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# Constitutional Crisis or Deja Vu? - The War Power, the Bush Administration and the War on Terror

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# Constitutional Crisis or Déjà Vu? The War Power, the Bush Administration and the War on Terror



## I. INTRODUCTION

During a hot Philadelphia summer in 1787, some of the greatest minds of our young nation convened to discuss the shape our Constitution would take. It needed to provide effective governance (painfully obvious after the failure of the Articles of Confederation) but it also needed to fiercely safeguard the power of the peo-

ple. Debate covered a wide range of topics, but perhaps none as heavily as the power of the Executive.

With the memory of English tyranny still fresh in the Framers' minds, multiple forms for the Executive were discussed. Some envisioned a single Executive, others believed a committee would be less dangerous. The original states themselves had largely eviscerated the executive power in their own constitutions,[1] and the Framers felt a certain ambivalence towards the idea of executive power.[2] This ambivalence would lead to ambiguities in the Constitution, particularly in the area of executive power and the war power.

The beginning of Article II of the United States Constitution states that "the executive Power shall be vested in a President of the United States of America."[3] Section 2 appoints the President as the "Commander in Chief of the Army and Navy of the United States, and of the Militia of the several States when called into the actual Service of the United States."[4] It is Congress that has the power "to declare War,"[5] though it was understood that the Executive would have the power to conduct war, once declared, and repel unprovoked attacks.[6]

From the beginning of presidential history, the Executive has sought to push the bounds of the war and executive powers. Some Presidents faced grave crises that threatened the fabric of the Union itself, while others faced non-traditional conflicts and threats. The actions of earlier Executives set precedents, for better or worse, which would be followed by future Presidents. Today, as we face an uncertain and possibly never-ending "war on terrorism," President George W. Bush is seeking to expand his power as a "wartime president" to a greater extent than any of his predecessors. This comment will examine the history and application of the war power and will analyze the present Administration and the "war on terror" itself, through August of 2006. Are President Bush's actions beyond the pale of constitutionality? Or have we seen all this before?

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1. JACK N. RAKOVE, ORIGINAL MEANINGS: POLITICS AND IDEAS IN THE MAKING OF THE CONSTITUTION 250 (1996).
2. *Id.* at 244.
3. U.S. CONST. art. II, § 1.
4. U.S. CONST. art. II, § 2.
5. U.S. CONST. art. I, § 8.
6. SENATOR JACOB K. JAVITS, WHO MAKES WAR — THE PRESIDENT VERSUS CONGRESS 14 (1973).

## II. HISTORY OF EXECUTIVE POWER AND THE WAR POWER

### *A. The Executive Power Generally*

Central to the difficulty in defining the powers of the Executive was the effort to define such power in non-monarchical terms.[7] The Framers had vastly divergent views on the Executive and were especially divided on the issue of executive power. The Federalists wanted a strong and single Executive, while the Anti-Federalists feared an elected dictator and preferred a much weaker Executive. This divergence in views made "the creation of the presidency . . . their most creative act . . . . [But] [i]t was precisely because their views diverged so sharply that disagreements over the power of the presidency emerged as a potent source of constitutional controversy . . . ."[8]

The American idea of the Executive emerged from two theories: mixed government and separation of powers.[9] While the theories were at times complementary to one another, at other times they were viewed as alternatives or even rivals. The occasional incompatibility of the two paradigms again underscored the ambivalence towards the Executive, and hesitancy of the Framers to concentrate too much power in one set of hands.[10]

The initial debates over the nature of the Executive focused on whether the Executive should in fact be one person, and whether the Executive should have any veto power over the Legislature. Early in the debate, delegate James Wilson suggested that the executive power be vested in a single person. After only two days of debate, the delegates agreed that the presidency of the United States would be an office held by a single individual.[11]

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7. RAKOVE, *supra* note 1, at 245. For example, the Framers wanted to avoid lifetime appointments and endeavored to ensure that the Executive would not have supreme power, but rather would have to share power through a checks and balances system. *Id.*

8. *Id.*

9. *Id.* The idea of mixed government was developed by Charles I in HIS MAJESTIES ANSWER TO THE XIX PROPOSITIONS OF BOTH HOUSES OF PARLIAMENT, published after the English Revolution in 1642, and Charles Montesquieu's DE L'ESPRIT DES LOIS (THE SPIRIT OF THE LAWS), published in 1748, describing Montesquieu's separation of powers theory. *Id.* Mixed government embodied the idea that the branches would at times overlap in certain spheres, while separation of powers proposed the checks and balances of each branch vis-à-vis the others. *Id.* at 245-46.

10. *Id.* at 249.

11. *Id.* at 257-58. Other Framers, such as George Mason, had proposed a plural Executive, ranging from a three-person Executive to a six-person Executive. *Id.* at 268-69. In fact, one of his greatest reasons for not signing the new Constitution was his displeasure and fear of a single Executive with no Constitutional Council to advise the Executive Branch. *Id.* at 269. Mason believed that a failure to have such a Council would surely

Debate over the veto power was slightly more contentious. Principles of separation of powers seemed to indicate that the Executive should not conflict with the will of the Legislature, but merely execute the laws of Congress. Delegate Roger Sherman of Connecticut remarked that no provision for the Executive was even necessary, as the President should be "'nothing more than an institution for carrying the will of the Legislature into effect.'"[12] Others preferring a mixed government view, especially Alexander Hamilton, favored an absolute veto power.[13] Between these two extremes, the delegates settled on a limited veto power, a decision that illustrated the unique genius of the new Constitution.

