. Paula Newton, *Al-Awlaki's Father Says Son is "Not Osama bin Laden,"* CNN (Jan. 11, 2010, 8:52 AM), http://www.cnn.com/2010/WORLD/meast/01/10/yemen.al.awlaki.father/index.html; Mark Tran, *White House Approves Assassination of Cleric Linked to Christmas Bomb Plot*, GUARDIAN, Apr. 7, 2010, http://www.guardian.co.uk/world/2010/apr/07/obama-assassination-cleric-christmas-bombing.

8. *See* Harold Hongju Koh, Legal Adviser, U.S. Dep't of State, Keynote Address of the Annual Meeting of American Society of International Law, The Obama Administration and International Law (Mar. 25, 2010), http://www.state.gov/s/l/releases/remarks/139119.htm.

9. Foon Rhee, *Obama Orders Guantanamo Bay Closed, Bans Torture*, BOSTON GLOBE, Jan. 22, 2009, http://www.boston.com/news/politics/politicalintelligence/2009/01/obama_orders_gu.html.

10. *Text: Obama's Speech on National Security*, N.Y. TIMES, May 21, 2009, at 6, *available at* http://www.nytimes.com/2009/05/21/us/politics/21obama.text.html.

11. David S. Cloud & Julian E. Barnes, *New Rules on Terror Custody Being Drafted*, L.A. TIMES, Apr. 15, 2010, http://articles.latimes.com/2010/apr/15/nation/la-na-obama-detention16-2010apr16.

than existing practices of extrajudicial killing. According to one Bush-era State Department official commenting on Obama policies, "[w]e are inadvertently creating incentives for people to be killed rather than captured .... And that may be why we are seeing relatively few people captured."[12]

The pervasive use of such discretionary and coercive authority—from rendition to indefinite detention and extrajudicial killing—suggests that the change in President has not marked a major improvement in constitutional protections and executive limitation.[13] Indeed, in the context of the bombing campaign in Libya, the Obama administration has gone so far as to claim the constitutional prerogative of the executive unilaterally to pursue military action, even when in violation of congressional restrictions or the War Powers Resolution.[14] This continuity between administrations raises a central political and legal question: how can we make sense of the persistent entrenchment of executive authority regardless of which party holds power?

At root, these developments are the product of a permanent logic of intervention in American foreign policy, which views foreign instability—no matter how distant from the United States's actual borders—as potential threats that must be pacified. Moreover, this commitment to international police power is widely shared across the political spectrum and is presumed to be a foundational element of American politics. While domestic critics have no doubt challenged the consequences of specific foreign policy agendas, such as the Vietnam War, Latin American counterinsurgency in the 1980s, or the post-9/11 War on Terror, few have challenged the larger framework that made such policies conceivable and have in turn promoted the centralization of

12. *Id.*

13. Comparing the presidencies through the analytical tools of just war theory, Stephen Carter recently has reached similar conclusions, arguing that both Obama and Bush have operated according to the "American Proviso" whereby "attacking America is morally different from being attacked by America." *See* STEPHEN CARTER, THE VIOLENCE OF PEACE: AMERICA'S WARS IN THE AGE OF OBAMA 69 (2011).

14. According to Democratic Congressman Brad Sherman, Secretary of State Hillary Clinton told House members during a classified briefing that, "[t]he White House would forge ahead with military action in Libya even if Congress passed a resolution constraining the mission." *See* Susan Crabtree, *Clinton to Congress: Obama Would Ignore Your War Resolutions*, TALKING POINTS MEMO (Mar. 30, 2011, 4:44 PM), http://tpmdc.talkingpointsmemo.com/2011/03/clinton-tells-house-obama-would-ignore-war-resolutions.php.

executive command. Over the following pages, I plan to describe how this logic of intervention became tied to the language of national security in the 1940s and helped to structure a new national security Constitution premised on increased secrecy and executive control. I will then discuss the consistent failure of procedural efforts to reform this institutional infrastructure, and conclude with some reflections on what would be required at present to alter these arrangements.

