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# The Political Balance of Power over the Military: Rethinking the Relationship between the Armed Forces, the President, and Congress

Geoffery S. Corn  
*South Texas College of Law*, gcorn@stcl.edu

Eric Talbot Jensen  
*BYU Law*, jensene@law.byu.edu

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# ARTICLE

## THE POLITICAL BALANCE OF POWER OVER THE MILITARY: RETHINKING THE RELATIONSHIP BETWEEN THE ARMED FORCES, THE PRESIDENT, AND CONGRESS

*Geoffrey Corn\* & Eric Talbot Jensen\*\**

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\* Assistant Professor of Law, South Texas College of Law. B.A., Hartwick College; J.D., *with highest honors*, George Washington University; LL.M., *distinguished graduate*, Judge Advocate General’s School. Prior to joining the faculty at South Texas, Mr. Corn served as Special Assistant to the U.S. Army Judge Advocate General for Law of War Matters, and Chief of the Law of War Branch, U.S. Army Office of the Judge Advocate General International and Operational Law Division. Mr. Corn also served as a member of the U.S. Army Judge Advocate General Corps from 1992–2004. Previously, he was a supervisory defense counsel for the Western United States; Chief of International Law for U.S. Army Europe; and a Professor of International and National Security Law at the U.S. Army Judge Advocate General’s School. Mr. Corn has served as an expert consultant to the Military Commission Defense team, and has published numerous articles in the field of national security law. He frequently lectures on law of war and national security law topics.

\*\* Lieutenant Colonel, Chief, International Law Branch, Office of The Judge Advocate General, U.S. Army. B.A., Brigham Young University; J.D., University of Notre Dame; LL.M., The Judge Advocate General’s Legal Center and School; LL.M. Yale Law School. Operational Law Attorney, Task Force Eagle, Bosnia, 1996. Command Judge Advocate, Task Force Able Sentry, Macedonia, 1997. Chief Military Law, Task Force Eagle, Bosnia, 1998. Professor, International and Operational Law Department, The Judge Advocate General’s Legal Center and School, 2001–2004. Deputy Staff Judge Advocate, 1st Cavalry Division, Baghdad, Iraq, 2004–2005. Member of the Bars of Indiana and the United States Supreme Court. The views expressed in this Article are those of the Author and not The Judge Advocate General’s Corps, the U.S. Army, or the Department of Defense. The Author wishes to express his appreciation to Professor Akhil Amar for his instruction and his comments and insights on early versions of this paper.

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## I. INTRODUCTION

[B]ut the way [Secretary of Defense Donald Rumsfeld] has handled General Shinseki, for example, by appointing his successor 15 months before his term expired, made him a lame duck, and if he disagreed with General Shinseki's professional military judgment, he should have made clear why. And Tom White, the Secretary of the Army, is also a former general, so they were giving their professional opinion to the Congress, which is what they're supposed to do.

Under our system of government, the Congress has the right to get the professional military judgment. And so, there's nothing wrong with what [Secretary Rumsfeld] is doing, but if you start firing people for being honest with the Congress, then I think you've caused long-term problems for the whole relationship between the military and civilians.<sup>1</sup>

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1. *Nachman 19:00* (MSNBC television broadcast Mar. 14, 2003) (statement of Larry Korb, Former Assistant Secretary of Defense); see also Michael R. Gordon, *Criticizing an Agent of Change as Failing to Adapt*, N.Y. TIMES, Apr. 21, 2006, at A18

During the Bush Administration's campaign to garner support for the invasion of Iraq, General Shinseki appeared before Congress and openly disagreed with the Secretary of Defense by testifying that operations in Iraq would require "several hundred thousand troops."<sup>2</sup> The quote above highlights allegations that, in response to this disagreement, Secretary Rumsfeld branded Shinseki "general non grata."<sup>3</sup> It also suggests that Rumsfeld's decision to effectively "fire" General Shinseki ensured that "[t]he rest of the senior brass got the message,"<sup>4</sup> thereby muting further opposition by military leaders to the Administration's war plans.<sup>5</sup>

It is certainly not unprecedented for retired senior military officers to criticize current civilian leaders of the military,<sup>6</sup> or for those leaders to respond dismissively to such criticisms. Nor is it unprecedented for the nation's civilian leadership to relieve from duty senior officers in wartime.<sup>7</sup> However, the controversies surrounding the perceived marginalization of military leaders by the politically appointed civilian leadership of the armed forces—particularly then-Secretary of Defense Rumsfeld—seem to differ from prior civil–military disputes. Rumsfeld's actions created the perception that a member of the executive branch had "fired" a member of the military, not for malfeasance or insubordination, but instead for providing candid testimony to Congress, causing

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(noting the tension between the Secretary of Defense and the military as well as the criticism of Rumsfeld by retired officers); *White Came Close to Being Fired Last Week*, BULL. FRONTRUNNER, Mar. 13, 2003 (describing a recent power struggle between the Office of the Secretary of Defense and the Army); cf. *Rumsfeld Defends Decision to Cancel Crusader Before Senate Panel*, BULL. FRONTRUNNER, May 21, 2002 (discussing the conflict between Secretary Rumsfeld and General Shinseki over the "Crusader," a proposed Army weapons system); Frank Tiboni, *U.S. Army Chiefs Term Was a Quiet Storm*, DEF. NEWS, June 16, 2003, at 36 (noting instances of strain between Rumsfeld and top military personnel regarding the Crusader).

2. Nancy Gibbs, *Digging in for a Fight*, TIME, May 3, 2004, at 26, 28 (quoting testimony of then Army Chief of Staff Shinseki).

3. *Id.* at 28.

4. Paul D. Eaton, Op-Ed, *A Top-Down Review for the Pentagon*, N.Y. TIMES, Mar. 19, 2006, at 12; see also Richard Cohen, Editorial, *Vietnam's Forgotten Lessons*, WASH. POST, Apr. 11, 2006, at A21 (contending that officers put their careers ahead of offering advice contradicting the Office of the Secretary of Defense); Gibbs, *supra* note 2, at 28 (suggesting that Rumsfeld's treatment of General Shinseki discouraged candor among officers).

5. Demetri Sevastopulo & Alexander Kliment, *Bush Battles to Save Rumsfeld*, FIN. TIMES (London), Apr. 15, 2006, at 6 (suggesting that Secretary Rumsfeld muted military leaders through "intimidation").

6. Max Hastings, Editorial, *Behind the Revolt*, WASH. POST, Apr. 26, 2006, at A25 (observing that retired military officers have criticized the execution of operations and wars throughout recent history).

7. F. MAURICE, GOVERNMENTS AND WAR 87–98 (1926) (chronicling President Abraham Lincoln's many hirings and firings during the Civil War).

other military leaders to adjust their candor accordingly.<sup>8</sup> If accurate, this phenomenon raises serious implications for the role of the military within our national government and the effect that role has on separation of powers.

There is, however, virtually no question that the President—or Secretary of Defense acting on behalf of the President—may properly reassign military leaders who disagree with their overall plan for military employment. In fact, one of the underlying premises of the U.S. form of government is that the military is subject to plenary civilian control. This principle is emphasized all over the world by military attorneys dispatched by the Department of Defense to educate fellow members of the military profession about their role in a democracy.<sup>9</sup> Nor is there any question that the President is vested with the authority to manage the execution of military operations as “top general” in his capacity as Commander in Chief of the armed forces, a power that is exclusive and immune from congressional interference.

The Shinseki episode suggests, however, that disconnecting the principle of civilian control over the military from fundamental separation of powers considerations risks distorting the purpose of the principle. Such disconnection has resulted in a narrow reading of “civilian leadership” to suggest that it extends only to civilians within the executive branch.<sup>10</sup> This subtle, practical exclusion of members of the legislative branch has contributed, and will continue to contribute, to allegations such as those levied against former Secretary Rumsfeld, whose actions were allegedly designed to discourage members of the military from providing candid information to Congress.<sup>11</sup> Restrictions on

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8. Cohen, *supra* note 4 (positing that career considerations affected advice offered by military leaders).

9. See Defense Institute of International Legal Studies, <http://www.dsca.mil/diils/> (last visited Aug. 6, 2007) (detailing training programs offered by the Defense Institute to military and civilian government officials).

10. For example, some have alleged that the Bush Administration’s recent restrictions on lower-ranking military members have that effect. “Several congressional officials accused [Robert L. Wilkie, Assistant Secretary of Defense for Legislative Affairs,] of attempting to muzzle the military’s lower ranks, which are more likely to give Congress an unvarnished opinion compared with the top-level Pentagon brass, who typically seek to further the Bush administration’s policies.” Bryan Bender & Charlie Savage, *Pentagon Restricting Testimony in Congress*, BOSTON GLOBE, May 10, 2007, at A1.

11. At least some Senators believe that Secretary Rumsfeld’s treatment of General Shinseki has muted military commanders’ willingness to come forward with information or advice contrary to that of the Administration. At General George Casey’s nomination hearing, Senator Graham questioned General Casey about General Shinseki’s prior testimony, and Senator Nelson responded, “Senator Graham, no one would say that General Shinseki was right, because the Secretary of Defense, Rumsfeld, wasn’t going to

such communications, even if implied instead of express, strike at the very core of the Founders' intent to "balance military power . . . *within* the national government."<sup>12</sup> This danger is exacerbated when the views of military leaders differ from those of the executive-branch policymakers. Permitting the restriction on communication of such opinions to Congress appears to treat the military as an executive agency, falling under the sole control of the President, and having no independent responsibility to the other branches of government or the nation as a whole. Although this may be a common conception of the relationship between the armed forces and the national government, such a conception is simply not accurate. Instead, the Constitution places the military in a unique position with control and responsibility purposely shared between the executive and legislative branches of government.<sup>13</sup>

This shared authority paradigm imposes upon military leaders both a right and duty to provide candid and complete information to the executive and legislative branches on matters within their spheres of constitutional competence. Furthermore, both branches of government have a right and responsibility to require such information. If the President or Congress fails to ensure they are fully informed within their spheres of responsibility, they are abrogating the constitutional design which has provided sound military policy to the United States for over 200 years. Similarly, members of the military who fail to provide this information to the Executive or the Legislature, especially if acting out of allegiance or loyalty to the other branch of government, have violated their oath of fidelity to the Constitution. This Article asserts that current trends in the civil-military relationship paradigm are increasing both the perception and reality that the military is an executive agency without concomitant responsibilities to Congress. As a result, the Department of Defense is increasingly operating under a paradigm of plenary executive-branch dominance which threatens to create an imbalance in the ability of the political branches to qualitatively execute their shared responsibilities

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let them say that." *Nomination of General George Casey to be Army Chief of Staff: Hearing Before S. Armed Servs. Comm.*, 110th Cong. (2007).

12. AKHIL AMAR, *AMERICA'S CONSTITUTION: A BIOGRAPHY* 115 (2005).

13. See generally Andrew J. Goodpaster, *Educational Aspects of Civil-Military Relations*, in *CIVIL-MILITARY REL.* 33 (Andrew J. Goodpaster & Samuel P. Huntington eds., 1977) (recognizing the different military responsibilities of the executive and legislative branches).

related to the use of the military as an element of national power.<sup>14</sup>

This Article neither proposes nor suggests that this perception of executive authority over military affairs is always invalid. Indeed, it is axiomatic that the authority of the Commander in Chief requires absolute fidelity to the President in relation to his command of the armed forces. However, it is equally axiomatic that for Congress to exercise its authority to make all laws that are “necessary and proper” for the execution of government powers,<sup>15</sup> it must understand what is necessary and proper in relation to military matters. Accordingly, what is suggested herein is that the requisite fidelity to the Commander in Chief in his “top general” capacity is increasingly misunderstood as extending to all political and policy issues related to the military. This Article asserts that such an expansive scope of perceived executive dominance over all military issues is inconsistent with the paradigm of shared authority over the military reflected in the Constitution, and holds the potential to diminish the effectiveness of congressional involvement in such issues. As will be discussed below, this increasing perception of plenary loyalty has contributed to a degrading effectiveness of this shared power paradigm by limiting the quality of congressional involvement in military affairs.

Accordingly, this Article proposes that Congress should facilitate access to timely and meaningful military information by implementing some mechanism to offset this accretion of dominance by the Executive and facilitate more meaningful and effective congressional involvement in military matters within legislative competence. Three proposals will be offered. At the most intrusive end of the spectrum, Congress would impose a legal mandate to appoint senior ranking military advisors to key congressional leaders. Such advisors would serve the function of aiding in the determination of what measures were necessary and proper in the execution of congressional military

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14. The four elements of national power are usually expressed as diplomacy, information, military, and economics. See THE JOINT CHIEFS OF STAFF, JOINT PUB’N NO. 1, JOINT WARFARE OF THE ARMED FORCES OF THE UNITED STATES, at v (2000), available at [http://www.dtic.mil/doctrine/jel/new\\_pubs/jp1.pdf](http://www.dtic.mil/doctrine/jel/new_pubs/jp1.pdf) (cataloging elements of national power). The military element includes more than just the armed forces, but the armed forces are often the first tool used to exercise that element of national power. See *id.* at III-16 (noting that the armed forces is one of multiple components of military operations).

15. See U.S. CONST. art. I, § 8, cl. 18 (vesting Congress with the authority to make all laws that are “necessary and proper for carrying into execution the foregoing powers, and all other powers vested by this Constitution in the government of the United States, or in any department or officer thereof” (emphasis added)).

responsibilities. In so doing, this advice would also aid in an understanding of the line between “proper” legislative action and “improper” interference with the command and control of military operations, a function vested exclusively in the Commander in Chief. A somewhat less intrusive approach would be for Congress to request the detail of such advisors from the Department of Defense. This would provide Congress with the military advice this Article asserts is necessary, but would do so in a manner that implicitly acknowledges the principal authority of the Commander in Chief over the military by granting the Executive the discretion to support or deny the request. At the least intrusive end of the spectrum, Congress would employ retired four-star flag-officers or other very senior leaders to perform a similar function. Congress would rely on these officers to offer the type of expertise and insight proposed by this Article as necessary to facilitate congressional participation in military related matters. However, their retired status would mitigate the actual or perceived conflict of interest that would invariably influence the role of active serving counterparts.

This Article is not about the recent debate over the power of the President and the “unitary executive.” That debate relates predominately to the President’s power to control executive agencies.<sup>16</sup> This Article, however, asserts that the U.S. military is not under the control of the executive branch in the same way as other executive agencies. As will be discussed, although the military is an executive “department”<sup>17</sup> and there has been a growing trend within the executive branch to treat the military similarly to other executive agencies, conceptualizing the military in this way diminishes the constitutional balance of

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16. See HAROLD HONGJU KOH, *THE NATIONAL SECURITY CONSTITUTION: SHARING POWER AFTER THE IRAN-CONTRA AFFAIR* 118–19 (1990) (contending that the structure of the Executive and Legislature lends to the struggle between the branches); Lawrence Lessig & Cass R. Sunstein, *The President and the Administration*, 94 COLUM. L. REV. 1, 41 (1994) (arguing that there is considerable legislative authority over administration of the federal government); Saikrishna Prakash, *The Chief Prosecutor*, 73 GEO. WASH. L. REV. 521, 551–52 (2005) (listing the historical arguments for a unitary executive as it affects prosecution); Christopher S. Yoo, Steven G. Calabresi, & Anthony J. Colangelo, *The Unitary Executive in the Modern Era, 1945–2004*, 90 IOWA L. REV. 601, 606 (2005) (tracing historical episodes that illustrate both the legal and the normative arguments supporting the unitary executive).

17. 10 U.S.C. § 111(a) (2000). It is clear from the history of the Goldwater-Nichols Department of Defense Reorganization Act of 1986 that Congress was worried about defining the powers of the Secretary of Defense vis-à-vis the separate Services within the Department, rather than vis-à-vis the Congress or any other nonexecutive-branch agency. See James R. Locher III, *Taking Stock of Goldwater-Nichols*, JOINT FORCE Q., Autumn 1996, at 10, 11–12 (analyzing Congress’s concern with the roles of the service secretaries in relation to the Secretary of Defense).



power over the military. Furthermore, classifying the military in such a manner disregards the textual and structural checks and balances created by the Framers of the Constitution to ensure that no branch of government gained too much control over the nation's armed forces. It is the thesis of this Article that the military is more properly understood as a *national* agency with controls explicitly divided between the executive and legislative branches. Maintaining this deliberate and carefully crafted balance of authority is vital to the effective functioning of the military and, more importantly, to the security of the nation.