In the Constitution, mixed government and separation of powers theories were harmonized. As Madison wrote in *The Federalist No. 51*, "the power surrendered by the people is first divided between two distinct governments, and the portion allotted to each subdivided among . . . separate departments . . . . [T]he different governments will control each other, at the same time that each will be controlled by itself."[14] Although there would be intersection between the branches, the branches themselves would maintain their separation through checks and balances.[15]

Initial debate ended with the decision to elect the President via electoral college, which would itself be elected by the Senate.[16] Thus ended the first phase of debate over the Executive. Next, the Framers would have to decide exactly which powers the new Executive would possess. The most important and hotly debated among these was the President's power in war.

### *B. The War Power*

Delegate Charles Pinckney remarked that he was for a "vigorous Executive," but was afraid the executive powers might "extend to peace and war, etc., which would render the Executive a Monarchy, of the worst kind, to wit, an elective one."[17] Other Fram-

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leave the President "unsupported by proper information and advice, and [would] generally be directed by minions and favorites . . . ." RAKOVE, *supra* note 1, at 269.

12. RAKOVE, *supra* note 1, at 256 (quoting 1 RECORDS OF THE FEDERAL CONVENTION OF 1787 (Max Farran ed., 1937)).

13. *Id.* at 257.

14. THE FEDERALIST NO. 51, at 161 (James Madison) (Roy P. Fairfield ed., 1966).

15. *Id.* at 146.

16. RAKOVE, *supra* note 1, at 259. The popular election of the electoral college was not the original form, but was adopted by the 23rd Amendment. *See* U.S. CONST. amend. XXIII.

17. RAKOVE, *supra* note 1, at 257 (citing RECORDS, *supra* note 12).

ers were cautious as to the abilities of the Executive in making war. Although all the delegates were confident in General George Washington's ability to resist abusing executive power, they were not as confident in the abilities of his successors.[18] The debate over war powers indicated that lack of faith and evidenced the Framers' desire to ensure that "one man alone would be unable to change the state of the nation from peace to war."[19]

Although it had been decided that Congress would possess the power to declare war and the President would be the Commander in Chief, the degree and range of these powers also were pressing concerns for the Framers.[20] Hamilton, unsurprisingly, favored a powerful Executive, writing in *The Federalist, No. 23* that "these powers ought to exist without limitation, because it is impossible to foresee or define the extent and variety of national exigencies."[21] Other delegates were horrified, and Elbridge Gerry stated that he "never expected to hear in a republic a motion to empower the Executive alone to declare war."[22] George Mason agreed, maintaining that it was unsafe to allow the Executive such power. He supported "clogging rather than facilitating war."[23] Sherman stated firmly that the Executive "'should be able to repel and not commence war.'"[24] In this instance, Hamilton and his followers were the minority, and Congress was endowed with the power to raise and support armies and navies, make the rules and regulations for such forces, call out the militia, declare war and generally exercise all of the policy functions associated with war. From the Convention's perspective, the role of the Executive should be limited to that of Commander in Chief.[25]

The executive power was, for better or worse, finally described. In some instances the executive powers were quite clear and in

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18. JAVITS, *supra* note 6, at 10.
19. *Id.*
20. *Id.*
21. THE FEDERALIST NO. 231, at 59 (Alexander Hamilton) (Roy P. Fairfield ed., 1966). A few years after ratification of the Constitution, James Madison had a rare disagreement with Hamilton over the nature of executive war powers. JAVITS, *supra* note 6, at 14. Madison accused Hamilton of using the "executive power" clause as a "convenient cloak for the assumption of 'policy forming powers constitutionally independent of direction by Congress, though capable of being checked by it.'" *Id.*
22. JAVITS, *supra* note 6, at 13.
23. *Id.*
24. *Id.* at 14.
25. *Id.* Another key source of dispute for future generations was what "Commander in Chief" actually means. *Id.* at 14-15. It appears that the Convention did not discuss this issue in great detail, as they believed Washington would illustrate the proper interpretation of this clause through his own actions as the first President of the United States. *Id.*

others they were necessarily ambiguous. It would be the task of future Presidents to attempt to enlarge that power, while Congress and the Supreme Court aimed to keep that power in check. After Washington's presidency ended, John Adams and Thomas Jefferson wasted little time before testing the extent of their powers.

## III. EARLY PRESIDENTIAL ACTIONS

While "quasi-war" can be used to describe many twentieth and twenty-first century conflicts, it is not a modern invention. President John Adams and President Thomas Jefferson both involved the United States in quasi or undeclared wars.[26] However, two vastly different styles and degrees of deference to the Constitution were exhibited by these men.

### *A. President Adams and Quasi-War*

Upon taking office as the second President, John Adams inherited an undeclared war with France.[27] The hostilities between France and the United States were largely a result of Washington's unfriendliness to France's new revolutionary government and a treaty between Great Britain and the United States recognizing British interpretation of the laws of the sea. As relations between the French and American governments declined, acts of economic and even military hostility increased.[28]

The deteriorating situation led to a divide among both Congress and the public over the idea of war with France. Some Federalists in Congress, members of the President's own party, clamored for war; the Jeffersonian Republicans, led by Vice President Jefferson, were reluctant. President Adams was torn between his desire to protect American interests and avoid declaring war without united public support.[29] His initial course of action was to assert American rights on the high seas, but avoid actual war.[30] Additionally, he requested a special session of Congress in order to "'consult and determine on such measures as in their wisdom shall be deemed meet for the safety and welfare of the said United

26. *Id.* at 25, 36.
27. JAVITS, *supra* note 6, at 27.
28. *Id.*
29. *Id.* at 28.
30. *Id.* at 27.