I. PENDLETON HERRING AND THE FORGOTTEN BIRTH OF "NATIONAL SECURITY"

Prior to the 1940s, the infrastructure undergirding American national defense held little in common with what we see today. The State Department dominated the formulation of peacetime foreign policy and the professional military (represented in executive branch deliberation by the War Department and the navy) enjoyed a restricted institutional role in devising policy. Moreover, the United States had a limited foreign intelligence network with few actual spies, relying instead on overseas military attachés, foreign service officials, Americans living abroad, and members of the press.[15] This approach, which emphasized civilian control and deemphasized secrecy, was tied to the longstanding argument in American politics that matters of war and peace should be decided through transparent and democratic mechanisms. Such openness was believed to be necessary for curtailing the ability of centralized actors—particularly in the executive branch—to make unilateral judgments about defense and emergency.

Among the very first public intellectuals to challenge this institutional and ideological status quo was Pendleton Herring, a key figure in the 1930s and 1940s who today is less well remembered. Herring was a political science professor in Harvard's Government Department and later became president of the American Political Science Association, as well as the first Secretary of the UN Atomic Energy Agency. During World War II, he chaired the Committee of Records of the War Administration, overseeing the publication of *The United States at War*, the official government account of the war. In perhaps his most central

15. *See* DOUGLAS STUART, CREATING THE NATIONAL SECURITY STATE: A HISTORY OF THE LAW THAT TRANSFORMED AMERICA 34–36 (2008).

public-policy role, he went on to be one of the primary authors of the National Security Act of 1947, which fundamentally reorganized the nature of American civil and military relations and generated our current defense policy framework.[16]

During the Great Depression numerous government officials and academics argued that economic emergency highlighted the value of far greater state authority and centralization. As the 1930s drew to a close and Americans began to focus on international events, Herring was among the earliest public voices to connect these arguments about the need for a "positive state" in the economic domain to similar needs presented by the looming specter of war. Herring argued that those issues of modern complexity and permanent threat that plagued domestic economic life were even more troubling in the context of foreign affairs. There, the rise of totalitarian regimes meant that the United States now faced external enemies that, due to ideology, could not be deterred in the same way as old European rivals. Moreover, technological improvements—especially the rise of air power—indicated that the United States was no longer safe behind the oceans. These scientific developments underscored how domestic tranquility faced continuous dangers from enemies who could not be accommodated or reasoned with through arguments about strategic self-interest. As Herring maintained in his widely read book, *The Impact of War*, "In our economic and social life we must now take on the characteristics of a people living in proximity to warlike neighbors and engaged in stern competition. The margins of safety that our democracy has known are being cut away."[17] According to him, what made the problems especially perilous was that totalitarian regimes were better equipped than democracies to take advantage of new technologies of transportation, warfare, and even communication. This was because the centralized nature of fascist or communist states allowed them to aggregate authority in administrative bodies and to avoid the inefficiencies of mass deliberation.

For Herring, the only method of overcoming these new circumstances was to employ the same conceptual and government structures that had operated during the Great Depression in order

16. See *id.* at 1–31 for an excellent account of Herring's career and his influence in structuring new defense practices.

17. PENDLETON HERRING, THE IMPACT OF WAR: OUR AMERICAN DEMOCRACY UNDER ARMS 15–16 (Kennikat Press 1972) (1941).

to create a permanent institutional infrastructure for responding to global threats. He began by employing a relatively novel phrase—"national security"[18]—to mirror the domestic discourse of economic security. Although the term itself had been employed sparingly before,[19] in the 1930s the phrase was still largely unfamiliar. In fact, as Mark Neocleous writes, "the multi-volume *Encyclopaedia of the Social Sciences*, published by MacMillan in 1934, contained no entry for 'national security.'"[20] But now, Herring invoked the phrase to argue that just as economic security was the dominant domestic objective, "national security"—the protection of the state and the way of life associated with it—should be understood as the dominant global objective. The threats to collective survival meant that defense policy could not be left to the same special interests and conflicting social forces that so recently brought the country to financial destitution. Instead the commitment to national security required a degree of social cohesiveness and centralized command, which even outstripped that needed to combat the Depression. According to Herring, "[a]s a nation we are facing a new world. This means a drastic change in the context within which our political institutions operate."[21] Herring sought to reassure critics by arguing that although he was not calling for the United States simply to mimic authoritarian states, he nonetheless believed that the country's leaders could learn from authoritarian methods of shaping policy and projecting power. "This does not mean that the opponents of Nazi Germany must become Nazified if they are to resist, but it does mean that totalitarian states can be opposed only through an equally effective mobilization of resources."[22]