Part II of this Article will analyze the constitutional structure of the military as established by the Framers, with particular emphasis on the text and structure as envisioned by them, given their historical concerns. Part III will discuss the information gathering and investigation powers of Congress and analyze Congress's historical use of these powers in creating a constitutional balance between the branches of government. Part IV will analyze Congress's information and investigation powers in relation to the military as compared with other executive agencies, including a review of historical practice and precedent and the invocation of "executive privilege." This Part will argue that a current imbalance exists with Congress not receiving the benefit of candid information from the military on issues clearly within Congress's sphere of responsibility. Part V will address why the distribution of war powers between the two political branches of government necessitates congressional access to meaningful military information, and how depriving Congress of such access undermines the validity of the coordinate decision-making paradigm over war powers. The Article will conclude in Part VI with recommendations to remedy the current imbalance through increased military representation in congressional staffs.

## II. CONSTITUTIONAL STRUCTURE AND THE UNIQUE STATUS OF THE MILITARY AS A "NATIONAL" AGENCY

### A. *The Constitutional Division of Authority over the Military*

The most pervasive incentive to the Federalists for founding "a more perfect Union"<sup>18</sup> was the geostrategic benefit that would

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18. U.S. CONST. pmb1.

accrue from joining together.<sup>19</sup> Other than Madison, whose arguments were fundamentally internal,<sup>20</sup>

the bulk of early *Federalist* essays focused less on internal arguments about democracy than external arguments about defense, less on demography within a republic than on geography at its borders. The central argument for a dramatically different and more perfect union was not that it would protect Virginians from the Virginia legislature, but rather that it would protect Virginia from foreign nations and sister states, and in turn protect these sisters from Virginia.<sup>21</sup>

Because of this geostrategic concern, control of the military was a sensitive topic to the Framers. In an effort to create the wisest defense structure, taking into account the lessons they had learned from their recent Revolutionary War experience,<sup>22</sup> the Framers chose to explicitly divide the military powers between the executive and legislative branches of the federal government.<sup>23</sup> To Congress was given the enumerated powers of declaring war,<sup>24</sup> raising and supporting armies,<sup>25</sup> providing for and maintaining a navy,<sup>26</sup> and “mak[ing] rules for the Government and regulation of the land and naval Forces.”<sup>27</sup> The

19. See AMAR, *supra* note 12, at 45 (asserting that the Founders recognized the advantages of forming a Union instead of separate, competing kingdoms). Professor Amar further argues that “[m]ost of the powers that Article I, section 8 conferred on Congress flowed naturally from the geostrategic vision of union distilled in the Preamble. Thus, section 8 began by echoing the Preamble almost verbatim, in language affirming the need to ‘Provide for the common Defence and general Welfare.’” *Id.* at 106.

20. *Id.* at 44 (explaining that Madison argued in favor of the Constitution in terms of geography and population).

21. *Id.* Professor Amar goes on to assert that, “[b]y creating an ‘insular’ condition in America, the proposed Constitution would guarantee Americans the rights of Englishmen, and more, by replicating—indeed, surpassing—the geostrategic niche of Englishmen.” *Id.*

22. See John C. Yoo, *The Continuation of Politics by Other Means: The Original Understanding of War Powers*, 84 CAL. L. REV. 167, 242 (1996) (“Those who ratified the Constitution would not have understood its provisions in a vacuum, but instead would have compared and contrasted the document with both their legal understanding of the words and their understanding of how these provisions operated in the world of the eighteenth century.”).

23. According to Professor Yoo, the “declare war” clause in the Constitution establishes the power to declare war as a federal prerogative, not a power allowed to the states. *Id.* He further states that “[d]eclaring war under international law was one vital national security power that any truly national government had to possess.” *Id.* at 244.

24. U.S. CONST. art. I, § 8, cl. 11.

25. U.S. CONST. art. I, § 8, cl. 12.

26. U.S. CONST. art. I, § 8, cl. 13.

27. U.S. CONST. art. I, § 8, cl. 14. The Constitution also contains two clauses dealing with state militias, allowing them to be employed, organized, armed and disciplined by federal authorities when “employed in the Service of the United States.” U.S. CONST. art. I, § 8, cls. 15, 16.

congressional grant of powers then ends with the authority “[t]o make all laws which shall be necessary and proper for carrying into execution the foregoing powers, and all other powers vested by this Constitution in the government of the United States, or in any department or officer thereof.”<sup>28</sup>

In contrast to Congress, the Framers did not enumerate the President’s power in relation to the military beyond stating “[t]he President shall be Commander in Chief of the Army and Navy of the United States.”<sup>29</sup> While the Executive’s authority is much more briefly described, its open-ended description appears to invest the President with a multitude of unenumerated powers.<sup>30</sup> Akhil Amar points to the beginnings of Articles I and II for some insight on the relationship between the powers granted to each branch.

The Constitution’s first two Articles began in different fashion. Article I proclaimed that “all legislative Powers *herein granted* shall be vested” in a bicameral Congress, while Article II declared that “*the executive Power* shall be vested” in the president. Article I’s opening clause thus added nothing to the later list of enumerated congressional powers, yet Article II’s opening clause itself appeared to vest a general residuum of “executive Power” in the president above and beyond the subsequent roster of enumerated presidential powers.<sup>31</sup>

These explicit constitutional provisions concerning the military and its division of responsibility and the inference of a

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28. U.S. CONST. art. I, § 8, cl. 18.

29. U.S. CONST. art. II, § 2, cl. 1. The President is also granted power to appoint officers within the military subject to the advice and consent of the Congress. U.S. CONST. art. II, § 2, cl. 2. Note that, while this may seem like an area where Congress has provided little oversight, as will be illustrated below, it is now an area where Congress is exercising its ability to check the President.

30. In response to those who argue that Congress’s powers and responsibilities concerning the military are strictly limited to the enumerated powers as opposed to the President’s sweeping investiture as Commander in Chief, Professor Amar states:

In truth, the real sweep of section 8’s final clause [granting Congress the power “to make all laws which shall be necessary and proper for carrying into execution the foregoing powers”] extended not downward over states but sideways against other branches of the federal government. . . . Here the Constitution’s text made explicit what otherwise might have been a disputable reading of the document’s organizing schema: Congress stood first among equals, with wide power to structure second-mentioned executive and third-mentioned judicial branches.

AMAR, *supra* note 12, at 110–11.

31. *Id.* at 185. *But see* Brief for Jack N. Rakove et al. as Amici Curiae Supporting Petitioner at 3, *Hamdan v. Rumsfeld*, 126 S. Ct. 2749 (2006) (No. 05-184), available at <http://www.hamdanvrumfeld.com/Rakovehamdanamicusfinal.pdf> (“[T]he adopters of our Constitution rejected a monarchical conception of executive prerogative, and instead maintained and extended the legislative supervision and control of executive power.”).

residuum of authority to the Executive comprise more detail than virtually every other national institution outside the three specified branches of government. Despite this institutional sketch, constitutional scholars still agree that “the Framers did not set down in writing the exact allocation of authority” with respect to the military.<sup>32</sup> Rather, “the document grants clearly related powers to separate institutions, without ever specifying the relationship between those powers.”<sup>33</sup> Because of this lack of relational clarity,<sup>34</sup>

ultimate judgments regarding how the Constitution allocates particular powers in foreign affairs cannot be reached solely by looking at constitutional text, for the problem is not simply one “of correctly discerning or stating the legitimate bounds of the presidential and the congressional powers respectively.” Rather, allocations of authority must be identified by “reasoning from the *total structure* which the text has created.”<sup>35</sup>

Many scholars argue that analysis of the structure of the Constitution lends itself not to a specific division of labor as to military power but to an intentional gray area,<sup>36</sup> or zone of shared powers,<sup>37</sup> requiring the legislative and executive branches to work out the allocation of power and responsibility. As Louis Fischer recently wrote:

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32. Yoo, *supra* note 22, at 241.

33. KOH, *supra* note 16, at 67.

34. *Compare* *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 589 (1952) (“The Founders of this Nation entrusted the lawmaking power to the Congress alone in both good and bad times.”), *with id.* at 632 (Douglas, J. concurring) (demonstrating the uncertainty of the left and right limits of the Commander in Chief power), *and id.* at 709–10 (Vinson, C.J., dissenting) (same).

35. KOH, *supra* note 16, at 68 (footnote omitted).

36. See John C. Yoo, *War and the Constitutional Text*, 69 U. CHI. L. REV. 1639, 1681 (2002) (“Careful examination of the central provisions involved, other relevant texts, and the constitutional structure shows that the Constitution does not mandate a specific, legalistic process for waging war. Instead, the Constitution vests the executive and legislative branches with different powers involving war, which the President and Congress may use to cooperate or to compete.”).

37. Professor Koh argues that throughout history,

the nation has adhered to a foreign policy decision-making structure premised on the balanced institutional participation of all three governmental branches. Although the National Security Constitution has assigned the president the predominant role in making foreign policy decisions, it has granted him only limited *exclusive* powers. Thus, the Constitution directs most governmental decision regarding foreign affairs into a sphere of concurrent authority, under presidential management but bounded by the checks provided by congressional consultation and judicial review.

KOH, *supra* note 16, at 4.

The framers did not object to a sharing or partial intermixture of powers. They were not doctrinaire advocates of a pure separation of powers between branches. Some overlapping was necessary to assure a vigorous system of checks and balances. They knew that the “danger of tyranny or injustice lurks in unchecked power, not in blended power.”<sup>38</sup>

This same view was initially raised by Madison, who “argued that the branches would develop their war policies through the conflict or cooperation of their plenary constitutional powers.”<sup>39</sup> This structure of cooperative tension was confirmed in *Loving v. United States*,<sup>40</sup> where the Supreme Court held that “the Executive has the power to regulate the conduct of members of the military, but he may do so only so long as those regulations do not conflict with Congressional enactments.”<sup>41</sup>

Funding the military exemplifies this cooperative tension. Many scholars assert that the power of the purse is the primary congressional means to control the military and counterbalance the Executive’s authority.<sup>42</sup> The Constitution’s requirement of biennial Army appropriations<sup>43</sup> ties the continued existence of the

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38. Louis Fisher, *Congressional Abdication: War and Spending Powers*, 43 ST. LOUIS U. L.J. 931, 936–37 (1999) (citations omitted).

39. Yoo, *supra* note 22, at 284; see also Laurie Kellman, *Specter: Bush Not Sole ‘Decision-Maker,’* WASH. POST, Jan. 30, 2007, available at <http://www.washingtonpost.com/wp-dyn/content/article/2007/01/30/AR2007013001344.html> (reporting that Senator Arlen Specter, in response to President Bush’s recent declaration that he was the “decision-maker” on issues of war, stated that “I would suggest respectfully to the [P]resident that he is not the sole decider. . . . The decider is a shared and joint responsibility.”).

40. *Loving v. United States*, 517 U.S. 748, 773–74 (1996) (holding that, in a case involving an Army Private convicted of murder and felony murder and sentenced to death, the President could promulgate aggravating factors in sentencing without further action from Congress).

41. Victor Hansen & Lawrence Friedman, *The Army and the Constitution: Time for Congress to Step In*, JURIST, Mar. 21, 2006, available at <http://jurist.law.pitt.edu/forumy/2006/03/army-and-constitution-time-for.php>. For a very interesting discussion concerning the Judiciary’s role in foreign relations law that is beyond the scope of this paper, see Derek Jinks & Neal Kumar Katyal, *Disregarding Foreign Relations Law*, 116 YALE L.J. 1230 (2007), and Eric A. Posner & Cass R. Sunstein, *Chevronizing Foreign Relations Law*, 116 YALE L.J. 1170 (2007).

42. See, e.g., Peter Raven-Hansen & William C. Banks, *Pulling the Purse Strings of the Commander in Chief*, 80 VA. L. REV. 833, 833–36 (1994) (contending that in modern times the power of the purse has gained in importance); Yoo, *supra* note 22, at 295 (“In making decisions whether to raise and support the requested forces, Congress can judge the benefits of a particular war as well as influence its means and ends.”); George Cahlink, *Senate Weighs Cutting C-17 and V-22 Aircraft Procurement Money from Emergency Spending Bill*, DEF. DAILY, Apr. 26, 2006, available at 2006 WL 8361048 (detailing efforts in Congress to curtail or implement military spending for various projects).

43. U.S. CONST. art. I, § 8, cl. 12.

Army to Congress's support and approval.<sup>44</sup> This provision obviously limits the power of the President over the land forces.<sup>45</sup> However, even in times of great crisis, the Congress has rarely used this power to limit presidential initiative,<sup>46</sup> leaving Akhil Amar to conclude:

In principle, Congress has retained the right to challenge presidential authority in these situations by refusing to fund the military, or by enacting "Rules for the Government and Regulation of the land and naval Forces" pursuant to Article I, section 8. But the precise boundary between the power of the purse and the power of the sword, between congressional rules and executive commands, has never been easy to define with perfect precision.<sup>47</sup>

Although Amar is undoubtedly correct that it is not "easy to define" the exact boundaries between executive and legislative authority over the military, that such boundaries exist is also undoubtedly correct. It is for this reason that the military cannot be considered analogous to other executive agencies, but instead a unique *national* agency with obligations running to both the President and the Congress in relation to the respective vested and implied authority of each civilian master. As will be proposed below, this distinct status is perhaps best manifested in the limits placed upon the President's authority to remove military officers from service to the nation.

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44. Kellman, *supra* note 39 ("Vice President Dick Cheney challenged Congress to back up its objections to Bush's plan to put 21,500 more troops in Iraq by zeroing out the war budget.").

45. See Brian Knowlton, *Bush Tries to Counter Opposition on Iraq*, INT'L HERALD TRIB., Jan. 18, 2007, at 1 (discussing congressional threats to cut off funds to prevent President Bush from increasing troop levels in Iraq). Professor Amar argues:

Precisely to prevent [the Army disregarding the people's directly elected House of Representatives,] section 8 required army—and only army—appropriations to run a stricter gauntlet. No standing appropriations would be permitted for standing armies. Every army appropriation would automatically dry up after two years, and only a fresh vote in each new term of Congress could keep the money flowing. Thus the people's House could unilaterally stop a standing army in its tracks simply by refusing to fund it . . . .

The particular two-year cut off meshed perfectly with the gears of the Constitution's electoral clock, which would bring the entire House membership before the American electorate every two years. . . . America would never be more than two years away from presumptive demilitarization.

AMAR, *supra* note 12, at 116.

46. See generally Fisher, *supra* note 38, at 940–83 (arguing that Congress has abdicated its power in military affairs and has rarely used the power of the purse as a check and balance on executive action).

47. AMAR, *supra* note 12, at 188.

*B. At the Pleasure of the President*

This Article began with a quote concerning the “firing” of General Shinseki for contradicting then Secretary of Defense Donald Rumsfeld while testifying before Congress. Of course, General Shinseki was not actually “fired.” Instead, his authority was marginalized by the unprecedented announcement of his successor fifteen months prior to the end of his period in office.<sup>48</sup> Though this most likely sent a chilling message to other military leaders contemplating public disagreement with Secretary Rumsfeld, it also represents a critical difference between the military and other executive agencies: while military officers, particularly those who occupy positions close to the President, may be assigned at the pleasure of the President, they may not be fired. This is a key distinction between other prominent executive-department officials and their nonexecutive military counterparts.<sup>49</sup>

When the President is displeased or unsatisfied with the performance or views of one of his executive-branch officials, he has at least two options to rectify what he believes is a subordinate’s failure. “Whenever an executive officer refuses to carry out an action that the President directs (and does not choose to resign over the issue), the President may either accommodate the official in some way or fire the official and seek appointment of one more congenial to the President’s policies.”<sup>50</sup> The President’s power to fire or remove a government official flows from Article II, Section 4 of the U.S. Constitution.<sup>51</sup>

There are numerous examples throughout history of Presidents firing their senior executive-branch officials. There are also examples of congressional opposition to those firings. For example, “the Senate censured President Andrew Jackson for

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48. Vernon Loeb & Thomas E. Ricks, *Rumsfeld’s Style, Goals Strain Ties in Pentagon*, WASH. POST, Oct. 16, 2002, at A1.

49. See John O. McGinnis, *Presidential Review as Constitutional Restoration*, 51 DUKE L.J. 901, 918. n.66 (2001) (arguing that the President may fire executive officials, although it may be politically costly); *All Things Considered* (NPR radio broadcast Mar. 13, 2007), available at <http://www.npr.org/templates/story/story.php?storyID=8285969&sc=emaf> (asking Senator Patrick Leahy whether he would seek to have Congress call for Attorney General Gonzales’s removal, after which Senator Leahy responded, “Well, you know, I was very careful with what I said. I said that the attorney general serves at the pleasure of the president. The president has to determine whether this is the kind of operation that he wants . . .”).