States of America.'"[31] As Senator Javits wrote, "there was never a question in Adams' mind of taking a national position without regard to the views of the body empowered to declare war."[32]

During the special session, President Adams requested an increase in armed power, but this request was not met with a favorable congressional response.[33] He also proposed sending a diplomatic commission to France.[34] The diplomatic mission was met with approval, and the United States attempted to negotiate with the French Government.[35] This mission, however, was met with such a disrespectful response, that once the details of the mission's treatment were made public, the public mood began to shift.[36] Although President Adams originally sought to use the new change in public opinion to push for a declaration of war, Congress was still not overwhelmingly receptive to the idea.[37] Before President Adams could exert much pressure, diplomatic channels re-opened, and President Adams maintained a state of quasi-war until the entire situation was resolved.[38]

During this quasi-war, President Adams exercised great self-restraint as the Executive and exhibited appropriate respect for the Constitution. Despite his initial inclinations and the wishes of a loud faction of his own party, President Adams would not commit the United States to a course of military action without congressional authorization. Though President Adams often came to the point of "drafting a belligerent request for a declaration of war," he never drafted such a request.[39] The passage of time, coupled with changes in information and public opinion, caused vacillations in President Adams's opinion several times. These changes in opinion, however, would have meant little had he not felt restrained by the Constitution the first time he contemplated drafting that "belligerent request."[40] Not every future President would feel the same compulsion President Adams felt to choose

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31. *Id.* at 28. *See also* 1 MESSAGES AND PAPERS OF THE PRESIDENTS (James D. Richardson ed., 1907).
32. JAVITS, *supra* note 6, at 28-29.
33. *Id.* at 29.
34. *Id.*
35. *Id.*
36. *Id.* The result of the diplomatic mission was known as the XYZ Affair, in which the French Government attempted to extort $250,000 from the American mission before they would even agree to discuss the hostilities. *Id.*
37. JAVITS, *supra* note 6, at 29.
38. *Id.*
39. *Id.* at 35.
40. *Id.*

the right course of action, despite personal and political cost. Clearly, institutional barriers against impulsive action were and are still necessary. The division of the war power between Congress and the President provides this barrier. Had President Adams failed to respect the constitutional mandate that "Congress shall have power to declare war," a costly war would have ensued — one which may have been fatal to the young United States.

### *B. President Jefferson and Private War*

The war occurring during President Jefferson's presidential term was very different from Adams's quasi-war. President Jefferson expanded the paradigm of the executive war power through war with the Barbary Pirates. According to Senator Javits, the Barbary War "appears in many ways to be filled with a presidential will to make war out of personal conviction unmatched until the days of the struggle in Vietnam."[41] Conflict with the Barbary Pirates had plagued many of the seafaring nations for decades. Controlled by principalities along the shores of Algiers, Morocco, Tripoli and Tunis, the Barbary Pirates terrorized ships in their waters, demanding high ransoms, oftentimes capturing and enslaving the crews, and demanding exorbitant annual fees from nations who wished to ensure protection for their merchant marines.[42] There was no question that the Pirates were dangerous and costly, but President Jefferson's desire to wage war against them had less to do with their methods and more to do with his own desire to see the United States develop a powerful naval force.[43]

Using previous attacks upon American ships as a justification, President Jefferson directed the Secretary of the Navy to send a naval force abroad to assure the safety of marine commerce, with the indication that any resistance offered by the Barbary Pirates was to be met with proportional force.[44] These directives evolved into a plan to overthrow the Pasha (or King) of Tripoli and replace him with a brother more amicable to American interests.[45]

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41. *Id.* at 37. Perhaps the Iraq Conflict now has set the standard for "presidential will to make war out of personal conviction."

42. JAVITS, *supra* note 6, at 39. *See also* RAY W. IRWIN, THE DIPLOMATIC RELATIONS OF THE UNITED STATES WITH THE BARBARY POWERS, 1776-1816 (1931).

43. JAVITS, *supra* note 6, at 41. *See also* GLENN TUCKER, DAWN LIKE THUNDER: THE BARBARY WARS AND THE BIRTH OF THE UNITED STATES NAVY (1963).

44. JAVITS, *supra* note 6, at 43.

45. *Id.* at 45. *See also* 2 AMERICAN STATE PAPERS, FOREIGN RELATIONS (1832-1861).

In directing all of these expeditions, President Jefferson indeed conducted a war against the Barbary Pirates. Although it was successful, President Jefferson's actions were largely outside the bounds of constitutionality. While he convinced Congress eventually to assent to many of his requests, he took on his own what Congress would not grant.[46] His actions essentially placed American armed forces in the "firing line," and he did this with no authorization from Congress — indeed without even informing Congress until well after he had carried out his plans.[47]

President Jefferson was bitterly criticized in the opposition press, with the *Gazette of the United States* declaring that "we see the executive — *because it is popular* — can make war when it pleases . . . ."[48] The *Columbian Centinel* asked plaintively that, as the "authority to declare war cannot be delegated or vested, why is it 'lawful and constitutional to do that against . . . the Barbary Powers, which it would be unlawful or unconstitutional to do against Great Britain, France, or any of the other states or nations?'"[49] President Jefferson's actions eroded the congressional war power, and he became the first, but certainly not the last President to test the divisions between congressional and executive powers. The immediate consequences may not have been dire, but such testing and stretching of the constitutional boundaries became the rule, rather than the exception, for President Jefferson's successors.

## IV. PRESIDENT LINCOLN — THE WAR POWER AND THE CIVIL WAR

Abraham Lincoln undoubtedly presided (and prevailed) over the worst moment in United States history, and his anointment as a political saint is deserved. Yet, did President Lincoln's vigorous and decisive actions irreparably tear the boundary between congressional and presidential powers that the Framers were so careful to erect?

President Lincoln derived his sense of power not only from what was actually written in the Constitution, but from what he thought it might imply in time of national emergency, finding

46. JAVITS, *supra* note 6, at 38.

47. *Id.* at 49. President Jefferson did not report the state of affairs in Tripoli to Congress until December 8, 1801. *Id.* The military actions directed by President Jefferson had commenced nine months earlier. *Id.*

48. *Id.* at 50.