Herring believed that such mobilization in the name of national security necessitated a series of basic shifts in the approach to American foreign relations. Among these shifts was the

18. *See id.*

19. *See* STUART, *supra* note 15, at 28. During World War I, corporations and pro-war nativists had organized the National Security League, which at its peak in 1918 included 90,000 members across the country. The League became a central mechanism for enflaming anti-German and then anti-Communist hysteria as well as in assisting government efforts to suppress general opposition to the war. But with the end of the Red Scare the League crumbled, and by 1940 the organization had declared bankruptcy and its leader had their archives burned to avoid public knowledge of its wartime practices. *Id.*

20. MARK NEOCLEOUS, CRITIQUE OF SECURITY 77 (2008).

21. HERRING, *supra* note 17, at 277.

22. *Id.* at 14.

importance of both greater executive expansion and a permanent and established role for professional soldiers in determining foreign policy goals. Earlier generations of Americans had believed that civilian command and democratic deliberation were essential to sustaining popular accountability and to avoiding the specter of military despotism. Now, however, Herring asserted that, "if democratic governments are to cope with the world today the military must have an accepted place in our scheme of values."[23] Only members of the military had the knowledge to make sense of specialized questions of preparedness, questions crucial to long-term strategic thinking.

Moreover, undergirding such centralization and military influence was a focus on secrecy and a rejection of old presumptions in favor of political transparency and public access. In order to respond to threats from abroad, the state needed to remain one step ahead of its potential enemies. This entailed developing a new formalized network of spies as well as linguistic and technological experts skilled in collecting and sifting through intelligence. In essence, this national security framework—built on centralization, military influence, and institutional secrecy—took for granted that, just as insecurity was a permanent condition of economic life, it also was a constant element of international politics. As such, Herring concluded that Americans had to reconcile themselves, regardless of old fears of military and executive dominance, to the fact that permanent crisis meant, "[d]emocracy may have to remain under arms for a long time to come."[24]

Above all, Herring's account entailed treating national security as a unifying commitment, one that transcended ordinary popular disagreement and thus was appropriately removed from the regular political process. According to him, if threats had now become continuous and ever present, it was also the case that, "[a] democracy can stand under arms and remain true to its values to the extent that it can call upon deep communal reserves of agreement."[25] For Herring, while the United States should remain an open society, he nonetheless concluded that, "[n]o internal resistances to these domestic efforts can be tolerated."[26] As a

23. *Id.* at 20.
24. *Id.* at 277.
25. *Id.* at 282.
26. *Id.* at 14.

consequence, if a balance between liberty and security must be struck, security had to enjoy primacy of place as both pre-political and the foundation of American unity.

Herring's national security vision was especially persuasive in the wake of World War II. To Washington policymakers, his arguments in *The Impact of War* appeared particularly prescient given that they were published only months before Pearl Harbor, an event that, for many political commentators, shattered the old faith in domestic safety behind the oceans. The National Security Act of 1947, aptly using Herring's phrase, gave legal substance to many of his ambitions. As historian Douglas Stuart writes of the law:

> It created a National Military Establishment, which became the Department of Defense in 1949. It gave the Air Force an independent status and provided the Joint Chiefs of Staff with statutory identity. It established the National Security Council (NSC), the Central Intelligence Agency (CIA), and a cluster of lesser-known institutions, including the National Security Resource Board, the Munitions Board, and the Research and Development Board.[27]

Among the long-term implications of these changes was the creation of a permanent peacetime structure for gathering intelligence, the elevation of the policymaking responsibility of military officers, and the dramatic growth of executive agencies tasked with issues of defense.