50. Kevin M. Stack, *The President’s Statutory Powers to Administer the Laws*, 106 COLUM. L. REV. 263, 295 (2006).

51. “The President, Vice President and all civil Officers of the United States, shall be removed from Office on Impeachment for, and Conviction of, Treason, Bribery, and other high Crimes and Misdemeanors.” U.S. CONST. art. II, § 4.

firing his Treasury Secretary for refusing to implement Jackson's instructions to withdraw national bank funds and to deposit them in state banks.<sup>52</sup> Despite this, it is fairly clear that "cabinet officers can be removed by the President at will."<sup>53</sup> This was amply shown by President Harry Truman who replaced seven of the ten Cabinet members upon coming to office after the death of President Roosevelt.<sup>54</sup>

Interestingly, President Truman's actions highlight the differences between the President's power of removal of military officials and other senior executive-branch officials. After President Truman had fired or forced the resignation of Secretary of Defense Louis A. Johnson and Attorney General J. Howard McGrath,<sup>55</sup> both left the executive branch completely and returned to private law practice.<sup>56</sup> In contrast, when President Truman removed General MacArthur as the Commander of U.S. forces in Korea in April, 1951, the General continued to serve as a commissioned officer of the U.S. Army.<sup>57</sup> It was not until his voluntary retirement in May of 1951 that he actually left active military service.<sup>58</sup>

Further, members of Congress had a volatile response to Truman's removal of General MacArthur. The move triggered discussions of impeachment by Congress, and a number of committee sessions were held to investigate the President's conduct.<sup>59</sup> In the end, congressional anger produced no

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52. Michael J. Gerhardt, *The Lessons of Impeachment History*, 67 GEO. WASH. L. REV. 603, 623 (1999) (citation omitted).

53. Thomas W. Merrill, *Beyond the Independent Counsel: Evaluating the Options*, 43 ST. LOUIS U. L.J. 1047, 1071 & n.74 (1999); see also John C. Fortier & Norman J. Ornstein, *Presidential Succession and Congressional Leaders*, 53 CATH. U. L. REV. 993, 1004 (2004) (noting that Cabinet members may be fired at will); Robert Post, *Recuperating First Amendment Doctrine*, 47 STAN. L. REV. 1249, 1277 (1995) (same); Robert C. Post, *Subsidized Speech*, 106 YALE L.J. 151, 164 (1996) (same).

54. See Yoo, Calabresi, & Colangelo, *supra* note 16, at 608 ("Six months into his presidency, only three of the ten cabinet members Truman inherited from FDR remained.").

55. See *id.* at 609 (describing the conflicts that led to the resignation or firing of both Johnson and McGrath).

56. KEITH D. MCFARLAND & DAVID L. ROLL, *LOUIS JOHNSON AND THE ARMING OF AMERICA: THE ROOSEVELT AND TRUMAN YEARS* 352 (2005); Anna B. Perry, *McGrath, James Howard*, in *DICTIONARY OF AMERICAN BIOGRAPHY: SUPPLEMENT EIGHT 1966-1970*, at 406 (John A. Garraty & Mark C. Carnes eds., 1988).

57. See WILLIAM MANCHESTER, *AMERICAN CAESAR: DOUGLAS MACARTHUR 1880-1964*, at 657 (1978) (stating that President Truman would have been within his right to require approval of MacArthur's post-recall statement because he was still on military payroll).

58. See *id.* at 664-66 (noting that MacArthur's testimony before a congressional committee in May 1951 was his "final official act").

59. Yoo, Calabresi, & Colangelo, *supra* note 16, at 611.



meaningful effect other than to provide MacArthur with a platform to magnify his perceived martyrdom.<sup>60</sup> However, it is interesting to note the difference in reaction by Congress to MacArthur's firing and that of Secretary Rumsfeld's firing of General Shinseki. Unlike MacArthur, there was virtually no congressional indignation at the treatment of Shinseki. Of course, these Generals held very different positions in the American psyche. Nonetheless, the differing congressional reaction to the functional firing of each four-star General foreshadows the discussion below concerning congressional abdication.

The Court has also addressed the removal power of the President, most definitively in *Morrison v. Olson*.<sup>61</sup> Prior to *Morrison*, the standard for presidential removal authority was "the difference between 'purely executive' officers (that the President had the power to remove without any interference from Congress) and quasi-legislative and quasi-judicial officers (where Congress could limit the President's removal authority by providing tenure protection),"<sup>62</sup> as established in *Myers v. United States*<sup>63</sup> and *Humphrey's Executor v. United States*.<sup>64</sup> "After *Morrison*, the question is whether the tenure protection interferes with the President's ability to perform his executive functions, including his duty to 'take care that the laws be faithfully executed.'"<sup>65</sup> This latter standard clearly expands the authority of the President to remove public officials from office without congressional interference. However, even this expanded authority fails to reach military officers.

Federal courts have treated military officers as a distinct category of public official for removal purposes. While the cases cited above deal with executive officials generally, *United States v. Perkins*<sup>66</sup> deals specifically with the dismissal of a member of the military and distinguishes the process from that of other executive-branch officials. In *Perkins*, the Supreme Court relied

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60. See generally MANCHESTER, *supra* note 57, at 664–75 (chronicling the congressional inquiry into MacArthur's recall).

61. *Morrison v. Olson*, 487 U.S. 654, 685–86 (1988).

62. M. Elizabeth Magill, *The Revolution That Wasn't*, 99 NW. U. L. REV. 47, 52 (2004) (citing *Morrison*, 487 U.S. at 685–86).

63. *Myers v. United States*, 272 U.S. 52, 161 (1926) (holding that the right of removal of executive officers rests solely with the President).

64. *Humphrey's Ex'r v. United States*, 295 U.S. 602, 627–29 (1935) (holding that Congress could limit presidential power to remove executive officials who function in nonexecutive ways).

65. Magill, *supra* note 62, at 52 (citing *Morrison*, 487 U.S. at 689–90).

66. *United States v. Perkins*, 116 U.S. 483, 483–85 (1886).

on a statute which provides that “[n]o officer in the military or naval service shall in time of peace be dismissed from service except upon and in pursuance of the sentence of a court-martial to that effect or in commutation thereof.”<sup>67</sup> This statute was relied on by the Court to reinstate a Navy cadet-engineer whose service had been improperly terminated by the Secretary of the Navy.<sup>68</sup> Similar statutory restrictions exist today. Title 10, Section 1161 of the U.S. Code states:

- (a) No commissioned officer may be dismissed from any armed force except—
  - (1) by sentence of a general court-martial;
  - (2) in commutation of a sentence of a general court-martial; or
  - (3) in time of war, by order of the President.<sup>69</sup>

However, even this “time of war” authority is proscribed by statute. Pursuant to its authority to make rules for the land and naval forces, Congress, through the Uniform Code of Military Justice, has constrained the ability of the President to dismiss military officers *even in time of war* to situations where sufficiently significant misconduct has occurred to warrant “charges” against the officer.<sup>70</sup> Then, after dismissal, the officer can demand a trial by court-martial which may or may not approve the dismissal and result in a more favorable administrative discharge.<sup>71</sup>

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67. See *id.* at 485 (quoting Rev. Stat. § 1229). For a discussion of *Perkins* and the appointment and removal power, see Jonathan L. Entin, *The Removal Power and the Federal Deficit: Form, Substance, and Administrative Independence*, 75 KY. L.J. 699, 725–26 (1987).

68. See *Perkins*, 116 U.S. at 485 (holding that a dismissed officer is entitled to reinstatement based on a statutorily invalid dismissal).

69. 10 U.S.C. § 1161 (2000).

70. See 10 U.S.C. § 804(a) (2000) (stating that an officer dismissed by the President is entitled to a court-martial under the charges on which he was dismissed).

71. Title 10, Section 804 of the U.S. Code states:

(a) If any commissioned officer, dismissed by order of the President, makes a written application for trial by court-martial setting forth, under oath, that he has been wrongfully dismissed, the President, as soon as practicable, shall convene a general court-martial to try that officer on the charges on which he was dismissed. A court-martial so convened has jurisdiction to try the dismissed officer on those charges, and he shall be considered to have waived the right to plead any statute of limitations applicable to any offense with which he is charged. The court-martial may, as part of its sentence, adjudge the affirmance of the dismissal, but if the court-martial acquits the accused or if the sentence adjudged, as finally approved or affirmed, does not include dismissal or death, the Secretary concerned shall substitute for the dismissal ordered by the President a form of discharge authorized for administrative issue.

It appears that while the President can remove his civilian executive-branch officials "at his pleasure," no analogous power exists over military officers, a limit on presidential authority established by both statute and jurisprudence. This limit on the discretion of the President to remove military officers from service to the nation bolsters the thesis of this Article: the unique role of the military involves an obligation of loyalty and candor to *all* branches of government, particularly in the area of information gathering; and congressional access to military expertise must be preserved for the good of the nation.

### C. *Power to Impeach*

Article I of the Constitution gives the House of Representatives the "sole power of impeachment"<sup>72</sup> and the Senate the "sole power to try all impeachments."<sup>73</sup> Because the House and Senate each have their own procedures for expulsion,<sup>74</sup> this power is directed at only judicial and executive-branch members. The Constitution, then, appears to contemplate two categories of public servants when it comes to impeachment: (1) Members of Congress who were unimpeachable but accountable through other processes; and (2) "all *civil* Officers of the United States."<sup>75</sup> While this latter category clearly includes executive-<sup>76</sup> and judicial-branch officials, including the President,

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(b) If the President fails to convene a general court-martial within six months from the presentation of an application for trial under this article, the Secretary concerned shall substitute for the dismissal order by the President a form of discharge authorized for administrative issue.

(c) If a discharge is substituted for a dismissal under this article, the President alone may reappoint the officer to such commissioned grade and with such rank as, in the opinion of the President, that former officer would have attained had he not been dismissed. The reappointment of such a former officer shall be without regard to the existence of a vacancy and shall affect the promotion status of other officers only insofar as the President may direct. All time between the dismissal and the reappointment shall be considered as actual service for all purposes, including the right to pay and allowances.

(d) If an officer is discharged from any armed force by administrative action or is dropped from the rolls by order of the President, he has no right to trial under this article.

10 U.S.C. § 804 (2000).

72. U.S. CONST. art. I, § 2, cl. 5.

73. U.S. CONST. art. I, § 3, cl. 6.

74. See U.S. CONST. art. I, § 5, cl. 2 ("Each House may determine the rules of its proceedings, punish its members for disorderly behaviour, and, with the concurrence of two thirds, expel a member."); AMAR, *supra* note 12, at 199 ("Congressmen themselves were not, strictly speaking, 'Officers,' and were thus not impeachable . . .").

75. U.S. CONST. art. II, § 4 (emphasis added).

76. Merrill, *supra* note 53, at 1060; see also Brian C. Kalt, *The Constitutional Case for the Impeachability of Former Federal Officials: An Analysis of the Law, History, and*

*military* officers are conspicuously immune from this power. Accordingly, these public servants fall into a third category for purposes of removal from office: the military.

By exempting the military from the impeachment power established by the Constitution, the Founders placed the military in a category different from other government officials, especially other executive-branch officials. This exemption from constitutional impeachment procedures provides further support for the proposition that the Founders intended to distinguish the military from other executive agents, thereby enhancing the specific responsibilities owed to both the legislative and executive branches. These responsibilities can not be abrogated by a strong Executive, abdicated by a weak Legislature, or abandoned by a recalcitrant military. Unfortunately, the current situation is tending toward all three.

### III. INVESTIGATION AND INFORMATION SEEKING: CONSTITUTIONAL BALANCE

As indicated in the introduction, this Article does not purport to delineate specific roles in foreign affairs, nor wade into the murky waters of the current arguments about the unitary executive. How these arguments may be ultimately resolved is of limited relevance for the assertions made herein. This is because there are certainly some areas where one branch of government predominates as opposed to the others; but there are also areas where it is not entirely clear which branch has primacy and what comprises each branch's role. The principle of import for this Article is that control over the military falls into the latter category of constitutional powers, with both the executive and legislative branches of government vested with shared authority to regulate, control, and employ the military power of the nation.<sup>77</sup> Accordingly, the key to successful use and control of

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*Practice of Late Impeachment*, 6 TEX. REV. L. & POL. 13, 19 n.17, 62 n.197 (2001) (discussing possible meanings of "civil officer" and later explaining that "[t]he President, Vice President, and the nonelected, nonmilitary officers of the executive branch can be impeached for high crimes and misdemeanors").

77. Recently, a constitutional scholar commented on Congress's power to limit the scope of the Iraq War:

We recognize the dictum first enunciated by Chief Justice Salmon P. Chase in his concurring opinion in *Ex Parte Milligan*: "The power to make the necessary laws is in Congress; the power to execute in the President. Both powers imply many subordinate and auxiliary powers. Each includes all authorities essential to its due exercise. But neither can the President, in war more than in peace, intrude upon the proper authority of Congress, nor Congress upon the proper authority of the President. Both are servants of the people, whose will is expressed in the fundamental law. Congress cannot direct the

national military power is that each branch of government remains engaged in its role and is sufficiently apprised of information necessary to make fully informed decisions—which include the decision to acquiesce to executive initiative—for the overall benefit of the country.

For example, writing concerning the War Powers Resolution, John J. Kavanagh argues that “[w]hile he is not legally required to do so, the President would be well advised to keep Congress informed because a cooperative relationship resulting in understanding and approval contributes greatly to the potential long-term success of foreign-policy initiatives.”<sup>78</sup> This statement reflects a broader principle that is central to the cooperative tension built into the text and structure of the Constitution. There is no doubt that the military is neither the sole agent of the President nor of Congress. Instead, both political branches play a vital role within the civil–military relationship. Neither branch, however, can effectively perform these respective roles unless thoroughly informed on important matters within their purview. Just as the President cannot make strategic deployment decisions without the candid advice of his military advisors, Congress cannot make informed weapons-procurement determinations without the candid advice of the military.

This information requirement is even more significant in relation to the contested areas of military control, such as the use

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conduct of campaigns . . .” This dictum is sometimes taken to mean that Congress may not enact laws designed to dictate tactical or command decisions. As the point is sometimes put, Congress may not micromanage the President’s execution of a war.

. . . .

The Constitution’s drafters understood the immense national sacrifice that war entails. Moreover, they understood that during times of war presidential power tends to expand. For these reasons, the Constitution assigns Congress the power to initiate war and to fund and define the parameters of military operations. As James Madison wrote, “the constitution supposes what the History of all Gov[ernments] demonstrates, that the Ex[ecutive] is the branch of power most interested in war, & most prone to it. It has accordingly with studied care, vested the question of war in the Legis[ative branch].” The Constitution’s structure, then, clearly contemplates that important decisions regarding the scale of war will not necessarily be made by the President alone, but ideally should, and certainly can, be reached through the democratic process with all the deliberation that entails. Far from an invasion of presidential power, it would be an abdication of its own constitutional role if Congress were to fail to inquire, debate, and legislate, as it sees fit, regarding the best way forward in Iraq.

Letter from Bruce Ackerman, Sterling Professor of Law and Political Science, Yale University, et. al., to Congressional Leaders (Jan. 17, 2007) (citations omitted), available at [http://www.house.gov/list/press/or01\\_wu/pr01172007Iraqpowers.html](http://www.house.gov/list/press/or01_wu/pr01172007Iraqpowers.html).

78. John J. Kavanagh, *U.S. War Powers and the United Nations Security Council*, 20 B.C. INT’L & COMP. L. REV. 159, 166 (1997) (citation omitted).

of military assets to conduct domestic law enforcement or intelligence gathering, the legality and prudence of various investigative and interrogation techniques, or the size and composition of forces necessary to accomplish a specific military mission.<sup>79</sup> For the military to be most effective as an element of national power, both Congress and the President must have appropriate access to relevant military information. Each political branch must be confident that the information provided by military experts is comprehensive, accurate, and candid. What is more important is that each respective branch must make this relevance determination, not the military. Even more troubling than the military determination would be the ability of one branch to effectively make this determination on behalf of the other by exercising authority over the military. Unfortunately, the well-established executive-branch structural authority over the military,<sup>80</sup> when compared to the far more ad hoc control mechanisms historically available to the Congress,<sup>81</sup> make it unclear whether both branches have an equal degree of confidence in the current information-provision paradigm.

These military-control mechanisms were highlighted by the passage of the Goldwater Nichols Department of Defense Reorganization Act of 1986.<sup>82</sup> This watershed legislation was passed only after several decades of prior legislation<sup>83</sup>

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79. See Eric Lichtblau & Mark Mazzetti, *Military Expands Intelligence Role in U.S.*, N.Y. TIMES, Jan. 14, 2007, at 1 (tracking domestic military intelligence expansion accomplished through use of national security letters sent to financial institutions); Adam Liptak, *Interrogation Methods Rejected by Military Win Bush's Support*, N.Y. TIMES, Sept. 8, 2006, at A1 (describing the controversy surrounding proposed legislation that would allow harsh interrogation techniques); Jonathan Weisman & Shailagh Murray, *Democrats Back Down on Iraq Timetable*, WASH. POST, May 3, 2007, at A1 (chronicling Congress's attempt to control the focus and size of military actions through the use of benchmarks in a funding bill).