49. *Id.* at 51.

what would today be called "penumbral" executive rights.[50] Active warfare began on April 12, 1861, and on April 15, President Lincoln proclaimed a state of insurrection and requested a special session of Congress.[51] Somewhat surprisingly, he did not call for the special session to meet until July, three months later. Prior to the session, he requested the activation of the army, claiming the rebellion was "too powerful to be suppressed by the ordinary course of judicial proceedings."[52] It was this assertion that raised serious constitutional questions as to the legitimacy of President Lincoln's actions, notwithstanding his ability as Commander in Chief to repel attack.

In assuming his role as Commander in Chief, President Lincoln also assumed the mantle of a "single body legislature."[53] He ordered funds to be disbursed from the Treasury Department, despite the constitutional language prohibiting such withdrawals except "in consequence of appropriations made by law."[54] He ordered the blockade of all Southern ports, a true act of war, without any congressional declaration or authorization.[55] President Lincoln ordered enlargement of the armed forces, ignoring Article I, Section 8 of the Constitution, which plainly states "Congress shall . . . declare war . . . raise and support armies . . . make all laws which shall be necessary to carry into execution the foregoing powers and all other powers vested in the Government of the United States."[56] While these actions, though clearly unconstitutional, could be justified as an exercise of the Commander in Chief's power in the face of rebellion and invasion, President Lincoln's unitary actions that resulted in an alteration of the legal and judicial system could not be justified nor tolerated.

In addition to carrying out the activities outlined above, President Lincoln also suspended the writ of habeas corpus, asserted a right to order summary arrests, a right to confiscate private property and the right to suppress free expression.[57] He prohibited the

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50. *See* Griswold v. Connecticut, 381 U.S. 479 (1965). "Penumbral" refers to Justice Douglas's famous decision in *Griswold*, in which he held that rights that are not specifically written in the Constitution may be found in the penumbra cast by other constitutional rights, particularly those found in the Bill of Rights. *Griswold*, 381 U.S. at 484.

51. *Id.* at 117.

52. JAVITS, *supra* note 6, at 117. *See also* JAMES G. RANDALL, CONSTITUTIONAL PROBLEMS UNDER LINCOLN (Univ. of Ill. Press 1964) (1951).

53. JAVITS, *supra* note 6, at 117. *See also* RANDALL, *supra* note 52.

54. U.S. CONST. art. I, § 9.

55. JAVITS, *supra* note 6, at 118.

56. *Id.* at 119. *See also* U.S. CONST. art. I, § 8.

57. JAVITS, *supra* note 6, at 119. *See also* RANDALL, *supra* note 52.

mailing of any material he deemed to be against the national interest, and completed this evisceration of the Bill of Rights not through legislative procedures, but by executive order.[58]

The Civil War was not only a test of the nation's strength, but a test of the Constitution itself. While the Constitution, much like the nation, emerged from the Civil War scarred, it emerged alive, in large part thanks to the Framers' ability to blend mixed government theories and separation of powers. In the first real test of the Framers' design, it worked — while Congress could do little to halt President Lincoln's abuses, the Supreme Court assumed the role of policeman.

The case was *Ex parte Milligan*,[59] and the opinion of the Court was delivered by Justice Davis. The petitioner, Milligan, a civilian and citizen, had been arrested in his home, imprisoned in Indiana and tried by a military commission under the suspension of the writ of habeas corpus.[60] His challenge to the conviction brought the case to the Supreme Court for the examination of three questions: Should a writ of habeas corpus be issued, should Milligan be discharged from custody, and did the military commission have the proper jurisdiction to legally try and sentence Milligan?[61]

Justice Davis wasted no time in declaring that the importance of the issues presented in the case "cannot be overstated; for [they] involve[] the very framework of the government and the fundamental principles of American liberty."[62] The Court further noted that "during the late wicked Rebellion, the temper of the times did not allow that calmness in deliberation . . . necessary to a correct conclusion of a purely judicial question . . . . Now . . . this question . . . can be . . . decided without passion or the admixture of any element not required to form a legal judgment."[63]

At the heart of *Milligan* was President Lincoln's decision to suspend the writ of habeas corpus and to subsequently replace normal judicial proceedings with martial law and military tribunals. The Court noted that:

> [the] law was passed in a time of great national peril . . . . The President had practically suspended [the writ of habeas corpus] and detained suspected persons in custody without trial;

58. JAVITS, *supra* note 6, at 119-20.
59. 71 U.S. 2 (1866).
60. *Milligan*, 71 U.S. at 107.
61. *Id.* at 108-09.
62. *Id.*
63. *Id.*

> but his authority to do this was questioned. It was claimed that Congress alone could exercise this power; and that the legislature, and *not* the President, should judge [] the political considerations on which the right to suspend it rested.[64]

Justice Davis was careful to highlight, however, that the suspension of the writ does not "authorize the arrest of any one, but simply denies to one arrested the privilege of this writ in order to obtain his liberty."[65] Therefore, the questions raised were (1) when the courts could refuse to grant the writ, and (2) when the citizen had the right to invoke it. While it was acceptable for a person to be arrested in the name of public safety, the detention of the person beyond a fixed period without access to the judicial process could not be justified.[66]

A member of the armed forces, under orders from Lincoln, arrested Milligan, held him in a military prison, and tried him under martial law.[67] Was it possible that this military tribunal, under presidential orders, had the legal authority to try a civilian?[68]

Justice Davis characterized this query by stating that "no graver question was ever considered by this court, nor one which more nearly concerns the rights of the whole people; for it is the birthright of every American citizen when charged with crime, to be tried and punished according to law."[69] After detailing the liberties secured and preserved in the Bill of Rights, the Court concluded that, in Indiana, the operation of the federal courts was never endangered during the Civil War, thus the public safety was not in grave danger.[70] Further:

> no usage of war could sanction a military trial there for any offence whatever of a citizen in civil life. Congress could grant no such power; and to the honor of our national legislature be it said, it has never been provoked by the state of the country to even attempt its exercise. One of the plainest constitutional provisions was, therefore, infringed when Milligan

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64. *Id.* at 114-15. (emphasis added). The Court further noted that the exigencies of the time required that the lawfulness of the suspension of habeas corpus be fully established, and it was under these circumstances that Congress acquiesced to Lincoln's demands for suspension. *Id.*

65. *Milligan*, 71 U.S. at 115.