The new ideological and institutional status quo meant that by the early 1950s, even Supreme Court decisions, which on their face appeared to limit executive discretion, had the practical effect of further expanding presidential power, as well as the emerging national security framework. For instance, a case such as *Youngstown Sheet & Tube Co. v. Sawyer*,[28] commonly read as a powerful example of the Court limiting presidential prerogatives, highlighted precisely the opposite developments. There, the Court invalidated President Truman's seizure of private steel mills during the Korean War, holding that he lacked either the statutory or constitutional authority to do so, especially given Congress's

27. STUART, *supra* note 15, at 8.
28. 343 U.S. 579 (1952).

explicit refusal to delegate this power when passing 1947's Taft-Hartley Act.[29] Despite the formalism of Justice Black's opinion for the court (no opinion received a majority of votes), six of the nine judges contended that the executive may have inherent emergency powers and five of the nine defended implied executive powers of lawmaking given congressional acquiescence.[30] More important, as Jules Lobel notes, "the concurrences of Justice Jackson and Justice Frankfurter, rather than the formalism of Justice Black's majority opinion, now dominate[] the national security establishment's view of the Constitution."[31]

While Black emphasized textualism and clear formal categories of legality and illegality, Jackson and Frankfurter's concurrences reiterated that the Constitution had to be read as a functional document. For Frankfurter, this meant that congressional acquiescence to executive practice had the potential to create a presumption in favor of constitutionality, in effect providing the President with legally-sanctioned lawmaking powers. Quoting Oliver Wendell Holmes, Frankfurter explicitly rejected Black's textual approach and declared that "[t]he great ordinances of the Constitution do not establish and divide fields of black and white."[32] According to him, the Constitution had to be understood

29. Justice Black's court opinion held that because Congress did not authorize executive action, the President did not have the constitutional authority during the Korean War to seize and operate private steel mills. "The Founders of this Nation entrusted the lawmaking power to the Congress alone in both good and bad times." *Id.* at 589.

30. With respect to inherent emergency powers—loosely understood to be those powers furthest away from a clear grant of constitutional or statutory authority—along with the three justices in dissent (Vinson, Reed, and Minton) Justices Burton, Clark, and Frankfurter also offered telling defenses of presidential assertiveness. Clark wrote that, "the Constitution does grant to the President extensive authority in times of grave and imperative national emergency. In fact, to my thinking, such a grant may well be necessary to the very existence of the Constitution itself." *Id.* at 662 (Clark, J., concurring). Burton maintained the legitimacy of inherent authority when facing an imminent attack, commenting, "[t]he present situation is not comparable to that of an imminent invasion or threatened attack. We do not face the issue of what might be the President's constitutional power to meet such catastrophic situations." *Id.* at 659 (Burton, J., concurring). As for Frankfurter, he commented that, "[w]e must therefore put to one side consideration of what powers the President would have had if there had been no legislation whatever bearing on the authority asserted by the seizure, or if the seizure had been only for a short, explicitly temporary period . . . ." *Id.* at 597 (Frankfurter, J., concurring).

31. Jules Lobel, *Emergency Power and the Decline of Liberalism*, 98 YALE L.J. 1385, 1410 (1989).

32. *Youngstown*, 343 U.S. at 597, *quoted in* Lobel, *supra* note 31, at 1411.

in the context of contemporary problems, and as capable of contracting or extending its allocation of authority based on society's needs. He maintained that "[i]t is an inadmissibly narrow conception of American constitutional law to confine it to the words of the Constitution and to disregard the gloss which life has written upon them."[33] Thus, whether assertions of executive and congressional power were constitutionally legitimate shifted with the practical realities on the ground and the perceived judgments about external threats. For Frankfurter, the Constitution was to be understood as a flexible document, one which catered to policymaking judgments about the requirements of national security.