80. One of Congress's principal motivations behind the reorganization of the Joint Chiefs of Staff was to "improve military advice given to civilian decisionmakers" by elevating the chairman "to be the principal military advisor to the president, the NSC, and the secretary of defense." GORDON NATHANIEL LEDERMAN, REORGANIZING THE JOINT CHIEFS OF STAFF: THE GOLDWATER-NICHOLS ACT OF 1986, at 76-78 (1999); see also Goldwater-Nichols Department of Defense Reorganization Act of 1986, Pub. L. No. 99-433, pmbl., 100 Stat. 992, 992 (codified at 10 U.S.C. § 111 (2000)) (highlighting the military command structure within the executive branch through legislative restructuring).

81. See Sam Nunn, *The Impact of the Senate Permanent Subcommittee on Investigations on Federal Policy*, 21 GA. L. REV. 17, 47-55 (1986) (discussing Congress's information-gathering powers through subcommittee hearings).

82. Goldwater-Nichols Department of Defense Reorganization Act of 1986, Pub. L. No. 99-433, 100 Stat. 992 (codified as amended in scattered sections of 10 U.S.C.).

83. Archie D. Barrett, *Empowering Eisenhower's Concept*, in Locher, *supra* note 17, at 13; see also Greg H. Parlier, *The Goldwater-Nichols Act of 1986: Resurgence in Defense Reform and the Legacy of Eisenhower* (May 15, 1989) (unpublished manuscript), available

culminating in the 1980s with a “bitter, five-year battle” between the military and Congress.<sup>84</sup> The sentiment in Congress and from previous administrations was that the military services had become too powerful and were not providing timely and effective advice to the President and Secretary of Defense.<sup>85</sup> To remedy this situation, one of the declared purposes of the Act was “to improve the military advice provided to the President, National Security Council, and Secretary of Defense.”<sup>86</sup> The Act attempted to do this by strengthening the Chairman of the Joint Chiefs of Staff position in the hopes that the Chairman would see himself as not associated with any Service, but rather, as providing advice for the good of the military as a whole.<sup>87</sup> By all accounts, the Act has been successful in achieving this objective and in mitigating the effects of service-centric power accretion.<sup>88</sup> According to James Locher III, a former Assistant Secretary of Defense for Special Operations and Low Intensity Conflict and professional staffer for the Senate Armed Services Committee, “[t]he most comprehensive assessment of post-1986 military advice concluded that the act ‘has made a significant and positive contribution in improving the quality of military advice.’”<sup>89</sup>

However, while Goldwater-Nichols appears to have created a structure which facilitates timely and accurate military advice to the executive branch, no such structure currently exists for the legislative branch. Congress does not benefit from established, structural information-access safeguards; it must instead rely upon its investigative and information seeking powers to insure it is informed sufficiently to exercise its constitutionally mandated role in the realm of military affairs. This Article will next address why the current information-access paradigm places Congress at a functional disadvantage from the President, and thereby diminishes the efficacy of congressional involvement

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at <http://www.globalsecurity.org/military/library/report/1989/PGH.htm> (chronicling the establishment of present military structure through legislative history and debate).

84. Locher, *supra* note 17, at 10.

85. *Id.* at 11.

86. Goldwater-Nichols Department of Defense Reorganization Act of 1986, Pub. L. No. 99-433, § 3, 100 Stat. 992, 993 (codified at 10 U.S.C. § 111 (2000)).

87. See Locher, *supra* note 17, at 11 (“[I]n designating the Chairman as the principal military adviser, Congress envisioned him becoming an ally of the Secretary with a common department-wide, nonparochial perspective. This change sought to provide the Secretary with independent military advice and also end the civil-military nature of past Pentagon disputes.”).

88. *Id.* at 13.

89. *Id.* at 12 (quoting Christopher Allan Yuknis, *The Goldwater-Nichols Reorganization Act of 1986—An Interim Assessment*, in *ESSAYS ON STRATEGY* 97 (Mary A. Sommerville, ed., 1993)).

in military matters.<sup>90</sup> This Part will accordingly review Congress's investigative and information gathering powers, and Part IV will argue that these powers are insufficient against today's powerful Executive to maintain the proper balance of military control within an effective separation-of-powers paradigm.

In Justice Brandeis' famous dissent in *Myers v. United States*,<sup>91</sup> he wrote that our constitutional system of checks and balances was designed "not to promote efficiency but to preclude the exercise of arbitrary power."<sup>92</sup> This fundamental premise of constitutional structure highlights the importance of balanced and separated control over the national military and has been echoed in cases involving the exercise of military authority. It further underlies the congressional power of investigation and information seeking which supports this vital balance. Such a power may not promote the greatest efficiency in government,<sup>93</sup> but it "is critical to the constitutional system of separation of powers, including protecting against executive branch abuse."<sup>94</sup>

The power to investigate and gather information has existed for centuries, and "[t]he inherent power of a parliamentary body to obtain information necessary to its work has many precedents in British and American colonial history."<sup>95</sup> This inherent and historically founded authority is vital to the legislative function. As William Marshall writes:

[L]egislative judgment is impossible without access to information. Legislative bodies would be unable to effectively evaluate policy alternatives and weigh

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90. See William P. Marshall, *The Limits on Congress's Authority to Investigate the President*, 2004 U. ILL. L. REV. 781, 783 (2004) ("The issues relating to Congress's power to investigate have important theoretical and practical significance. On a theoretical level, these issues are at the core of the constitutional system of checks and balances. On a practical level, the issues are of central tactical concern in the litigation of inter-branch disputes." (footnote omitted)).

91. *Myers v. United States*, 272 U.S. 52, 240 (1926) (Brandeis, J., dissenting). *Myers* involved a demand for back pay for a Postmaster who was removed by the President without seeking advice or approval from the Senate. *Id.* at 106 (majority opinion). The Supreme Court held that the President need not seek advice or approval from the Senate when removing the Postmaster. *Id.* at 176.

92. *Id.* at 293 (Brandeis, J., dissenting), quoted in KOH, *supra* note 16, at 7.

93. See Fisher, *supra* note 38, at 958–59 (quoting Senator Frank Church as arguing against legislative hearings to review military actions in the Gulf of Tonkin because "[t]here is a time to question the route of the flag, and there is a time to rally around it, lest it be routed. This is the time for the latter course . . ." (alteration in original)).

94. Marshall, *supra* note 90, at 784. "At the same time, it is not a power that should be exercised without limit. An unconstrained congressional investigative power, like an unchecked Executive, generates its own abuses." *Id.*

95. Nunn, *supra* note 81, at 18.



competing priorities if they could not call witnesses and otherwise inquire into complex issues. Indeed, it is often through congressional hearings and investigations that foundational ideas and insights of how to address social ills are generated. As history attests, some of the nation's most important enactments would never have materialized had Congress not had investigative powers.<sup>96</sup>

This principle was well understood by the founders and adhered to by the fledgling U.S. government. As early historical practice illustrates, not only is this necessary check and balance supported by the text and structure of the Constitution as demonstrated above, but the historical interaction between the executive and legislative branches also reflects the importance of an informed Congress for the maintenance of constitutional balance.<sup>97</sup>

#### A. *Early Constitutional Practice*

There is a long history of English parliamentary and early colonial right to investigate, including the review of military actions.<sup>98</sup> "In 1722, for example, the Massachusetts House summoned military officers before it to account for their failures in certain military operations."<sup>99</sup> This tradition was understood by the Framers and assumed in the Constitution. As Senator Sam Nunn writes, "[t]he power to investigate government operations—the oversight function—is not explicit in the Constitution. Instead, it is implied in section 1 of article I, which states that '[a]ll legislative powers herein granted shall be vested in a Senate and a House of Representatives.'"<sup>100</sup> This implied power is a power of oversight applicable to the other branches of government and on government actions as a whole:

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96. Marshall, *supra* note 90, at 799.

97. For example, President Washington chose not to challenge "Congress's power to investigate. Rather, he requested that Thomas Jefferson 'work out a compromise with Congress . . .'" *See id.* at 786.

98. *Id.* at 785–86.

99. *Id.* at 785 (footnote omitted).

100. Nunn, *supra* note 81, at 18; *see also* Archibald Cox, *Executive Privilege*, 122 U. PA. L. REV. 1383, 1385 (1974) ("Article I's grant of power to legislate is therefore held to carry implied authority to summon witnesses and to compel the production of evidence.").

Oversight actions [of Congress] fall into two informal and overlapping categories: legislative and investigative. In practice, legislative oversight is most frequently undertaken in the form of committee and subcommittee hearings.

....

Investigative oversight, unlike legislative oversight, typically involves examining allegations of corruption or malfeasance within an individual department or by a specific official.<sup>101</sup>

One of the important early cases dealing with Congress's investigative power is *McGrain v. Daugherty*,<sup>102</sup> where the Senate ordered an investigation in certain acts of the Attorney General.<sup>103</sup> In the process of the inquiry, several witnesses refused Senate subpoena, and the President of the Senate ordered the witnesses arrested.<sup>104</sup> In response to a habeas corpus claim, the Supreme Court confirmed the principle that "the power to legislate carries with it by necessary implication ample authority to obtain information needed in the rightful exercise of that power, and to employ compulsory process for the purpose."<sup>105</sup> The Court went on to hold in the case that "the power of inquiry—with process to enforce it—is an essential and appropriate auxiliary to the legislative function."<sup>106</sup>

The first historical demonstration of Congress using its investigative oversight<sup>107</sup> in military matters occurred in 1792 as a result of a military action led by Major General Arthur St. Clair against the Miami and Shawnee Indians.<sup>108</sup> St. Clair and his forces were defeated in a surprise attack, resulting in "over nine hundred casualties out of a force of some fourteen hundred,

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101. Jonathan G. Pray, *Congressional Reporting Requirements: Testing the Limits of the Oversight Power*, 76 U. COLO. L. REV. 297, 306–07 (2005) (footnotes omitted).

102. *McGrain v. Daugherty*, 273 U.S. 135 (1927).

103. *Id.* at 151.

104. *Id.* at 152–54.

105. *Id.* at 165.

106. *Id.* at 174.

107. "Investigative oversight includes a broad power to subpoena documents and to compel individuals to appear before Congress or one of its committees. This subpoena power has been amply litigated, and private individuals who defy congressional subpoenas risk charges of contempt of Congress." Pray, *supra* note 101, at 308 (footnotes omitted).

108. For a detailed account of the battle, including events leading up to the ill-fated expedition and actions taken after the battle, see RICHARD H. KOHN, *EAGLE AND SWORD: THE FEDERALISTS AND THE CREATION OF THE MILITARY ESTABLISHMENT IN AMERICA, 1783–1802*, at 107–24 (1975).

and only about 580 men found their way back to Fort Washington, St. Clair's base on the Ohio River."<sup>109</sup> In response to the military defeat, the House of Representatives, by a vote of forty-four to ten, appointed a committee to further investigate the incident and determine if military inefficiency or incompetence contributed to the defeat.<sup>110</sup> The committee was "to call for such persons, papers, and records, as may be necessary to assist their inquiries."<sup>111</sup>

Acting pursuant to this authorization, the committee initiated its investigation and, as part of its inquiry, submitted a request for documents relating to the events in question from Secretary of War Henry Knox and President George Washington. President Washington did not challenge Congress's power to investigate the matter. Rather, he requested that Thomas Jefferson "work out a compromise with Congress that would preserve the [E]xecutive's prerogative, while assuring congressional access to the important documents." Based on this instruction, Jefferson persuaded the House to send a more limited request to the President asking him to "cause the proper officers to lay before this House such papers of a public nature . . . as may be necessary to the investigation."

The President's cabinet convened to consider the matter and decided that the papers could be turned over to the committee. Like the President, the cabinet did not question the power of the House to initiate investigations. It asserted that "the House was an inquest, and therefore might institute inquiries. . . . [and] call for papers generally."<sup>112</sup>

The result of the inquiry was a report that exonerated St. Clair and placed the blame on logistical mismanagement in the War Department.<sup>113</sup> This investigation led to an exercise of congressional authority over military matters.<sup>114</sup> The Senate subsequently introduced a bill in April of 1792 that put the

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109. STANLEY ELKINS & ERIC MCKITRICK, *THE AGE OF FEDERALISM* 271 (1993).

110. Marshall, *supra* note 90, at 786.

111. *Id.* (citation omitted).

112. *Id.* at 786-87 (alterations and omissions in original) (citations omitted). "At the same time, the cabinet, in language that has been argued as laying the historical foundation for executive privilege, also added, 'the Executive ought to communicate such papers as the public good would permit, and ought to refuse those, the disclosure of which would injure the public.'" *Id.* at 786-87.

113. DAVID P. CURRIE, *THE CONSTITUTION IN CONGRESS: THE FEDERALIST PERIOD 1789-1801*, at 164 (1997) (citation omitted).

114. LEONARD D. WHITE, *THE FEDERALISTS: A STUDY IN ADMINISTRATIVE HISTORY 1789-1801*, at 149 (First Free Press 1965) (1948).

Department of Treasury in charge of supplying the Army.<sup>115</sup> The bill became law on May 8, 1792,<sup>116</sup> and led to a reorganization of military purchase and supply procedures in conjunction with the Department of War.<sup>117</sup> This early precedent of the implied investigatory authority demonstrates an original appreciation for the relationship between the investigatory and legislative functions.

No question was raised at the time about Congress's authority to conduct the investigation and take appropriate remedial actions to improve military effectiveness.<sup>118</sup> Indeed, the St. Clair incident was not the only congressional investigation during Washington's tenure as President.<sup>119</sup> The precedent was accordingly established early in the history of the nation: "congressional investigation into the conduct of executive officers under the new Constitution was now firmly accepted not only by the House but by the President and his Cabinet as well."<sup>120</sup>

Subsequent Presidents have adopted different attitudes about their responsibility to inform Congress concerning contemplated or initiated military actions.<sup>121</sup> Within the last half-century, Congress has been compelled to investigate specific

115. *Id.*

116. Act of May 8, 1792, ch. 32, 1 Stat. 279.

117. WHITE, *supra* note 114, at 149–50.

118. CURRIE, *supra* note 113, at 163.

119. William Marshall writes:

In another instance, the Senate sought correspondence regarding the administration's diplomatic relations with France. As described by one writer, "The request was likely an attempt to embarrass [Gouverneur] Morris [the U.S. Ambassador to France] as the correspondence was thought to contain embarrassing and disparaging comments about French leaders and the French Republic generally." President Washington, although not fully compliant, did not object to the Senate's power to seek these materials. Rather, he ordered that copies and translations be made "except in those particulars which, in [his] judgment, for public considerations, ought not to be communicated."

Marshall, *supra* note 90, at 787 (citations omitted) (alterations in original).

120. CURRIE, *supra* note 113, at 164. President Washington once refused to supply documents relating to the negotiation and ratification of the Jay Treaty in response to a request by the House of Representatives,

relying in part upon a claim that the House had no power over the matter, as the power to ratify treaties rested with the Senate. The House, however, sought the documents for the purposes of considering appropriations to implement the treaty—a power clearly within its prerogative. Washington nevertheless refused to turn over the requested materials.

Marshall, *supra* note 90, at 787 (citations omitted). It is unclear why Washington refused to produce the documents, but some have suggested that "Washington understood the House's right to the documents and that his actions were based on political calculation rather than constitutional principle." *Id.* (footnote omitted).

121. For an analysis of various Presidents' approaches to involving Congress in military actions, see Fisher, *supra* note 38, at 940–83.

wartime functions on several occasions. In response to President Roosevelt's mobilization program prior to World War II, then-Senator Harry Truman argued:

[I]f Congress was asked to approve spending on military projects, it should have an investigating committee to ensure that the money was spent wisely, efficiently and equitably. On March 1, 1941, the Senate passed Truman's resolution and the Special Committee to Investigate the National Defense Program was created. As Chairman, Truman said he wanted to help President Roosevelt uncover inefficiency and fraud in an effort to improve war production capability. Matters of military strategy and tactics were carefully avoided. Truman shaped his committee into what historians have called "the most successful congressional investigative effort in United States history."<sup>122</sup>

Similarly, after World War II, "[t]his need for information and, just as importantly, Congress' [sic] duty as the nation's representative body to inform the public, gave rise in 1948 to the creation of the Senate Permanent Subcommittee on Investigations."<sup>123</sup> Congressional investigations involving the military have been conducted concerning a wide variety of military issues, including the purchase of the F-111 aircraft between 1962 and 1970;<sup>124</sup> "widespread corruption in the post exchanges and servicemen's clubs on American military installations in Southeast Asia" during the Vietnam War;<sup>125</sup> the Military's Civilian Health Plan;<sup>126</sup> East-West technology transfer during the Cold War;<sup>127</sup> and the issuance of security clearances.<sup>128</sup>

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122. Nunn, *supra* note 81, at 19–20 (citations omitted). The author continues:

An early Truman Committee inquiry that uncovered waste in the construction of Army camps led to an overhaul of the military contract-awarding system. Lieutenant General Brehon B. Somerville, Chief of Building for the Army, estimated that the reforms saved the government some \$250 million. The Committee's investigation of aluminum, steel and other shortages also led to increased production. Another inquiry resulted in a reorganization of the Navy's Bureau of Ships. Committee criticism of the Office of Production Management prompted President Roosevelt to establish the War Production Board. Undersecretary of War Robert Patterson remarked that "some of the very best features of our war program have had their origin from the investigations made by this [Truman] committee."