66. *Id.* at 125-26.

67. *Id.* at 118.

68. *Id.*

69. *Id.* at 118.

70. *Milligan*, 71 U.S. at 122.

was tried by a court not ordained and established by the Congress.[71]

The Court conceded that the suspension of habeas corpus may, at times, be justified, and that martial rule can properly be applied. Yet the Court warned that "[m]artial rule can never exist where the courts are open, and in the proper and unobstructed exercise of their jurisdiction."[72]

In his concurrence, Chief Justice Chase noted that while Milligan's alleged crimes were grave, "it is more important to the country and to every citizen that he should not be punished under an illegal sentence, sanctioned by a court of last resort, than that he should be punished at all."[73]

In his simple explanation of the executive and legislative powers, the Chief Justice remarked that "Congress has the power not only to raise and support and govern armies, but to declare war. It has, therefore, the power to provide by law for the carrying on of war."[74] The executive power lies with the President.[75] While both powers imply "subordinate and auxiliary powers," the President cannot, "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."[76] Further, the President may not unilaterally institute judicial tribunals absent congressional approval.[77]

Justice Davis similarly delineated the intention of the Founders. The Founders recognized that the nation had no "right to expect it will always have wise and humane rulers, sincerely attached to the principles of the Constitution."[78] The Framers were "guarding the foundations of civil liberty against the abuses of unlimited power," and left a multitude of rights inviolable.[79] While the Government insisted that the "safety of the country in time of war demands that this broad claim for martial laws shall be sustained," Justice Davis argued that "if this were true, it could be

71. *Id.* at 121-22.
72. *Id.* at 127.
73. *Id.* at 132 (Chase, C.J., concurring).
74. *Id.* at 139.
75. *Milligan*, 71 U.S. at 139 (majority opinion).
76. *Id.*
77. *Id.*
78. *Id.* at 125.
79. *Id.*

well said that a country, preserved at the sacrifice of all the cardinal principles of liberty, is not worth the cost of preservation."[80]

*Ex parte Milligan* set out a careful interpretation of the President's war powers, one that is still valid today. The Court recognized the need for the President to be able to freely and decisively respond to national crises, and very few of President Lincoln's constitutional oversteps in the military area were seriously questioned. What could not be tolerated, however, was a complete breakdown of the separation of powers that the Framers had crafted. No matter what the national crisis, the President could not usurp Congress's lawmaking abilities, nor could he replace the Judicial Branch with military tribunals that did not promise the same guarantees set forth in the Bill of Rights.

The following sections will examine the President's ability to increase his scope of power as Commander in Chief, exemplified by Presidents Woodrow Wilson, Franklin Roosevelt and Harry Truman, and the subsequent curtailing of that power by the Supreme Court. The concluding section will examine the Administration of George W. Bush, which in some areas has behaved within the bounds set by earlier Administrations and, in other areas, has attempted to expand the executive power in ways never before contemplated or condoned.

## V. PRESIDENTIAL POWER AND WORLD WAR — PRESIDENT WILSON AND PRESIDENT ROOSEVELT

### *A. President Wilson and the Era of Total War*

Woodrow Wilson presided over the United States at a time when war, though still regarded as an unnatural state of affairs, occurred often enough to have its own set of norms.[81] The frequency of war in the American experience resulted in an "aggrandizement of presidential war power," and President Wilson was willing to erode the constitutional boundaries even more.[82]

While President Wilson was both an intellectual and a strict moralist, he was comfortable flexing his executive muscle, presiding over the United States' first experience in world war. In ex-

80. *Milligan*, 71 U.S. at 125-26.

81. JAVITS, *supra* note 6, at 191. *See also* The Hague Convention Respecting the Laws and Customs of War on Land, Oct. 18, 1907, 36 Stat. 2439, T.S. 546.

82. JAVITS, *supra* note 6, at 192.

amining the Wilson Administration, former Senator Jacob Javits writes:

> The Wilson Presidency brought to center stage all of the forces that had been gathering for years on behalf of overwhelming and undiluted executive power . . . . [I]t was inevitable that presidential authority would assume the large dimensions that it has yet to relinquish. Wilson's own intellectual power and his authoritarian personality were fit instruments for the political providence that has shaped our contemporary institutions.[83]

President Wilson believed that the Executive's role in international relations was significant and that, as President, he had constitutional supremacy in times of conflict. However, as a political scientist, President Wilson also wanted to avoid the appearance of acting unconstitutionally. When war with Germany began in 1917, President Wilson was careful to make an effort to secure congressional authorization for his actions.[84]

The actual congressional declaration of war was easily obtained, with only two members of Congress in opposition to it. However, disputes as to the proper spheres of congressional and executive power quickly arose.