II. AMERICAN PRIMACY AND THE FAILURE OF PROCEDURAL REFORM

Many of today's defenders of this national security constitution—imagined by Herring and given institutional and legal form in the 1940s and 1950s—often present these changes as simple responses to unavoidable conditions of objective threat. Just as Pearl Harbor presented a physical attack on the homeland justifying a new framework, the American position in the world since has been one of continuous insecurity in the face of new, equally objective dangers. According to this view, the reason for continuity between Obama and Bush is the straightforward consequence of the persistence of these externally generated crises.

Yet, from its inception, supporters of the national security framework also have noted the link between the idea of insecurity and American's post-World War II role of global primacy, one that has only expanded following the Cold War. In 1961, none other than Senator James William Fulbright declared that the imperatives of national security meant that "our basic constitutional machinery, admirably suited to the needs of a remote agrarian republic in the 18th century," was no longer "adequate" for the "20th-century nation."[34] For Fulbright, at the heart of this national security vision was the importance of sustaining the country's "preeminen[ce] in political and military power."[35] Moreover, Fulbright held that

33. *Youngstown*, 343 U.S at 610 (Frankfurter, J., concurring).

34. J. William Fulbright, *American Foreign Policy in the 20th Century Under an 18th-Century Constitution*, 47 CORNELL L.Q. 1, 1 (1961).

35. *Id.*

greater executive action and war-making powers were necessary precisely because the United States found itself "burdened with all the enormous responsibilities that accompany such power."[36] Fulbright felt that the United States had both a right and a duty to suppress those forms of chaos and disorder, which existed at the edges of American authority. Thus, rather than being purely objective, the American condition of permanent external threat was itself deeply tied to political calculations about national identity and the value of global primacy. What generated the condition of continual danger was not only technological change, but also the belief that the United States' own sense of national security rested on the successful projection of power into the internal affairs of foreign states.

It is the failure to reckon with this political dimension of the national security Constitution that largely explains the inadequacy of efforts since the 1940s to address the problems of executive authority, heightened centralization, and pervasive secrecy. As the opening quote from Schlesinger makes clear, today's critics of the imperial President are hardly the first to raise such worries.[37] Instead, these critics are part of a sixty-year history of reform aimed at limiting presidential prerogative and preventing likely abuses.[38] What is remarkable about such reform efforts is that in every generation scholars and politicians have articulated the same basic anxieties and presented virtually identical procedural solutions. These solutions have focused on enhancing the institutional strength of both Congress and the courts to rein in executive prerogatives. They either promote new statutory schemes that codify legislative responsibilities or call for greater court activism. As early as the 1940s, Clinton Rossiter argued that only a clearly established legal framework in which Congress enjoyed the power to declare and terminate states of emergency would prevent executive tyranny in times of crisis.[39] After the Iran-Contra scandal, Harold Koh, now State Department Legal Adviser, once more raised this approach, calling for passage of a national security

36. *Id.*

37. *See* SCHLESINGER, *supra* note 1 and accompanying text.

38. *See infra* notes 39–43 and accompanying text.

39. *See* CLINTON L. ROSSITER, CONSTITUTIONAL DICTATORSHIP: CRISIS GOVERNMENT IN THE MODERN DEMOCRACIES 297, 306–13 (1948). According to Rossiter, "[i]f Congress is to play a salutary part in future emergency governments in this country, then its functions of legislation, investigation, and control must be streamlined and strengthened." *Id.* at 309.

charter, which explicitly enumerated the powers of the executive and the legislature, and promoted greater balance between the branches.[40] More recently, Bruce Ackerman has defended the need for an emergency constitution premised on congressional oversight.[41] As for greater judicial vigilance, Schlesinger argued over thirty years ago that the courts "had to reclaim their own dignity and meet their own responsibilities" by abandoning deference and by offering a meaningful check on presidential power.[42] Today, Lawrence Tribe and Patrick Gudridge once more hope that, by providing a powerful voice of dissent, the courts can play a critical role in balancing the branches. They write that adjudication can "generate[]—even if largely (or, at times, only) in eloquent and cogently reasoned dissent—an apt language for potent criticism."[43]