*Id.* at 20–21 (citations omitted) (alternation in original).

123. *Id.* at 17 (citation omitted).

124. *Id.* at 48.

125. *Id.* at 50.

126. *Id.* at 52–53.

127. *Id.* at 53–54.

128. *Id.* at 54–55.

This investigative power has also been leveraged in relation to strategic military-deployment decisions. For example, there have been congressional hearings on U.S. involvement in Central America,<sup>129</sup> the use of Marines in Lebanon,<sup>130</sup> the invasion of Granada,<sup>131</sup> the Iran Contra Affair,<sup>132</sup> and most recently, the treatment of detainees and military commissions.<sup>133</sup> As mentioned above, Congress was also actively involved in reorganizing the Department of Defense in 1986,<sup>134</sup> and conducting the Base Realignment and Closure process.<sup>135</sup> In addition, Congress remains active in military affairs, having routine hearings on important military matters perceived to implicate congressional responsibilities and authorities.<sup>136</sup>

### B. Judicial Practice

The judicial branch has validated the legality and necessity of Congress's power of investigation.<sup>137</sup> In a string of cases beginning in 1821 with *Anderson v. Dunn*<sup>138</sup> through *Marshall v.*

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129. Martin Wald, *The Future of the War Powers Resolution*, 36 STAN. L. REV. 1407, 1421–23 (1984).

130. Kelly L. Cowan, *Rethinking the War Powers Resolution: A Strengthened Check on Unfettered Presidential Decision Making Abroad*, 45 SANTA CLARA L. REV. 99, 111–13 (2004); Wald, *supra* note 129, at 1423–27.

131. Cowan, *supra* note 130, at 113–14; Wald, *supra* note 129, at 1427–29.

132. KOH, *supra* note 16, at 16–38.

133. See generally *Hearing on the Future of Military Commissions Before the S. Armed Services Comm.*, 109th Cong. (2006); *Hearing on Detainee Trials Before the S. Judiciary Comm.*, 109th Cong. (2006); *Hearing on Military Commissions and Tribunals Before the H. Armed Servs. Comm.*, 109th Cong. (2006).

134. LEDERMAN, *supra* note 80, at 62–84 (1999) (discussing the Goldwater-Nichols Department of Defense Reorganization Act of 1986, Pub. L. No. 99-433, pmbll., § 3, 100 Stat. 992, 992–94 (1986) (codified at 10 U.S.C. § 111 (2000))).

135. See Jason A. Coats, *Base Closure and Realignment: Federal Control over the National Guard*, 75 U. CIN. L. REV. 343, 351–56 (2006) (detailing the Base Closure and Realignment process, including an analysis of the interaction between the executive and legislative branches). This is a good example of an issue where the executive and legislative branches each recognize the interests of the other and do not object to the involvement of the other in the process.

136. See Jon D. Michaels, *Beyond Accountability: The Constitutional, Democratic, and Strategic Problems with Privatizing War*, 82 WASH. U. L.Q. 1001, 1065 (2004) (“Consultation with, written reports to, and oversight hearings before Congress represent important ways in which military policy is subject to considerable scrutiny and accountability.”).

137. But see John F. O'Connor, *Don't Know Much About History: The Constitution, Historical Practice, and the Death Penalty Jurisdiction of Courts-Martial*, 52 U. MIAMI L. REV. 177, 226 (1997) (“Recognizing that Congress and the President have greater fact-finding capabilities, whether it be their ability to gather intelligence, hold hearings, or consult the Pentagon, the Court has often declared that it is by comparison incompetent to determine the needs of the military services, or the impact any action might have on national readiness.”).

138. *Anderson v. Dunn*, 19 U.S. 204, 226–34 (1821) (acknowledging Congress's power

*Gordon*<sup>139</sup> in 1917, the Supreme Court endorsed this power, though limiting it to its “legislative sphere,”<sup>140</sup> which excluded, among other things, “the private affairs of citizens.”<sup>141</sup> In 1927, in *McGrain v. Daugherty*,<sup>142</sup> the Supreme Court revisited the issue again and “came down forcefully on the side of congressional inquiry, holding that the power of inquiry, with process to enforce it, was essential if the legislature was to function effectively.”<sup>143</sup> The *McGrain* decision was important because it

found not only in favor of the legislative power to investigate, but it did so quite broadly. The legislative power to investigate would include not only direct attempts to aid legislation, but also investigation into Executive Branch misfeasance under Congress’s appropriations authority. Further, it would allow specific inquiries into individual wrongdoing even if that wrongdoing could also be subject to judicial criminal sanction.<sup>144</sup>

The force and effect of this principle has never been judicially diminished. Rather, subsequent cases such as *Watkins v. United States*,<sup>145</sup> *Barenblatt v. United States*,<sup>146</sup> *Wilkinson v. United States*,<sup>147</sup> and *Eastland v. United States Servicemen’s Fund*<sup>148</sup> have reconfirmed Congress’s ability to investigate and subpoena.<sup>149</sup> However, no discussion of judicial treatment of

to hold persons in contempt anywhere in the United States).

139. *Marshall v. Gordon*, 243 U.S. 521, 545 (1917) (refusing to interfere with Congress’s implied authority to hold a person in contempt for obstructing “the exercise of legislative power”).

140. See *Marshall*, *supra* note 90, at 788–92 (analyzing the cases).

141. See *Kilbourn v. Thompson*, 103 U.S. 168, 190 (1880) (holding that the House of Representatives exceeded its powers by investigating “the private affairs of the citizen”).

142. *McGrain v. Daugherty*, 273 U.S. 135 (1927).

143. *Nunn*, *supra* note 81, at 19 (citing *McGrain*, 273 U.S. at 174).

144. *Marshall*, *supra* note 90, at 796.

145. *Watkins v. United States*, 354 U.S. 178, 187 (1957) (holding that Congress’s information-gathering authority “comprehends probes into departments of the Federal Government to expose corruption, inefficiency or waste”).

146. *Barenblatt v. United States*, 360 U.S. 109, 134 (1959) (upholding *Barenblatt*’s conviction for contempt of Congress when he refused to testify before the House Committee on Un-American Activities).

147. *Wilkinson v. United States*, 365 U.S. 399, 400–01 (1961) (relying on *Barenblatt* to convict an inmate of contempt for refusing to answer questions from the House Committee on Un-American Activities).

148. *Eastland v. U.S. Servicemen’s Fund*, 421 U.S. 491, 506–07 (1975) (reviewing whether a Senate subcommittee had power to subpoena bank records of a private corporation doing business on U.S. military bases). The Court determined that the subpoena was allowed and the investigation was within congressional purview “because it involved gathering facts on a subject—namely the activity of corporations on military bases—on which Congress could legislate.” *Pray*, *supra* note 101, at 310.

149. Randall K. Miller, *Congressional Inquests: Suffocating the Constitutional Prerogative of Executive Privilege*, 81 MINN. L. REV. 631, 636 (1997).

congressional investigative power is complete without considering the seminal case that addressed the power of Congress to demand documents from President Nixon.

*United States v. Nixon* arose out of the Watergate investigation—specifically President Nixon’s refusal to respond to a subpoena directing him to “produce certain tape recordings and documents relating to his conversations with aides and advisers.”<sup>150</sup> The President opposed the subpoena on the grounds of executive privilege.<sup>151</sup> The Court “acknowledged, for the first time, that executive privilege is a constitutionally-based prerogative”<sup>152</sup> but then decided President Nixon had to surrender the tapes.<sup>153</sup> The Court held that “[w]hatever the nature of the privilege of confidentiality of Presidential communications in the exercise of Art[icle] II powers, the privilege can be said to derive from the supremacy of each branch within its own assigned area of constitutional duties.”<sup>154</sup> This test for the invocation of executive privilege is not unlike the limitation on congressional investigative authority from *Marshall v. Gordon* discussed above.<sup>155</sup> Thus, each branch’s power may be exercised within its scope of powers, but can not be exercised at the exclusion of the interests of the other branch. And so, in the case of the military where the powers are explicitly and intentionally shared, both Congress and the President must match the exercise of the privilege to the scope of the power.

Congressional oversight is, however, not unlimited. It “does not extend into matters that are within the province of another branch of government”<sup>156</sup> and generally is limited to purposes within its legislative sphere.<sup>157</sup> However, combined with prior legislative and executive practice, judicial practice confirms that Congress has expansive investigative and information-gathering authority. This authority is not only inherent in congressional responsibility but also vital to maintaining the balance between the sometimes competing branches of government. Nowhere is this principle more significant than in relation to military matters. Accordingly, the next section will compare Congress’s

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150. *United States v. Nixon*, 418 U.S. 683, 686 (1974).

151. *Id.*

152. *Miller*, *supra* note 149, at 638.

153. *Nixon*, 418 U.S. at 714.

154. *Id.* at 705.

155. *See supra* notes 139–41 and accompanying text.

156. *Pray*, *supra* note 101, at 310; *accord Marshall*, *supra* note 90, at 798 (“Congress could not inquire into matters within the exclusive province of one of the other branches.”).

157. *Marshall*, *supra* note 90, at 792.



use of the investigative power over the military with that of other executive agencies, including a review of the presidential claim of “executive privilege.” It will conclude that Congress is not currently receiving the benefit of candid information from the military on issues within its sphere of responsibility.

Both the text and structure of the Constitution, and the historical precedents since its establishment, indicate that Congress has the authority and responsibility to investigate military matters. This necessarily implies a requirement to demand candid information from military leaders. Accordingly, concomitant with that congressional authority is the obligation of the military to provide Congress relevant, timely, and meaningful information related to military issues.

This obligation is actually reflected in a little-known provision of the Goldwater-Nichols Department of Defense Reorganization Act of 1986, which states: “After first informing the Secretary of Defense, a member of the Joint Chiefs of Staff may make such recommendations to Congress relating to the Department of Defense as he considers appropriate.”<sup>158</sup> This provision, applicable to each member of the Joint Chiefs of Staff, was inserted to ensure that no one would “shield civilian decisionmakers from a chief’s passionate dissent.”<sup>159</sup> Michael Nardotti, the Judge Advocate General for the Army from 1993 to 1997, believes this provision was important in the military’s approach to the homosexual policy discussion in the 1990s and echoes the importance of this independent “statutory responsibility to assert the best interests of the military.”<sup>160</sup> In light of the perceived marginalization of General Shinseki by the Secretary of Defense in response to his apparent dissent to the Bush Administration’s strategic assessments regarding Iraq—an opinion that was not even volunteered but rendered only when demanded from Congress—contributing to the accordant perception that candor before Congress could be perceived by the

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158. Goldwater-Nichols Department of Defense Reorganization Act of 1986, Pub. L. No. 99-433, 100 Stat. 992, 1006 (codified at 10 U.S.C. § 151(f) (2000)).

159. LEDERMAN, *supra* note 80, at 77.

160. George R. Smawley, *The Soldier-Lawyer: A Summary and Analysis of An Oral History of Major General Michael J. Nardotti, Jr., United States Army (Retired) (1969–1997)*, 168 MIL. L. REV. 1, 30–31 (2001).

[T]he Chair—the Joint Chiefs—are in a different position than all other senior officers. . . . [A]ny member of the Joint Chiefs can raise an issue to Congress that that chief deems important to the national defense. . . . I don’t think that was appreciated by the [Clinton] Administration early on. They had a very simplistic notion of “you’re the Commander-in-Chief, these are your subordinates, you can tell them what to do and that’s all there is to it.” They learned a hard lesson.

*Id.* (first and second alterations in original) (citation omitted).

President as an act of disloyalty, the time may be ripe to bolster this provision.

#### IV. INVESTIGATION AND INFORMATION SEEKING: CONSTITUTIONAL IMBALANCE

One question relevant to the current presidential-congressional balance of power over military affairs is whether the information-seeking power is effectuated in any way different in relation to the military than to more traditional executive agencies. If Congress has greater power over the military than it does over true executive agencies, then this confirms the assertion that the military is a national agency rather than a purely executive agency. More importantly, a necessary consequence of this increased congressional power is a reduced degree of presidential authority to limit or proscribe the information flow from the military to Congress in relation to his power to limit access to executive agencies. This consequence supports the thesis of this Article that the military has a singular responsibility to keep Congress, as well as the Executive, informed on military matters. Demonstrating this difference will also highlight the continuing need for Congress to demand information and conduct investigations on military activities within its sphere of authority. As will be shown at the end of this section, the increasingly prevalent role of the Executive over military affairs requires that Congress be vigilant in preserving such access to information.

There are three specific bases for the assertion that the military is distinct from true executive agencies: (1) the fact that members of the military, even high-ranking members, do not serve at the "pleasure of the President" in the same way as other executive department officials; (2) the inapplicability of the power of impeachment to military officers; and (3) the President's use of executive privilege. The first two bases have been addressed previously.<sup>161</sup> As mentioned above, the fact that military members continue to serve even after being fired or reassigned by either the President or Secretary of Defense clearly distinguishes them from executive-branch officers.<sup>162</sup> Additionally, the fact that military members are not subject to impeachment again confirms the unique status of military members. This unique status is further established by the difference in application of executive privilege.

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161. See *supra* Sections I.B and I.C respectively.

162. See *supra* note 49 and accompanying text.

### A. Executive Privilege

When the President seeks to protect information from a congressional inquiry, he may invoke the constitutionally based doctrine of executive privilege.<sup>163</sup> Pursuant to this privilege, certain executive communications are not discoverable by Congress.<sup>164</sup> Executive privilege is “the President’s claim of constitutional authority to withhold information from Congress.”<sup>165</sup> It arises most frequently in attempts to protect one of four executive interests: “(a) the deliberative process; (b) military and state secrets; (c) law enforcement strategies and informants; and (d) the President’s private affairs.”<sup>166</sup> While these categories are not exclusive, protection of military documents or testimony will most likely fall into the national interest of “military and state secrets.”<sup>167</sup> As Mark Doherty has written,

Congress’ [sic] power of inquiry is weakened when it comes to national security concerns or military secrecy matters. These areas have traditionally been protected under claims of executive privilege because confidential communication between executive officials becomes imperative for effective negotiation with foreign leaders and with regard to efficient and successful implementation of military strategies.<sup>168</sup>

Every president has exercised executive privilege in some fashion,<sup>169</sup> and according to Archibald Cox, the Watergate Special Prosecutor from May to October of 1973, prior to the Nixon Administration there were twenty-seven occasions where a claim of executive privilege was made.<sup>170</sup>

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163. Mark P. Doherty, *Executive Privilege or Punishment? The Need to Define Legitimate Invocations and Conflict Resolution Techniques*, 19 N. ILL. U. L. REV. 801, 802 (1999).

164. *See id.* (indicating that certain “conversations and communications between executive decision makers and subordinates” may be above congressional inquiry).

165. RAOUL BERGER, *EXECUTIVE PRIVILEGE: A CONSTITUTIONAL MYTH* 1 (1974).

166. Miller, *supra* note 149, at 640; *see also* Doherty, *supra* note 163, at 807–16 (discussing these executive interests as arguments in favor of executive privilege).

167. *Cf.* Doherty, *supra* note 163, at 812–14 (describing the “military secrets” category).

168. *Id.* at 834.

169. Jeffrey P. Carlin, Walker v. Cheney: *Politics, Posturing, and Executive Privilege*, 76 S. CAL. L. REV. 235, 240 (2002). President George W. Bush “has recently asserted ‘executive prerogative’ in refusing to allow the Director of Homeland Security to testify before Congress.” *Id.* at 247.