Prior to the declaration of war on April 6, 1917, President Wilson had sought congressional permission to arm merchant ships carrying supplies to Europe. The request died after a filibuster was introduced, but President Wilson proceeded to give the orders without congressional authorization.[85] President Wilson stated that such a measure was "within his own power to enact 'without special warrant of law, by the plain implication of [his] constitutional duties and powers.'"[86] War arrived a few weeks later, and President Wilson's action was never challenged. President Wilson also sought to employ a broad interpretation of the "Executive Power" under Article II. He instituted the Council for National Defense and created a series of advisory committees that would possess executive authority once war was declared.[87]

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83. *Id.* at 202.
84. *Id.* at 203.
85. *Id.*
86. *Id.* *See also* THE PUBLIC PAPERS OF WOODROW WILSON (Ray S. Baker and W. E. Dodd eds., 1927) [hereinafter WILSON PAPERS].
87. JAVITS, *supra* note 6, at 203-04. The Advisory Committees included the War Industries Board and the Food Administration, and their regulations were meant to be enforced with the full power of law. *Id.* This task was made easier when Congress added statutory

In addition to creating a multitude of advisory committees, President Wilson also believed it was in his purview as Commander in Chief to take greater control over the national economy.[88] The food supply, links to transportation and communication, and natural resources, were mobilized into the national service. The Lever Act,[89] which President Wilson proposed to Congress, granted him the authority to control prices and distribution. The Act also granted him the implementation power that is normally reserved to the Legislature.[90] Although some legislators offered resistance to President Wilson's moves,[91] he was able to override opposition based on a growing national fury towards Germany and a thirst for war.[92] By December of 1917, President Wilson had consolidated as much executive power as was possible — he had the authority to draft citizens under the Selective Service Act,[93] executive agencies began taking the place of the Legislature, and Congress itself had delegated many of its powers to the President.[94]

Despite this consolidation of powers, President Wilson still felt that the Executive should be granted more leeway in time of war. Specifically, he believed that the Executive required greater efficiency in organizing the Executive Branch.[95] President Wilson saw the Overman Act[96] as the vehicle through which to achieve this goal. The provisions of the bill authorized the President to have total control over the Executive Branch, enabling him to eliminate or create departments at his own discretion and to delegate his own authority.[97] Quite simply, "if [President] Wilson decided to make foreign policy through the Postmaster General and

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authority to this initiative. *Id.* Congress essentially acquiesced to an expansion of executive power at the expense of its own. *Id.* at 204. *See also* GEORGE F. MILTON, THE USE OF PRESIDENTIAL POWER, 1789-1943 (1980).

88. JAVITS, *supra* note 6, at 204.

89. The Food and Fuel Control Act, 65 Cong. Ch. 53, 40 Stat. 276, Aug.10, 1917.

90. *Id.* at 204-05.

91. *Id.* Senator Reed objected to Wilson's attempts to control the national economy and, during floor debate, complained that the more Congress resisted Wilson's power play, the more "the lash is laid across the legislative back." *Id.* at 204. The Lever Act was called "unconstitutional legislation" by the chairman of the Senate Agriculture Committee. *Id.* at 205.

92. JAVITS, *supra* note 6, at 204.

93. 40 Stat. 76 (1917).

94. JAVITS, *supra* note 6, at 205.

95. *Id.* at 206. *See also* WILSON PAPERS, *supra* note 86.

96. 65 Cong. Ch. 78, 40 Stat. 556 (1918).

97. JAVITS, *supra* note 6, at 204.

to send the mail through the State Department, the Overman Act gave him all the authority he needed to do so."[98]

Although the Act was passed in 1918, it was met with fierce criticism by the Senate.[99] Senator Cummins declared that the bill "was unconstitutional because it attempts to delegate legislative power to the President."[100] He also condemned his fellow Senators, and America as a whole, for branding those who dissented with presidential policy as traitors.[101] Senator Cummins argued that the President's powers in times of war were no greater than his powers in times of peace. He maintained that the Constitution was strong enough to meet the challenges of war and should not be abandoned in times of stress.[102] His *Milligan*-like warnings were echoed by Senator Knox. Senator Knox opined that the President had no "war power as such" — that is, the President did not have more or different powers in times of war.[103] The President's authority was limited to his powers as Commander in Chief, which were distorted and incorrectly expanded by both the Executive himself and the public at large during active war.[104]

President Wilson was an effective speaker and a moralist who frequently divided the world into good and evil.[105] He employed his way with words to complete a power grab that essentially resulted in the President exercising absolute control over Congress.[106] In the thrall of war, national outrage overshadowed good sense, as the Founding Fathers had feared. Even more troubling was the fact that President Wilson also attempted to use his newfound control over the Legislature during peace negotiations.[107] The checks and balances the Framers had carefully crafted were not working — Congress seemed content to grant its powers to the Executive. This practice was a dangerous precedent, resulting in exactly the type of "elected monarchy" the Framers had dreaded.

Such a consolidation of absolute power in an individual leaves the country to the vagaries of history — "entirely too much comes to depend on the nature of his personality, his staff and advisers,

98. *Id. See also* 40 Stat. 556.
99. JAVITS, *supra* note 6, at 206.
100. *Id.* at 207.
101. *Id.*
102. *Id.*
103. *Id.*
104. JAVITS, *supra* note 6, at 207.
105. *Id.* at 208. *See also* JOHN M. BLUM, WOODROW WILSON AND THE POLITICS OF MORALITY (1956).
106. JAVITS, *supra* note 6, at 208.
107. *Id.*

as well as the image he feels compelled to project in his dealings with others."[108] Regrettably, President Wilson set a trend that has continued into the twenty-first century.

### *B. President Franklin Roosevelt Responds to World War*

Fortunately, many of the wartime privileges that President Wilson carved out for himself receded when the First World War concluded in 1919. Further, a Congress that had been swept away by war fervor was more than happy to wrest back its power when peace returned.[109] Congress's delayed anger over presidential actions taken during the war guaranteed certain death for President Wilson's post-war peace plan and assured that there would be no American involvement in the League of Nations.[110]

President Wilson had presided over a world war that had few implications for American territory. No invasion of the United States was attempted, and no attack on American soil occurred. President Franklin Roosevelt presided over a world war that would require much more American involvement and sacrifice; to successfully conduct such a war, he built upon the precedents that had been set by both President Lincoln and President Wilson.