None of these calls to action, in either their older or more recent forms, have presented a meaningful check on national security practices. Instead, presidential and military prerogatives continue to expand even when the courts or Congress intervene. The ultimate result is often to entrench further the system of discretion and centralization. In essence, today's scholarship finds itself mired in an argumentative loop, representing inadequate remedies and seemingly incapable of recognizing past failures. The hope—returned to by scholars for the last sixty years—has been that by creating procedures for strengthening the other branches, executive abuse can be stemmed.[44] What leaves this hope

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40. *See generally* HAROLD H. KOH, THE NATIONAL SECURITY CONSTITUTION: SHARING POWER AFTER THE IRAN-CONTRA AFFAIR (1990). Koh wrote at the time that:

> What the Iran-Contra affair underscores is the need for a new national security charter—an omnibus statutory amendment to the National Security Constitution—in the form of a framework statute designed to regulate and protect many aspects of the foreign-policy-making process. Unlike the current patchwork of laws, executive orders, national security directives, and informal accords that govern covert and overt war making, emergency economic power, foreign intelligence, and arms sales, such a statute would act as a successor to the National Security Act of 1947.

Id. at 157 (endnote omitted).

41. *See* ACKERMAN, *supra* note 3, at 19 ("Congress and the public [need to be invited] to make the necessary discriminations [on presidential military powers]").

42. *See* SCHLESINGER, *supra* note 1, at 418 ("[admonishing also] Congress, . . . the executive establishment, the press, the universities, [and] public opinion").

43. Laurence H. Tribe & Patrick O. Gudridge, *The Anti-Emergency Constitution*, 113 YALE L.J. 1801, 1846 (2004).

44. *See supra* notes 39–43 and accompanying text.

perpetually unrealized is that the ideal of national security—articulated so powerfully by Herring—takes for granted the need for constitutional flexibility. Only through the exercise of such flexibility can the United States assert authority abroad and intervene continuously to pacify emerging and perceived sources of instability. Since the executive branch (armed with the expertise of the professional military) is presumed to embody the institution best equipped to exercise this constitutional flexibility, the other branches necessarily face a legitimacy deficit. Under the realities of national security, whenever Congress or the courts intercede to limit executive power they inevitably do so on shaky grounds. Thus, the tendency of procedural reform efforts has been to place greater decision making in the other branches and then to watch those branches delegate such power back to the Presidency.

In the case of congressional legislation (from the 200 standby statutes on the books to the post-9/11 and Iraq War Authorizations for the Use of Military Force to the Detainee Treatment Act and the Military Commissions Acts), this has often entailed Congress self-consciously playing the role of junior partner—buttressing executive practices by extending its own constitutional imprimatur to them. As just one example, the USA PATRIOT Act, while no doubt politically controversial, has been renewed by Congress for ten consecutive years without any meaningful checks. In fact, following the most recent renewal (for three months), the Obama administration is on record declaring it would like a longer-term extension and the Senate debate has principally concerned whether the Act should be renewed for three years or made permanent.[45] In essence, current practices have meant the internalization of emergency norms within the ordinary operation of American constitutional politics.[46] This internalization takes the form of statutes and administrative procedures that provide legal underpinning for the executive's expansive and coercive powers.

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45. *See* Pete Kasperowicz, *Obama Signs Patriot Act Extension into Law*, THE HILL (Feb. 25, 2011, 3:42 PM), http://thehill.com/blogs/floor-action/house/146173-obama-signs-patriot-act-extension-into-law; Pete Kasperowicz, *Senate Returns to Patriot Act Extension Next Week*, THE HILL (Feb. 25, 2011, 1:00 PM), http://thehill.com/blogs/floor-action/house/146133-senate-returns-to-patriot-act-extension-next-week.