170. Cox, *supra* note 100, at 1396–97 (citing Memorandum submitted by Attorney General William Rogers in *Hearing on S. 921 Before the Subcomm. on Constitutional Rights of the Senate Comm. on the Judiciary*, 85th Cong., 2d Sess., at 63-146 (1958)). In five of these cases, “the congressional request explicitly stated that the President should decide whether furnishing the papers would be in the public interest,” removing them from the list of contested claims. *Id.* at 1397. Of the remaining claims, only two involved

The first incident considered by most experts to mark the beginnings of executive privilege<sup>171</sup> resulted from the St. Clair incident previously discussed.<sup>172</sup> Though President Washington surrendered the documents requested by Congress, he did so only after determining that disclosure of the information they contained was not overly injurious to the public or Presidency.<sup>173</sup> As Thomas Jefferson, who was engaged in the Cabinet conversations, wrote:

We had all considered and were of one mind 1. that the house was an inquest, [and] therefore might institute inquiries. 2. that they might call for papers generally. 3. that the Executive ought to communicate such papers as the public good would permit, [and] ought to refuse those the disclosure of which would injure the public. Consequently were to exercise a discretion. 4. that neither the [committees] nor House had a right to call on the head of a [department], who [and] whose papers were under the [President] alone, but that the [committee should] instruct their chairman to move the house to address the President.<sup>174</sup>

Washington then provided the requested information to Congress.<sup>175</sup>

On two other occasions, Congress sought documents from President Washington that he was unwilling to provide.<sup>176</sup> In the latter case of the Jay Treaty discussed above, Washington refused to provide the documents.<sup>177</sup> There are several key factors relating to Washington's refusal to produce the requested information that are particularly important in distinguishing the assertion of privilege in relation to military matters versus other executive matters. First, the Jay Treaty request did not implicate military matters but instead the treaty-making authority.<sup>178</sup> President Washington was acutely familiar with the need for Congress to be intimately involved in military affairs from his service during the Revolutionary War, which seems to have

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the testimony of military members, and the President complied with one of the two requests. *Id.* at 1400 nn.61–62.

171. Carlin, *supra* note 169, at 243–44.

172. See *supra* notes 107–20 and accompanying text.

173. Carlin, *supra* note 169, at 243.

174. 1 THE WRITINGS OF THOMAS JEFFERSON 189–90 (Paul Leicester Ford ed., New York, 1892), quoted in MARK J. ROZELL, EXECUTIVE PRIVILEGE: PRESIDENTIAL POWER, SECRECY, AND ACCOUNTABILITY 29 (2d ed. 2002).

175. Carlin, *supra* note 169, at 243.

176. *Id.* at 244–46.

177. *Id.* at 244–45.

178. *Id.*

informed his response to the St. Clair request.<sup>179</sup> In that case, he submitted to a congressional inquiry in a situation that certainly could have been not only personally embarrassing but also politically costly.<sup>180</sup> This was significantly different from his reaction to the House request concerning the Jay Treaty. Secondly, as noted above, it is unlikely that President Washington thought the House truly needed access to the requested information in either case, but refused access only in relation to the Jay Treaty affair, even if only for political ends. Washington did not choose to take similar action in the St. Clair defeat when he certainly must have been tempted to do so. In confronting this novel issue of privilege related to the tug of war between the political branches, Washington obviously chose his battles carefully and used his “executive privilege” only where he determined appropriate to do so—when the issue implicated exclusive executive authority.

Many accounts have been written about the subsequent invocation of executive privilege.<sup>181</sup> However, “[h]istorians, judges and lawyers differ over the proper description and analysis of these incidents.”<sup>182</sup> As Harold Koh argues, “Professor Henkin has properly observed that ‘executive privilege has not often been formally asserted in foreign affairs matters.’”<sup>183</sup> This is particularly true when the military is directly implicated. For example, there was no claim of executive privilege in the Iran-Contra affair,<sup>184</sup> a situation ripe for such a claim. In fact, there has been only one time when executive privilege has been used to preclude a military officer from testifying on military matters,<sup>185</sup>

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179. See T. HARRY WILLIAMS, *THE HISTORY OF AMERICAN WARS, FROM 1745 TO 1918*, at 27–28 (1981) (recalling that as General in Chief of the Continental forces, Washington was instructed “punctually to observe and follow such orders and directions, from time to time, as you shall receive from this or a future Congress . . . or committee of Congress”).

180. See KOHN, *supra* note 108, at 114–24 (detailing the personal and political attacks lodged against Washington as a result of the conflict).

181. In addition to other citations in this Article, see ADAM CARLYLE BRECKENRIDGE, *THE EXECUTIVE PRIVILEGE: PRESIDENTIAL CONTROL OVER INFORMATION* (1974); Robert Kramer & Herman Marcuse, *Executive Privilege—A Study of the Period 1953–1960*, 29 *GEO. WASH. L. REV.* 623, 827–916 (1961).

182. Cox, *supra* note 100, at 1396.

183. KOH, *supra* note 16, at 172 (quoting Louis Henkin, “A More Effective System” for *Foreign Relations: The Constitutional Framework*, in 5 *COMMISSION ON THE ORGANIZATION OF THE GOVERNMENT FOR THE CONDUCT OF FOREIGN POLICY* app. L, at n.32 (1975)).

184. *Id.*

185. See Benjamin J. Priestler, Paul G. Rozelle, & Mirah A. Horowitz, *The Independent Counsel Statute: A Legal History*, 62 *LAW & CONTEMP. PROBS.* 5, 79 (1999) (discussing President Kennedy’s use of executive privilege “to protect his military supervisor from testifying about the Bay of Pigs invasion and to prevent congressional oversight of foreign policy”).

and this was done to avoid continued confrontation between branches of government as opposed to any specific legal argument.<sup>186</sup>

The issue of executive privilege has also come before the courts, though only tangentially related to the military. As noted above, in *Watkins*<sup>187</sup> and *Barenblatt*,<sup>188</sup> the Supreme Court both confirmed and limited the congressional inquiry authority, limiting this power to issues within the sphere of vested congressional authority. No court has ever been called upon to adjudicate a dispute resulting from an assertion by the President of executive privilege concerning a military matter. However, in other cases involving an assertion of privilege based on military or diplomatic *secrets*, where foreign affairs power was implicated, the courts have uniformly sustained the privilege.<sup>189</sup> But even in those cases, the key question has not been whether Congress has a right to the information, but rather, “the sufficiency of the security measures Congress is willing to adopt” to secure the information.<sup>190</sup>

It is, however, undisputed that the incidents of invocation of executive privilege to resist information requests from Congress have significantly increased in recent decades. According to

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186. President Kennedy instructed General Maxwell Taylor to not discuss the recent failed action at the Bay of Pigs as “it would result in another highly controversial, divisive public discussion among branches of Government which would be damaging to all parties concerned.” BERGER, *supra* note 165, at 379 n.3 (citation omitted).

187. In *Watkins*, the Court specifically stated that Congress’s investigative power “comprehends probes into departments of the Federal Government to expose corruption, inefficiency or waste.” *Watkins v. United States*, 354 U.S. 178, 187 (1957).

188. In *Barenblatt*, the Court stated:

The power of inquiry has been employed by Congress throughout our history, over the whole range of the national interests concerning which Congress might legislate or decide upon due investigation not to legislate; it has similarly been utilized in determining what to appropriate from the national purse, or whether to appropriate. The scope of the power of inquiry, in short, is as penetrating and far-reaching as the potential power to enact and appropriate under the Constitution.

Broad as it is, the power is not, however, without limitations. Since Congress may only investigate into those areas in which it may potentially legislate or appropriate, it cannot inquire into matters which are within the exclusive province of one of the other branches of the Government. Lacking the judicial power given to the Judiciary, it cannot inquire into matters that are exclusively the concern of the Judiciary. Neither can it supplant the Executive in what exclusively belongs to the Executive. And the Congress, in common with all branches of the Government, must exercise its powers subject to the limitations placed by the Constitution on governmental action, more particularly in the context of this case the relevant limitations of the Bill of Rights.

*Barenblatt v. United States*, 360 U.S. 109, 111–12 (1959).

189. Cox, *supra* note 100, at 1426.

190. *Id.*

Raoul Berger, who termed the president's executive privilege a "myth,"<sup>191</sup> "[s]ince 1954 it has become executive practice to refuse on the flimsiest grounds information which should underlie the appropriations of billions of dollars or the passage of vital legislation."<sup>192</sup> Nonetheless, it appears that, with the single exception of General Taylor's testimony, presidents have not chosen to invoke executive privilege concerning military matters. While it is near impossible to prove the motivation for such a negative, some scholars rely on this history in support of their assertions that the Constitution does not provide a basis for such a claim. As Louis Fisher has written:

The historical record is replete with examples of Congress relying on the regular legislative process, including access to national security information held by the executive branch, to control presidential actions in military affairs. There is no evidence from these sources that the Commander in Chief Clause was intended to deny members of Congress information needed to supervise the executive branch and learn of agency wrongdoing.<sup>193</sup>

Though Senator Sam Ervin's statement that "[t]he refusal to make information available to the Congress when needed for its legislative functions is inimical to the power of the Congress to fulfill its legislative duties"<sup>194</sup> may not hold true in all areas of executive power, it clearly appears applicable in the realm of military power.

### *B. Abrogation, Abdication, and Abandonment*

A recent article in the *Washington Post* reported that "[t]he judge advocates general, responding in writing to questions from the Senate Armed Services Committee about the treatment of suspected terrorist Mohamed al-Qahtani, found that several techniques used at Guantanamo Bay, Cuba, could be considered violations of interrogation policy because individually they are humiliating or degrading."<sup>195</sup> It is unnecessary here to review the raging controversy over treatment of detainees and potential

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191. BERGER, *supra* note 165, at 1.

192. *Id.* at 7.

193. LOUIS FISHER, *THE POLITICS OF EXECUTIVE PRIVILEGE* 233 (2004).

194. *Executive Privilege: Hearing before the Subcomm. on Separation of Powers of the Comm. on the Judiciary*, 92d Cong. (1971), reprinted in 117 CONG. REC. 22, 28990 (1977) (statement of Sen. Sam J. Ervin, Jr., Chairman, Subcomm. on Separation of Powers of the Comm. on the Judiciary), quoted in Doherty, *supra* note 163, at 818.

195. Josh White, *Military Lawyers Say Tactics Broke Rules*, WASH. POST, Mar. 16, 2006, at A13.

torture at various U. S. military and nonmilitary facilities. It is, however, apparent that Congress believes that the treatment of detainees and possible violations of U.S. international legal obligations<sup>196</sup> are within its legislative and oversight sphere of authority. Any doubt about this view was resolved when Congress enacted legislation addressing these issues.<sup>197</sup>

In preparation for that legislation, committees from both the Senate and House called the senior judges and lawyers of each service to testify before them.<sup>198</sup> During these hearings, members of Congress admitted that they had abdicated responsibility in this area and that they were only belatedly coming to take action that was needed years ago.<sup>199</sup> On the other hand, Congress was equally concerned about members of the military being improperly employed by the President.<sup>200</sup> Unfortunately, this

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196. In October 1994, the United States became a party to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, which provides that “no one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment.” Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, June 26, 1987, 1465 U.N.T.S. 85, available at <http://www.ohchr.org/English/law/pdf/cat.pdf>; see also Office of the United Nations High Commissioner for Human Rights, Ratifications and Reservations: Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, <http://www.ohchr.org/English/countries/ratification/9.htm> (last visited Aug. 16, 2007).

197. See Military Commissions Act of 2006, Pub. L. No. 109-366, § 948b(a), 120 Stat. 2600, 2602 (to be codified at 10 U.S.C. §§ 948a–950w and other sections of titles 10, 18, 28, and 42 (a)) (enacted for the purpose of “establish[ing] procedures governing the use of military commissions to try alien unlawful enemy combatants engaged in hostilities against the United States for violations of the law of war and other offenses triable by military commission”). For a commentary on Congress’s actions, see Judith Resnik, *Opening the Door*, SLATE, Feb. 1, 2006, <http://www.slate.com/id/2135240/>.

198. See generally *Hearing on the Future of Military Commissions*, supra note 133 (calling for the testimony of Judge Advocate Generals from the Army, the Navy, the Air Force and the Marine Corps); *Hearing on Detainee Trials*, supra note 133 (calling for the testimony of the Assistant Attorney General, Judge Advocate Generals from the Army, the Navy, the Air Force, and the Marine Corps., and Legal Counsel to the Chairman of the Joint Chiefs of Staff); *Hearing on Military Commissions and Tribunals*, supra note 133 (calling for the testimony of Judge Advocate Generals from the Army, Navy, the Air Force, and the Marine Corps, as well as the Assistant Attorney General from the Department of Justice and the Former Chairman of the Joint Chiefs of Staff).

199. See *Hearing on Military Commissions and Tribunals*, supra note 133 (statement of Loretta Sanchez, Member, House Comm. on Armed Services) (expressing that she had been concerned about the issue for several years and that action should have been taken several years ago).

200. The following exchange took place between Representative Buyer and Judge Advocate General MacDonald:

BUYER: So, as speaking to the JAGs now, as you look at what is before us—the bill—and as you flip through the bill, you could do what we do here in Congress. All of a sudden, you recognize your words, you recognize your provisions.

When you go through this, how much of this are your words and your provisions? If I asked you to pull out a highlighter and highlight what are your provisions and your words, could you do that? Or would that be difficult to do?



perception is partly attributable to the growing congressional acquiescence to increasing executive dominance over the functions of the military. As Professor Marshall has asserted:

The presidency is now indisputably the most powerful branch of the federal government, and Congress's power to investigate may be one of the few effective checks against executive branch dominance or abuse. Moreover, congressional investigations provide access to the information that is necessary for Congress to fulfill its own duties.<sup>201</sup>

While others have cautioned against congressional investigative overreaching,<sup>202</sup> there seems to be a growing consensus that Congress has either acquiesced in this flow of power to the Executive<sup>203</sup> or actually "abdicated fundamental war

MACDONALD: I think we could do a decent job of doing that. For example . . .

BUYER: All right, let's just cut to the chase. Is this your work product? Or is this the Department of Justice's work product?

MACDONALD: I think it's a combined work product.

BUYER: How much combined? Give me a percentage.

You can't do it? Or you're hesitant to do it?

MACDONALD: No, no—I can talk generally about some of the provisions that I've seen, some of our changes . . .

BUYER: Man, I tell you what. If I partner with you in working something, I think I'd know how much is my work product and how much is your work product. Wouldn't you?

You and I must have a different consistency then, because I'm going to know.

I guess, here's what my problem is, is I got to go to Mr. Larsen. He complimented all of you, he complimented the JAGs, that the JAGs should be included more in the process. I concur, I agree. So, I'm a huge advocate of the JAGs here.

So, I just want to know—you see, this is going to be called "military commission." You're about to be used. So, if you're about to be used, I want to know how much of the military's been involved in the process. So please answer my question.

BUYER: How much of this is military work product?

Your silence is killing me.

*See id.*

201. Marshall, *supra* note 90, at 782 (internal citation omitted).

202. *See id.* at 784 ("[T]he practices currently governing Congress's use of [its] power [to investigate the President] have evolved to the point where there are few effective constraints on its exercise. . . . Procedural requirements should be created (or, more accurately, restored) in order to place greater political demands on Congress before it may pursue a particular investigation."); Miller, *supra* note 149, at 640 ("Unbounded congressional oversight would stifle, consume, and ultimately, supplant executive functions.")

203. *See* KOH, *supra* note 16, at 123 ("Congress has persistently acquiesced in executive efforts to evade [the post-Vietnam] legislation's strictures. That acquiescence has institutional roots in legislative myopia, inadequate drafting, ineffective legislative tools, and an institutional lack of political will."). Charles Black adds:

and spending powers to the President.”<sup>204</sup> Although this abdication has occurred over time,<sup>205</sup> and has largely been in response to executive assertions of authority, it does not bode well for the continuing vitality of the constitutional system of checks and balances.<sup>206</sup> Even the power of the purse, a critical weapon in the congressional arsenal for asserting control over military affairs,<sup>207</sup> is proving increasingly less effective as a check on Executive initiative. Despite the fact that “the appropriations limitation remains one of Congress’s few effective legal tools to regulate presidential initiatives in foreign affairs,” “the president has developed over time a full range of devices to exploit spending loopholes in the appropriations process.”<sup>208</sup> Further, judicial doctrines of restraint and deference in cases involving national security issues<sup>209</sup> have “kept suspended constitutional objections not just to congressional creation of appropriations limits, but also to the enforcement of such limits on the executive.”<sup>210</sup>

While many experts might differ on the degree to which Congress has become marginalized in relation to the use and control of the military, few would likely dispute that marginalization has occurred.<sup>211</sup> However, it is improper to focus

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[W]hat very naturally has happened is simply that power textually assigned to and at any time resumable by the body structurally unsuited to its exercise, has flowed, through the inactions, acquiescences, and delegations of that body, toward an office ideally structured for the exercise of initiative and for vigor in administration.

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The result has been a flow of power from Congress to the presidency.

Charles L. Black, Jr., *The Working Balance of the American Political Departments*, 1 HASTINGS CONST. L.Q. 13, 17, 20 (1974).

204. Fisher, *supra* note 38, at 932.

205. *Id.* (noting that congressional abdication of fundamental war and spending powers to the President has occurred since World War II).

206. See Kellman, *supra* note 39 (quoting Senator Russell Feingold as saying: “The Constitution makes Congress a coequal branch of government. It’s time we start acting like it”).