President Roosevelt's brilliance as a politician cannot be questioned, and his recognition that America would need to aid Great Britain in its fight against Nazi Germany, whether or not the United States ever sent its troops to the actual battlefield, played a large part in guaranteeing that the Allied Powers would triumph during World War II. Despite the unquestionably good results of President Roosevelt's actions, his methods prior to the congressional declaration of war on December 8, 1941, stretched the bounds of constitutionality and solidified the public's perception of presidential power as both pervasive and unparalleled.

Even before the United States was directly attacked, President Roosevelt recognized the danger posed by Nazi Germany and its Axis Allies.[111] A natural political genius who learned from his experiences with the Great Depression, President Roosevelt was aware of the effect that declaring a "national emergency"[112] would have on both the public and Congress. In declaring a state of emergency — an emergency that arose because Great Britain was

108. *Id.*
109. *Id.*
110. *Id.*
111. JAVITS, *supra* note 6, at 215.
112. *Id.* at 214. *See also* ARTHUR M. SCHLESINGER, JR., THE AGE OF ROOSEVELT (1960).

threatened by Germany — President Roosevelt pioneered a "pre-war application of the Commander in Chief power."[113] He employed this power in introducing the Destroyers for Bases[114] and the Lend-Lease[115] programs.

During the spring of 1940, British Prime Minister Winston Churchill approached President Roosevelt and requested American naval assistance.[116] German U-boats were stretching the British Navy to its limits and reinforcements were necessary. While Roosevelt did indeed want to involve United States materiel, unilaterally entering into such an arrangement with Prime Minister Churchill would have been tantamount to entering into a treaty without the "advice and consent of the Senate."[117]

Unwilling to force a constitutional crisis, but also unwilling to let Great Britain go it alone, by September of 1940, President Roosevelt had devised a plan to provide aid to the British without having to engage in a political battle with an isolationist Congress.[118] A naval appropriations bill that had been enacted earlier in President Roosevelt's presidency prohibited the President from giving any military equipment to a foreign government unless that equipment was certified by the military as unsuitable to defend the United States.[119] Engaging in a very creative interpretation of the bill, President Roosevelt determined this statute to mean that if he devised an arrangement that strengthened American defense, he could dispose of the unsuitable equipment as he saw fit as a power implied under his role as Commander in Chief. President Roosevelt unilaterally donated fifty older battleships to Great Britain in exchange for the use of naval bases on Great Britain's North Atlantic islands.[120]

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113. JAVITS, *supra* note 6, at 215.

114. The Destroyers for Bases program was a diplomatic agreement entered into between United States Secretary of State Cordell Hull and the British Ambassador, The Marquess of Lothian, C.H. *See* the Destroyers for Bases Agreement, 2 September 1940, *available at* http://www.history.navy.mil/faqs/faq59-24.htm.

115. An Act to Promote the Defense of the United States, 22 U.S.C. § 411 (1941). Essentially, under Lend-Lease, the United States supplied Great Britain, the Soviet Union, China, France and other Allied nations with vast amounts of war materiel between 1941 and 1945, with the understanding that the materiel would eventually be paid for or returned to the United States. *See* SIR RICHARD CLARKE, ANGLO-AMERICAN ECONOMIC COLLABORATION IN WAR AND PEACE, 1942-1949 (1982).

116. JAVITS, *supra* note 6, at 215. *See also* WINSTON S. CHURCHILL, THE GRAND ALLIANCE (Penguin Books Ltd. 2005) (1950).

117. U.S. CONST. art. II, § 2.

118. JAVITS, *supra* note 6, at 215.

119. *Id.*

120. *Id.*

When President Roosevelt's action was criticized, Attorney General Robert Jackson argued that, as Commander in Chief, the President was entitled to "dispose" the forces at his command.[121] Logically, the Commander in Chief can dispose of those forces and their equipment as he sees fit. Further, as the arrangement entailed no further American obligation, it was not a treaty — thus, the advice and consent of the Senate was not constitutionally required.[122]

While President Roosevelt's actions may have been necessary, the justification he proffered illustrated a fundamental misunderstanding, or intentional misapplication, of the Constitution's Commander in Chief Clause. Article II, Section 2 of the Constitution states that the President is the Commander in Chief "of the Army and Navy of the United States, and of the Militia of the several States, *when called into the actual Service of the United States.*"[123] At no time during 1940 was the United States Military called into the "actual Service of the United States." While the President remains Commander in Chief of the Army and Navy at all times, the broader war power aspect of the Commander in Chief power was meant only to be activated when the United States was on a war footing. President Roosevelt's *prewar* activation of the Commander in Chief powers signaled the start of the second great test of the Framers' design, a test that only became more strenuous with the introduction of the Lend-Lease program.

During President Roosevelt's 1941 State of the Union Address, he stated that the United States must provide "billions of dollars worth of weapons" to the Allied forces, but was careful to state that such action would not be an act of war.[124] As part of his prewar activation of the Commander in Chief power, however, President Roosevelt wanted total authority to manufacture or purchase any weapon or war materiel. Additionally, he wanted the freedom to exchange any war information with any government he selected and to provide whatever weapons and supplies necessary to support any nation he thought should receive American backing.[125]

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121. *Id.* at 216. After the Destroyers for Bases deal was announced, The New York Times wrote that the agreement would have been more desirable if it "had the formal stamp of congressional approval," the Boston Post maintained that the entire deal was "removed from our rightful democratic process," and the St. Louis Post-Dispatch ran a headline claiming "Dictator Roosevelt Commits an Act of War." *Id.* at 216-17.

122. *Id.* at 216.

123. U.S. CONST. art. II, § 2 (emphasis added).

124. JAVITS, *supra* note 6, at 217.

125. *Id.* at 218.