46. For more on the normalization of emergency in American law, see Kim L. Scheppele, *Exceptions that Prove the Rule: Embedding Emergency Government in Everyday Constitutional Life*, *in* THE LIMITS OF CONSTITUTIONAL DEMOCRACY 124 (Jeffrey K. Tulis & Stephen Macedo eds., 2010).

III. CONCLUSION: BREAKING OUT OF THE ARGUMENTATIVE LOOP

The only way ultimately to produce lasting reform is to shift American political identity away from the national security frame shared by both the Bush and Obama administrations. In emphasizing the sense of permanent threat, this frame has not only generated an American polity continuously under arms, but it has also led to a global military footprint perhaps unparalleled in human history. As of 2009, some 516,273 military service members—not including Department of Defense civilian officials—were deployed abroad, stationed across 716 reported overseas bases (the true number is likely over 1000), and present in approximately 150 foreign states (nearly eighty percent of the world's countries).[47] This worldwide military network is sustained by tremendous expenditures, which account for almost half of global defense spending—a number equal to the following twenty nations combined.[48] Simply maintaining and protecting this global defense infrastructure has the inevitable consequence of strengthening executive power and promoting the further entrenchment of emergency rhetoric and rationales.

Most troubling, in order to extend its footprint and international primacy, the United States finds itself engaging in practices that often actually promote, rather than inhibit, instability at the fringes of American power. The ever-present concern with national security means that policymakers view the United States as enjoying a right to act covertly or overtly in all parts of the world in order to quell presumed threats. Yet, in doing so, American actions have the tendency to produce their own backlashes, with the United States subject to local insurrections and new potential dangers. Rather than recognizing how the projection of American power itself participates in generating these crises, the talismanic logic of national security works to rationalize yet further territorial presence. This cycle of intervention, backlash, instability, and

47. *See Deployment of U.S. Troops*, UNITED PRESS INT'L ONLINE (Dec. 2, 2009, 1:01 PM), http://www.upi.com/Top_News/Special/2009/12/02/Deployment-of-US-troops/UPI-93091259776903/;
OFFICE OF THE DEPUTY UNDERSECRETARY OF DEF., DEP'T OF DEF., BASE STRUCTURE REPORT DOD-22 (2009), *available at* http://www.defense.gov/pubs/pdfs/2009baseline.pdf.

48. *See* STOCKHOLM INT'L PEACE RESEARCH INST., SIPRI YEARBOOK 2009 app. 5A (2009), *available at* http://www.sipri.org/yearbook/2009/05/05A.

more intervention promotes a deep distortion in the actual meaning of local events—which oftentimes have little direct relation to American interests. It also serves as a continual justification for yet further constitutional flexibility and presidential prerogative, precisely because new dangers seem omnipresent.

One clear consequence is that, as the local meaning of events disappears, the actual severity of foreign threats can often be greatly exaggerated. In 2009, only twenty-five United States civilians (sixteen at home and nine abroad) were killed in terrorist attacks according to the State Department.[49] While the fear of a terrorist attack is a legitimate concern, such numbers—which have been consistent in recent years—place the gravity of the threat in perspective and suggest the disconnect between the rhetoric of existential danger (one presumably comparable to Pearl Harbor) and the reality of relative security. Moreover, the persistent alteration of basic constitutional values to fit national security aims, regardless of objective consequences, for actual American physical safety, speaks to a profound imbalance in the United States's political priorities. It highlights just how entrenched Herring's old vision of security as pre-political (a lodestar around which to calibrate fundamental rights and collective interests) has become. Ultimately, the failure of the Obama administration to offer a meaningful legal correction is because at root the current administration—like its predecessor—remains committed to this vision of security and to the larger political framework produced by it. Thus, the question for Americans is whether there exists the public will to challenge the prevailing consensus, with its account of permanent threat and the need for a continuous projection of American power. Without such a will, there can be no substantive shift in our constitutional politics.

49. *See* NAT'L COUNTERTERRORISM CTR., 2009 REPORT ON TERRORISM 19 (2010), *available at* http://www.nctc.gov/witsbanner/docs/2009_report_on_terrorism.pdf.