207. See Saikrishna Prakash, *Unleashing the Dogs of War: What the Constitution Means by “Declare War”*, 93 CORNELL L. REV. (forthcoming Oct. 2007) (manuscript at 7, available at <http://ssrn.com/abstract=977244>) (arguing that the power of the purse can still be a powerful weapon in Congress’s arsenal); Eaton, *supra* note 4, at 12 (urging Congress to “remember it still has the power of the purse”).

208. KOH, *supra* note 16, at 130–31. *But see* Yoo, *supra* note 22, at 299 (“Although one might feel some disappointment at Congress’ [sic] failure to take advantage of its funding powers, a failure of political will should not be confused with a constitutional defect. A congressional decision not to exercise its constitutional prerogatives does not translate into an executive branch violation of the Constitution.”).

209. See generally DYCUS, ET. AL., NATIONAL SECURITY LAW 133–56 (4th ed. 2007).

210. KOH, *supra* note 16, at 130.

211. Some are urging greater congressional action to check the ever increasing power

solely on the actions of the executive and legislative branches when assessing the cause for such marginalization. There is, in fact, another contributor to this process: the military. Military leaders must remain cognizant that their duty to the nation mandates a free flow of information and expert advice to *both* political branches of government. As illustrated by General Shinseki's actions, this duty cannot be compromised in the interest of placating one branch in favor of the other. Instead, candor, access, and independent judgment must remain the hallmarks of the civil-military relationship—a relationship between the military and the government, and not merely the Executive. Generals and admirals must not be deterred in their duty of candor when confronted with real or perceived Secretarial intimidation when important issues are at stake. More importantly, there is no constitutional requirement for the military to wait to be summoned by Congress to give testimony.<sup>212</sup> This should be part of the responsibility granted the unique position given to the military. However, institutional perceptions and structural paradigms have produced such a result.

Congress cannot continue to abdicate its investigative role in relation to military matters. Even if asserting this role is politically charged, the responsibility vested in that body by the Constitution requires that members receive maximum information on military matters. The friction produced by demands for information is essential to produce the constitutionally expected outcomes related to control over the military and issues involving military matters. Nor can the military be permitted to temper, either intentionally or inadvertently, its commitment to the free flow of information to all political decisionmakers because of the risk of alienating executive-branch officials, the inclination to do so being perhaps even more problematic when Congress is less assertive. Either of these trends, if continued, risks leaving the Congress uninformed

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of the President over military activities. Professor Victor Hansen, a retired Army JAG officer, and Lawrence Friedman have argued:

Congress must conduct its own inquiry [into Army manning and equipment] through congressional hearings and investigation, and determine independent of the administration what the state of the Army is and what the appropriate force levels are for the Army in the future. Congress must then provide an honest assessment both in the appropriations process and otherwise about the real costs of sustaining the world's best fighting force over the long term.

Hansen & Friedman, *supra* note 41.

212. Cf. Chrysanthe Gussis, *The Constitution, the White House, and the Military HIV Ban: A New Threshold for Presidential Non-Defense of Statutes*, 30 U. MICH. J.L. REFORM 591, 616 (1997) (noting that, although "Congress did not consult with top military leaders," military leaders, in turn, did not make their wishes known).

or poorly informed concerning important military matters. This will endanger not only the constitutional system of checks and balances but also the safety of the nation. This risk is perhaps nowhere more profound than in relation to the decision to wage war.

#### V. ACCESS TO MEANINGFUL MILITARY INFORMATION: THE ESSENTIAL FOUNDATION TO THE SHARED WAR-POWERS PARADIGM

This Article has asserted that the trend to view the military as an executive agency is inconsistent with the structure and history of the Constitution. In contrast to this view, and the continuing trend among both politicians and military leaders to view separation-of-powers issues involving the military through this lens, the military is better understood as a national agency, a fact ultimately reflected in the obligation of the military to achieve the objectives assigned by Congress on behalf of the nation.<sup>213</sup> This is certainly in and of itself a compelling justification for resisting any trend towards such a de facto civil-military relationship. However, there is another profoundly important reason for ensuring that executive dominance, legislative indifference, or both, are not permitted to disable meaningful congressional access to candid and timely military information and advice: such information is the foundation for the legitimate exercise of national war powers.

If there is one overriding principle related to the exercise of war powers by the national government, it is that cooperation between the political branches is the *sine qua non* of constitutional legitimacy.<sup>214</sup> The distribution of power between

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213. Title 10, Section 3062 of the U.S. Code establishes the "mission" of the U.S. Army:

- (a) It is the intent of Congress to provide an Army that is capable, in conjunction with the other armed forces, of—
- (1) preserving the peace and security, and providing for the defense, of the United States, the Territories, Commonwealths and possessions, and any areas occupied by the United States;
  - (2) supporting the national policies;
  - (3) implementing the national objectives; and
  - (4) overcoming any nations responsible for aggressive acts that imperil the peace and security of the United States.

10 U.S.C. § 3062 (2000).

214. See generally JOHN HART ELY, WAR AND RESPONSIBILITY: CONSTITUTIONAL LESSONS OF VIETNAM AND ITS AFTERMATH 3 (1993) (asserting that the original meaning of the War Clause required that all wars be legislatively authorized); LOUIS FISHER, PRESIDENTIAL WAR POWERS (1995) (recounting the historical progression of presidential war powers toward unilateral action without congressional authorization); Geoffrey S. Corn, *Clinton, Kosovo, and the Final Destruction of the War Powers Resolution*, 42 WM. &

the Chief Executive, vested with the express Commander in Chief authority,<sup>215</sup> and the Legislature, vested with the power to authorize, fund, and provide the manpower for war, is express in the various provisions of the Constitution.<sup>216</sup> While this distribution has resulted in the proverbial and historical “tug of war” between the two political branches, and the momentum of recent history has clearly favored the Executive, nothing has altered this basic “shared power” constitutional paradigm.<sup>217</sup>

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MARY L. REV. 1149, 1154–55 (2001) [hereinafter Corn, *Clinton*] (arguing that “the power to initiate nondefensive combat operations is not an exclusive executive power, but a power shared between the executive and legislative branches”); Charles A. Lofgren, *War-Making Under the Constitution: The Original Understanding*, 81 YALE L.J. 672, 673 (1972) (discussing the “original understanding respecting the allocation between the President and Congress of the general power to commence war” and whether “that power [was] understood to include the commencement of undeclared war”); Jane E. Stromseth, *Understanding Constitutional War Powers Today: Why Methodology Matters*, 106 YALE L.J. 845, 865–86 (1996) (reviewing FISHER, *supra*) (examining the evolution of constitutional war powers from their original understanding to present day applications in small scale conflicts); see also Geoffrey S. Corn, *Presidential War Power: Do the Courts Offer Any Answers?*, 157 MIL. L. REV. 180, 255 (1998) [hereinafter Corn, *Presidential*] (arguing that the history of judicial resolution of war-powers issues supports the conclusion that with the exception of purely defensive war, inter-branch cooperation will almost invariably result in the conclusion that war-making decisions are consistent with the Constitution).

215. U.S. CONST. art. II, § 2.

216. These powers include the power of the purse, the power to provide for the establishment and regulation of land and naval forces, and the power to declare war and grant letters of marque and reprisal. U.S. CONST. art. I, § 8; see also FISHER, *supra* note 214, at xi (noting that the framers of the Constitution empowered Congress with the authority to initiate war, and independent presidential authority departs from the constitutional checks and balances framework); J. Gregory Sidak, *The Quasi War Cases—And Their Relevance to Whether “Letters of Marque and Reprisal” Constrain Presidential War Powers*, 28 HARV. J.L. & PUB. POLY 465, 499 (2005) (surveying Quasi-War cases and concluding that the cases concern national sovereignty and supremacy, not the separation of powers).

217. See generally ELY, *supra* note 214, at 115–31 (providing a proposed revision of the War Powers Resolution that more effectively forces the president to acquire congressional support before engaging in combat); FISHER, *supra* note 214, at xiii (questioning the limits of presidential war powers and the roles of the judicial and legislative branches in policing the Executive); Corn, *Clinton*, *supra* note 214, at 1154–55 (favoring an interpretation of the Constitution in which the power to initiate nondefensive combat operations is not an exclusive executive power, but a power shared between the executive and legislative branches); Lofgren, *supra* note 214, at 673 (examining the original understanding of the Constitution respecting the allocation between the President and Congress of the general power to commence undeclared war); Stromseth, *supra* note 214, at 865–86 (evaluating substantive patterns of history to provide normative significance to war-powers scholarship). But see generally Robert F. Turner, *War and the Forgotten Executive Power Clause of the Constitution: A Review of John Hart Ely’s War and Responsibility*, 34 VA. J. INT’L L. 903, 904 (1994) (criticizing Ely for interpreting war powers in the Constitution as “proffer[ing] a series of unsupported assumptions”); Yoo, *supra* note 22 (arguing that the war-powers framework created by the Framers differs sharply from that envisioned by modern scholars).

The Constitution grants neither branch of government plenary war-making power. Although historical practice and federal jurisprudence essentially endorse extensive executive initiative in the foreign-policy realm,<sup>218</sup> the legality of war-making decisions has been historically contingent on evidence of congressional support.<sup>219</sup> However, such cooperation need not be manifested in express congressional authorization for presidential war-making initiatives. Even after Congress passed a legislative mandate that such support shall be considered valid only when in express form, there seems to be little doubt that the historic practice of expressing support through less formal mechanisms continues to satisfy the requirements of the Constitution.<sup>220</sup> As a result, while express legislative authorization for military conflict remains the most obvious indicator of cooperation between the President and Congress, exercise of executive initiative relying on implied legislative consent continues to be an accepted norm of constitutional war-making.<sup>221</sup>

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218. See generally ELY, *supra* note 214, at ix (noting the judicial branch's unwillingness to insist that Congress participate in decisions to go to war); FISHER, *supra* note 214, at xi–xiii (describing the gradual increase in magnitude of the president's war powers); Corn, *Clinton*, *supra* note 214, at 1154–55 (arguing that the Executive should not need express legislative authorization before initiating nondefensive combat operations, but rather such power should be held jointly between the executive and legislative branches).

219. See Corn, *Presidential*, *supra* note 214, at 181 (contending that a broad view of executive war-power must have a foundation of congressional support for war-power policies).

220. See FISHER, *supra* note 214, at 192 (contending that the principle of congressional approval was well grounded in 1787 and remains that way today); Corn, *Clinton*, *supra* note 214, at 1152 (noting a “consistent pattern of executive side-stepping, legislative acquiescence, and judicial abstention” relative to various combat operations after the passage of the War Powers Resolution (footnotes omitted)); Turner, *supra* note 217, at 970 (noting that Congress designed the War Powers Resolution to establish a framework relationship for the use of any force by the Commander in Chief).

221. See FISHER, *supra* note 214, at xi–xiii (underscoring the collision between constitutional principles and the rise of presidential war-power); Corn, *Clinton*, *supra* note 214, at 1152–54 (demonstrating that some evidence of implied congressional support for the President has always existed for military operations since the War Powers Resolution); Turner, *supra* note 217, at 969–70 (arguing that Congress did not intend the War Powers Resolution to grant the President additional legal authority to initiate or fight wars, but did recognize that “Presidents historically had claimed independent constitutional authority to commit forces under a range of other circumstances”); see also *Campbell v. Clinton*, 203 F.3d 19, 23 (D.C. Cir. 2000) (dismissing a challenge by members of Congress to the military campaign ordered by President Clinton against Yugoslavia based on sufficient evidence of implied congressional consent to the operation); *Dellums v. Bush*, 752 F. Supp. 1141, 1142–43 (D.D.C. 1990) (dismissing a similar challenge by members of Congress to the anticipated initiation of combat operations against Iraq in 1990 without express legislative authorization, based on the failure of Congress to express affirmative opposition to such initiation).

This "implied consent" theory of cooperative war-making is based on a critical premise: Congress is fully capable of expressing opposition to a presidential war-making initiative if and when it so chooses.<sup>222</sup> Although there continues to be disagreement between legal experts on the impact of such an expression of opposition,<sup>223</sup> there does seem to be sufficient precedent for the conclusion that such legislative action would make it exceedingly difficult for a president to legally justify continued military operations contrary to such opposition.<sup>224</sup> While the timing and form of the opposition would impact the required executive response, the ultimate outcome would likely be conflict termination.<sup>225</sup> Thus, although the President is permitted to exercise initiative in the face of congressional silence, relying on a theory of implied consent, Congress retains the ultimate power, with the limited exception of a purely defensive war, to "check" that initiative.<sup>226</sup> Accordingly, the

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222. See Corn, *Clinton*, *supra* note 214, at 1184 (pointing out that modern cases dismissing war-power challenges reflected the conclusion that Congress is free to choose the means to support war-making initiatives).

223. See, e.g., Turner, *supra* note 217, at 977 (disagreeing with another scholar that a legislative veto provision compelling the President to remove forces from foreign hostilities would be unconstitutional); Yoo, *supra* note 22, at 295 ("Contrary to the arguments by today's scholars, the Declare War Clause does not add to Congress' [sic] store of war powers at the expense of the President.").

224. See *Dellums*, 752 F. Supp. at 1145 (stating that delegating to the executive branch the sole power to define whether a military operation constituted war "would evade the plain language of the Constitution"); see also Corn, *Presidential*, *supra* note 214, at 205 (noting that the framework of early cases analyzing war-power issues is "premised on the assumption that the authority to make war-power decisions is shared between the two political branches of government").

225. For a fascinating insight into the perspective of a former President, expressed not long after the passage of the War Powers Resolution, see *The Constitution: That Delicate Balance* (Columbia University Seminars on Media and Society 1984) (on file with M.D. Anderson Library, University of Houston).

While discussing a hypothetical impasse between a President who desired to continue a military operation and a Congress that had cut off funding for the operation, President Ford reluctantly conceded that if he were that President, he would concede to congressional will. *Id.*

226. This "initiative/acquiescence/response" continuum as a framework for the exercise of national-security powers between the political branches is explained in detail in Dean Harold Koh's seminal book, *The National Security Constitution*. According to Dean Koh:

As it has evolved, the National Security Constitution assigns to the president the predominant role in the process, but affords him only a limited realm of exclusive powers, with regard to diplomatic relations and negotiations and to the recognition of nations and governments. Outside of that realm, governmental decisions regarding foreign affairs must transpire within a sphere of concurrent authority, under presidential management, but bounded by the checks provided by congressional consultation. . . .

KOH, *supra* note 16, at 69; see also Corn, *Clinton*, *supra* note 214, at 1162-64 (analyzing the applicability of Dean Koh's theory to the War Powers Resolution debate).

burden is on Congress to express its will, and not on the President to speculate on what congressional silence indicates.<sup>227</sup> This principle was deftly articulated by Judge Dooling in the Vietnam era war-powers case *Orlando v. Laird*:<sup>228</sup>

It is passionately argued that none of the acts of the Congress which have furnished forth the sinew of war in levying taxes, appropriating the nation's treasure and conscripting its manpower in order to continue the Vietnam conflict can amount to authorizing the combat activities because the Constitution contemplates express authorization taken without the coercions exerted by illicit seizures of the initiative by the presidency. But it is idle to suggest that the Congress is so little ingenious or so inappreciative of its powers, including the power of impeachment, that it cannot seize policy and action initiatives at will, and halt course of action from which it wishes the national power to be withdrawn. Political expediency may have counseled the Congress's choice of the particular forms and modes by which it has united with the presidency in prosecuting the Vietnam combat activities, but the reality of the collaborative action of the executive and the legislative required by the Constitution has been present from the earliest stages.<sup>229</sup>

Judge Dooling's opinion responded to a request by Army enlistees for injunctions against orders that required them to deploy to Vietnam.<sup>230</sup> These soldiers asserted that the Constitution required express and explicit authorization for the Vietnam conflict, and that military appropriations were insufficient to satisfy this constitutional requirement.<sup>231</sup> Judge Dooley's response to this theory is, in the opinion of the authors, one of the most effective articulations of the basic constitutional scheme of war-making authority. It also, however, reveals a critical requirement in the exercise of this shared power: information. Because congressional *inaction* has such a potential enabling effect for a President, a fully informed Congress is essential to justify this enabling effect. It is clear that consent for

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227. See *Dellums*, 752 F. Supp. at 1150 (holding that these types of claims are not ripe for judicial review until Congress takes action); see also Corn, *Clinton*, *supra* note 214, at 1181–82 (noting that, from a constitutional standpoint, one Supreme Court case decided it was “more significant that Congress seemed to be supporting the President implicitly than that Congress had failed to do so explicitly”).

228. *Orlando v. Laird*, 317 F. Supp. 1013 (E.D.N.Y. 1970), *aff'd*, 443 F.2d 1039 (2d Cir. 1971).

229. *Id.* at 1019.

230. *Id.* at 1014–16.

231. *Id.* at 1014.



executive war-making initiative may be either express or implied. It is equally clear that the concept of consent implies that action—or inaction—by Congress be motivated by comprehensive and timely information on the nature, scope, and prognosis for military operations—information that is quintessentially within the realm of military expertise. In essence, even if Congress need not indicate support for the President through express legislative authorization, Congress must be sufficiently informed of the relevant information related to a war-making initiative to validate the mode of consent it chooses to utilize.

An essential component in satisfying this information necessity is equal access to military expertise. If Congress's access to information from the Pentagon is contingent on the President's willingness to permit such access, the President will be empowered to manipulate the conditions upon which express or implied congressional consent is founded. Perhaps more importantly, if members of the military profession perceive their loyalty to the Commander in Chief as a justification for limiting the extent of their candor with Congress on any matter that falls within the realm of shared Constitutional authority—most significantly the authorization for the use of military force—the effect might be similar. Thus, even in the absence of any improper motive by the President to manipulate information provided to Congress, the subtle effect of a misperceived locus of obligation within the military ranks might debilitate the historically accepted war authorization modalities.<sup>232</sup>

With limited exception, the constitutional responsibility for committing the United States to conflict is shared between the two political branches of government.<sup>233</sup> Over the decades, a pattern of executive primacy over such matters has evolved.<sup>234</sup> Nonetheless, the support of Congress—either express or implied—remains widely regarded as essential to satisfy the requirements of the Constitution. Although the post-Vietnam Congress sought, through the War Powers Resolution, to prohibit executive reliance on anything short of express legislative authorization to support the initiation of conflict,<sup>235</sup> subsequent

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232. For an excellent analysis of the evolution of this perceived locus of obligation, see Charles J. Dunlap, Jr., *Welcome to the Junta: The Erosion of Civilian Control of the U.S. Military*, 29 WAKE FOREST L. REV. 341 (1994).

233. Corn, *Presidential*, *supra* note 214, at 250.

234. *Id.*

235. War Powers Resolution, 50 U.S.C. §§ 1541–48 (2000).

practice and jurisprudence have reconfirmed the validity of the implied consent formula.

However, the legitimacy of this formula is contingent upon a Congress fully informed of the consequences of military adventurism. As the current Iraq-conflict debate illustrates, hasty war authorization judgments based on less-than-candid military estimates concerning the amount of forces needed or types of tactics required are a recipe for subsequent “buyers remorse.” Unfortunately, this debate is also a reminder that no matter how profound such remorse may be, mandating the termination of a conflict against the will of a President is far more difficult than limiting or prohibiting initial involvement. Because meaningful and timely congressional access to candid strategic, operational, and tactical military estimates may facilitate the quality of initial decisions related to initiating conflict, it is essential that the institutional framework defining the civil–military relationship effectively facilitate the provision of such information and reinforce for military leaders their obligation to come forward with the information.

## VI. CONCLUSION AND RECOMMENDATIONS

The key question raised by this Article is, therefore, not simply whether Congress is able to require military leaders to provide information, but whether the institutional dynamics of the relationship between Congress and the military facilitate a fully informed legislature. This, in turn, involves two principal sub-considerations: does the statutory framework establishing the civil–military relationship effectively facilitate the provision of information, and do senior military leaders who possess such information perceive that they can be candid with Congress without jeopardizing their careers? Absolute candor from military leaders is particularly essential in the lead up to war, for as the nation is being currently reminded in relation to the war in Iraq, it is far more difficult for Congress to oppose a war that has already commenced than it is to challenge the wisdom of initiating the conflict and deny or limit the authority to do so. Unless Congress is provided military perspectives of military decisions—especially war-making decisions—from the outset of consideration with stark and absolute candor, the exercise of congressional power to check presidential initiative becomes less likely.

Although military leaders would readily acknowledge the ethical and professional obligation of candor when responding to questions from political leaders, the pervasive influence of

executive-branch authority over the Department of Defense has arguably created a sense of higher duty to that branch of government. While the designation of the President as Commander in Chief justifies this allocation of loyalty to a certain extent, it must not be understood as a justification for withholding or obstructing congressional access to essential information. Loyalty to the nation, as well as fidelity to the Constitution—the professional obligation of all members of the armed forces—requires a genuine appreciation not only of the principle of civilian control of the military, but also requires an understanding that this concept connotes more than myopic loyalty to the executive branch. Unless such an appreciation exists there is grave danger that form will prevail over substance, with military leaders walking a careful line—providing minimally responsive information to Congress without being in fact misleading.

In his seminal work on the civil–military relationship and the Vietnam War, *Dereliction of Duty*,<sup>236</sup> H.R. McMaster provided a compelling illustration of the inherent danger that results when senior military leaders fail to provide candid military advice and opinions to their civilian masters.<sup>237</sup> Although McMaster focused primarily on the breakdown of information exchange between the Joint Chiefs and President Johnson, the disabling effect he highlights is equally applicable to the ability of Congress to discharge its constitutional role involving military affairs.<sup>238</sup> In essence, *Dereliction of Duty* confirms the need to ensure candid military advice is available to *all* civilian leaders responsible for military decisions, not simply the President. Thus, when considered within the context of the shared constitutional powers of Congress and the President, McMaster's thesis bolsters the necessity of ensuring adequate structural mechanisms to safeguard congressional access to candid military advice.

Congress is not unaware of its self-inflicted diminishing role in foreign affairs. The War Powers Resolution is a quintessential congressional response to this growing diminution.<sup>239</sup> As Congress's restraint on the Executive has diminished, it has relied more and more on reporting requirements to maintain

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236. H.R. MCMASTER, *DERELICTION OF DUTY: LYNDON JOHNSON, ROBERT MCNAMARA, THE JOINT CHIEFS OF STAFF, AND THE LIES THAT LED TO VIETNAM* (1997).

237. *Id.* at 327–28.

238. *Id.* at 309–12.

239. See KOH, *supra* note 16, at 38–40 (claiming that “Congress passed the War Powers Resolution to prevent future Vietnams”).

oversight on government agencies.<sup>240</sup> However, “[t]he War Powers Resolution experience shows that reporting and consultation requirements lack teeth and are all too easily evaded.”<sup>241</sup> Some assert this can only be cured by even stronger reporting requirements, supplemented by expert advice from the military. Kelly Cowan argues:

[T]he wording of the [War Powers] Resolution must be changed, requiring the president to present to Congress the justifications for entering into hostilities abroad before he or she takes action. These modifications would require the president to assemble military experts and thoroughly evaluate the ramifications of military involvement. Congress should then vote on whether this is a dispute that United States Armed Forces should enter.<sup>242</sup>

Others call for the reinvigoration of congressional oversight through funding limitations, again based on expert advice from the military. Retired General Paul Eaton argues:

Congress must assert itself. Too much power has shifted to the executive branch, not just in terms of waging war but also in planning the military of the future. Congress should remember it still has the power of the purse; it should call our generals, colonels, captains and sergeants to testify frequently, so that their opinions and needs are known to the men they lead.<sup>243</sup>

Still others have argued for a more institutionally focused approach to solving the continuing erosion of the congressional role in the military aspect of foreign affairs. Harold Koh urges that, “[t]o avert the recurring cycles of interbranch warfare that we have recently experienced, we must reject notions of either executive or congressional supremacy in foreign affairs in favor of more formal institutional procedures for power sharing, designed clearly to define constitutional responsibility and to locate institutional accountability.”<sup>244</sup>

These suggestions are not mutually exclusive. In fact, a combination of the best of these approaches is exactly what is needed to ensure that Congress is properly informed in military matters; to right the wavering “checks and balances” paradigm;

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240. Pray, *supra* note 101, at 298. The GAO has concluded that there are too many reporting requirements to determine “whether reports were actually submitted in accordance with the statutes.” *Id.* at 299.

241. KOH, *supra* note 16, at 128.

242. Cowan, *supra* note 130, at 123.

243. Eaton, *supra* note 4.

244. KOH, *supra* note 16, at 6–7.

and to stop the abrogation, abdication, and abandonment of rights and responsibilities amongst the government players. Congress needs an institutional structure that provides more effective access to military expertise, which will in turn contribute to a more balanced understanding of loyalty to civilian control within the military culture.

Currently, the Office, Chief of Legislative Liaison (OCLL) is the “sole directive agency for Department of the Army Congressional Affairs.”<sup>245</sup> While there is no doubt that this office is of fundamental importance and illustrates the recognition that the military must provide information to Congress, it (and its sister service counterparts) are not sufficiently imbedded within Congress to provide the information necessary for Congress to resist the encroaching Executive. As advocated by Harold Koh, institutional change is required to ensure sufficient congressional access to military advice.<sup>246</sup>

#### *A. Enhancing Congressional Information Access: Congressional Military Advisors*

One approach that might affect this institutional change would be to provide Congress with more permanent and indigenous access to military expertise. Congressional leaders could rely on this access to better understand the military aspects of national security issues. Perhaps more importantly, this access could also be essential to assist Congress in identifying information that is *not* being fully provided—in a sense, aiding Congress to overcome the difficulty of seeking information it does not even know it should be seeking. This expertise would arguably facilitate the critical legislative investigation function, providing Congress with more confidence that it was not only receiving but also seeking relevant and essential information from the Department of Defense.

Providing such expertise to Congress could be effectuated through a variety of modalities, ranging from the formalism of statutory mandates to the less formal inclusion of individuals

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245. See The Office, Chief of Legislative Liaison, <http://www.hqda.army.mil/ocll/> (last visited Aug. 8, 2007). For the Navy Office of Legislative Affairs, see United States Navy: Office of Legislative Affairs, <http://www.navy.mil/navydata/people/ola/ola.html> (last visited Aug. 8, 2007). For the Air Force Office of Legislative Liaison, see <http://www.af.mil/library/biographies/bio.asp?bioID=5159> (last visited Aug. 16, 2007). For the Marine Corps Office of Legislative Affairs, see Office of Legislative Affairs Homepage, <http://hqinet001.hqmc.usmc.mil/OLA/home.htm> (last visited Aug. 8, 2007).

246. See KOH, *supra* note 16, at 6 (calling for the restructuring of congressional institutional attributes to “create incentives for executive officials to act irresponsibly and for congressional and judicial officials to permit such actions”).

with this unique expertise on critical congressional staffs. However, it is the thesis of this Article that the current modality—relying almost exclusively on the Department of Defense to “volunteer” such expertise through the legislative liaison officers—is too informal and ad hoc to satisfy the needs of Congress, particularly as the inherent military expertise of Senators and Representatives decreases over time with the accordant decrease in military experience throughout the population. Accordingly, this Article proposes three approaches to providing this expertise.

The first approach would be for Congress to designate by statute positions for congressional military advisors. For example, Congress could mandate the assignment of high-ranking active-duty officers to positions associated with committees vested with authority over military affairs, such as the Senate Armed Service Committee and the House Armed Services Committee. Other committees, such as Appropriations and Foreign Relations, might also be appropriate. An alternate approach could be the designation of a military aide to both the Senate Majority Leader and the Speaker of the House of Representatives. Appointing a high-ranking military advisor to the congressional military committees, and the Senate Majority Leader, the Speaker of the House, or both, would enhance these leaders’ access to timely and relevant military advice analogous to that enjoyed by the President through the Chairman of the Joint Chiefs of Staff.<sup>247</sup> This move would also ensure that congressional perspectives are incorporated into deliberations of the Joint Chiefs and serve as an additional manifestation of the coequal status of the two branches in terms of access to military advice.

This approach does, however, raise a number of significant concerns. First, requiring the assignment of an officer to any position seems to conflict with the authority of the President as Commander in Chief to make such determinations. There is,

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247. To accomplish this task, 10 U.S.C. § 151(f) could be amended to read:

(f) Military Advisers to Congress.

- (1) After first informing the Secretary of Defense, a member of the Joint Chiefs of Staff may make such recommendations to Congress relating to the Department of Defense as he considers appropriate.
- (2) The Secretary of Defense shall make available to Congress upon request, through the Speaker of the House and Senate Majority Leader, senior members of the military to provide advice as needed. The Secretary of Defense shall also provide members of each service to form a permanent delegation to the House Armed Services Committee and the Senate Armed Services Committee to provide advice on military matters.

therefore, a serious question as to whether such a statutory mandate would be constitutional. There is also a serious question of how it could be enforced if the President declined to comply with the mandate. The second concern involves the issue of conflicting loyalty. Placing a high-ranking active-duty military officer into such a position would almost inevitably place that officer in an almost untenable position of making judgments of loyalty between the Commander in Chief and the congressional leadership. The third concern is whether such an assignment would be effectively undermined by the probable marginalization of the officer from the deliberative process within the Department of Defense. Finally, there is the very subtle but real danger that placing high-ranking officers in such positions could actually facilitate the power of the military establishment over civilian control by enabling the military to exacerbate inter-branch rivalries.

For all of these reasons, it seems the benefit of any statutory mandate would be outweighed by practical and constitutional impediments to effectuating the purpose of such a mandate. This does not, however, mean that the current paradigm is the only option available for Congress. Other structural safeguards against executive aggrandizement of military control need not interfere with the plenary authority of the President as Commander in Chief. In fact, access to professional military advice might actually aid the Congress in distinguishing between matters reserved exclusively to the President pursuant to this vested authority and those subject to shared authority. This would facilitate congressional involvement where appropriate and limit congressional interference with the type of command and control issues outside their sphere of authority. The question, therefore, is what alternatives would strike the proper balance proposed by this Article.

One alternative to a statutory mandate would be for Congress to request that the President appoint a detail of military advisors. This method would obviously reconcile the desire for such a permanent advisory presence with the authority of the President over assignment decisions. In addition, assuming the President supported the request and responded by detailing high-ranking officers, the objective of enhancing congressional information access would appear to be satisfied. However, there are two obvious drawbacks to this approach. The first is the discretionary status of such details. The ultimate decision on whether to respond to such a congressional request, and the rank, experience, and longevity of such a detail would be totally discretionary on the part of the President. As a result,

even assuming officers of appropriate rank and experience were detailed to such positions, their performance could be influenced by the concern that their advice might alienate the Executive, resulting in damage to career progression, termination of the detail, or other adverse consequences. In light of the discretionary nature of such an approach, the inherent conflicts of interest that would pervade the function of such officers would defeat the purpose of the detail.

This leads to perhaps the only viable method to increase congressional competence over military matters without interfering with the exclusive command function of the President or creating such an inherent conflict of interest as to defeat the purpose of a detail: reliance on retired four-star officers. It is well within the authority of Congress to establish staff positions in support of the legislative function. Pursuant to that authority, Congress could establish civilian positions for military advisors, and require those positions be filled by retired four-star flag-officers or other retired senior members of military. This approach would offer several advantages over the other two options. Of course, such retired officers would presumptively bring to any position a wealth of military experience and insight. They would also bring a powerful intuition—the type of intuition that could be leveraged to apply healthy skepticism to information submitted to Congress by the Department of Defense, thereby facilitating a more comprehensive inquiry process. Because these positions would be civilian and not military, staffed exclusively with retired officers, there would be no implication of interference with the Commander in Chief function of the President. Nor would conflict of interest be a significant concern because the fidelity of such officers to the broader interests of the nation could be presumed. Furthermore, these officers would be immune from termination at the pleasure of the President, freeing them to express their views with candor. These officers would also come to such positions with a powerful level of inherent “clout” within the military establishment, enabling them to leverage their reputations to enhance their information gathering function. Finally, because they will have already achieved the highest level of military success, “career progression” would in no way influence their performance.

Perhaps the ultimate value of this method of providing permanent military expertise to Congress is that the loyalty of these officers to the nation and to the armed forces would almost invariably result in “branch neutral” advice and expertise. This would be critical in accomplishing the proposed objective—facilitating the ability of an increasingly militarily inexperienced



Congress to determine what is necessary and proper in the realm of national security decisions involving military considerations. Whether Congress could attract such officers to such positions would of course depend on a number of factors. However, if permanent, vested with the appropriate level of professional prestige, and defined in terms of service to the nation rather than service to one particular branch of government, the probability of finding officers to serve in such capacity is not as speculative as might first appear.

The history and text of the Constitution establish a military that is controlled by both the legislative and executive branches of government as a means of preventing abuses by either. Constitutional practice prior to World War II also supported this balance between the two branches. That system is increasingly degraded as the Executive gains in power relative to Congress. Both Congress and the military need to take steps to insure they exercise their rights and responsibilities in regard to each other, righting the current imbalance that has developed. By mandating that military members work directly in these committees, Congress would ensure increased military expertise and immediate access to military information, tools that would not only help balance the executive domination of the Department of Defense but would also enshrine the rightful place of the military as a national agency. Such a move would also provide a powerful message to the military itself—the authority of the Commander in Chief to direct military operations does not indicate plenary authority over all military matters. More importantly, it would remind all members of the military that control of the military—and the loyalty such control implies—is a coequal responsibility of both political branches of our government.