While President Wilson had attempted to wrest some of this power, especially in overseeing the economy and food supply and in the drafting of servicemen through the Selective Service Act, "no President had ever asked for such wide-ranging authority over American production and supply in time of peace or war" as Roosevelt.[126] Although President Roosevelt faced a Congress that was less swept away by war fever and more inclined to isolationism, the Lend-Lease Bill[127] eventually provided nearly all of what Roosevelt requested.

Response to the Lend-Lease Bill was at first overwhelmingly negative. A New York *Daily News* headline read "Defense Bill Gives All War Power to Pres."[128] During congressional hearings on the Bill, historian Charles Beard told the Senate that the Lend-Lease Bill would essentially amend the Constitution with respect to the war power, and President Roosevelt himself made no effort to disguise his intention of passing the Bill.[129] Secretary of the Treasury Morgenthau was frank in his testimony that the intent of the Bill was to give the President "a free hand in the manufacture and distribution of war materiel . . . there was to be no subterfuge."[130]

During the six weeks of congressional debate, Senator Wheeler charged that the Bill violated international law, complaining that "Congress coldly and flatly [has] been asked to abdicate."[131] Senator Wheeler also declared that passing the Lend-Lease Bill would indicate open warfare. Congressman Clifford Hope agreed with Senator Wheeler, maintaining that the Lend-Lease Bill "will put us in the war in the end just as surely as if Congress had voted a declaration of war."[132]

Although opposition was vocal, it was still the minority view. On March 11, 1941, Lend-Lease passed both houses of Congress.[133] While those Congressmen concerned with the constitutional implications of the Bill had inserted provisions in the final text that required congressional authorization of expenditures un-

126. *Id.*
127. 22 U.S.C. § 411 (1941).
128. JAVITS, *supra* note 6, at 218.
129. *Id. See also An Act to Promote the Defense of the United States: Hearing on H.R. 1776 Before the S. Comm. on Foreign Relations*, 77th Cong. (1941) (statement of Charles Beard).
130. JAVITS, *supra* note 6, at 219.
131. *Id.*
132. *Id.*
133. *Id.* at 222.

der the Bill as well as a clause empowering Congress to repeal the act by joint resolution, the statute still granted much of Congress's war power to President Roosevelt.[134]

The battle over Lend-Lease was a classic illustration of the tension the Framers wove into the Constitution. Although the Executive had been designed to operate with "energy" during moments of crisis, the Framers were also careful to ensure that the President could not be too exuberant. President Roosevelt was still forced to publicly discuss his intentions and seek some approval from Congress. Although Congress eventually abdicated much of its power, stretching the boundary between the Legislative and Executive Branches, President Roosevelt was not able to unilaterally seize that power.

While Roosevelt's critics still complained that his actions would lead the United States into world war, December 7, 1941 made those complaints moot. On December 8, 1941, the day after the Japanese attack on Pearl Harbor, Congress unanimously declared war on Japan and its allies. World war was again upon the United States, and President Roosevelt used his Commander in Chief powers to the fullest. Much like President Lincoln's actions, President Roosevelt's actions in directing military strategy and entering into agreements with heads of Allied governments, while perhaps unconstitutional, were not questioned. President Lincoln had clearly set the precedent that the President should be granted great leeway during a military crisis. Yet, President Roosevelt resembled President Lincoln in another important, and less complimentary, way: President Roosevelt also led the greatest assault on civil liberties since President Lincoln, but this time the Supreme Court was unable to see past the fog of war to ensure that constitutional principles were upheld.

During the active phase of the Second World War, the Supreme Court rendered its infamous decision in *Korematsu v. United States*.[135] Korematsu was an American citizen of Japanese ancestry, who had refused to be relocated to an internment camp after the attack on Pearl Harbor.[136] The opinion of the Court was de-

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134. *Id.*

135. 323 U.S. 214 (1944).

136. *Korematsu*, 323 U.S. at 215. The issuance of Executive Order No. 9066 after the attack on Pearl Harbor would later be viewed as one of the most embarrassing and disturbing moments of American history. *See* PETER IRONS, JUSTICE AT WAR: THE STORY OF THE JAPANESE AMERICAN INTERNMENT CASES (Univ. of Washington Press 1996) (1976). The Order required that all Americans of Japanese descent living on the West Coast be removed from their homes and forced to live in military internment camps. *See* Exec. Order

livered by Justice Black, who at least had the wherewithal to state that "it should be noted . . . that all legal restrictions which curtail the civil rights of a single racial group are immediately suspect."[137] Yet, despite noting the strict-scrutiny paradigm, the Court found that "pressing public necessity may sometimes justify the existence of such restrictions; racial antagonism never can."[138] Similar paltry justifications continued throughout the opinion. Justice Black explained that while "compulsory exclusion of large groups of citizens from their homes . . . is inconsistent with our basic governmental institutions . . . . when [the country is] under conditions of modern warfare . . . the power to protect must be commensurate with the threatened danger."[139]

In concluding the opinion of the Court, Justice Black wrote that while Mr. Korematsu argued that he was imprisoned solely because of his ancestry and no inquiry into his loyalty was ever made, the Court was "dealing specifically with nothing but an exclusion order."[140] He wrote that:

> cast[ing] this case into outlines of racial prejudice . . . confuses the issue. Korematsu was not excluded from the Military Area because of hostility to . . . his race. He was excluded because we are at war with the Japanese . . . . [M]ilitary authorities feared an invasion of our West Coast and felt constrained to take . . . security measures . . . .[141]

This argument would have perhaps been more persuasive had the "properly constituted military authorities" also feared American citizens of German and/or Italian ancestry, as the United States was also involved in total war with Nazi Germany and Fascist Italy.

Justice Roberts's dissent correctly noted that there was a "clear violation of Constitutional rights," and expressed doubt that the exclusion order was not precipitated by racial prejudice.[142] Justice Murphy also dissented and stated that the test of "whether the

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No. 9066, 56 Stat. 173 (1942) (not codified, *repealed by* Pub. L. No. 94-412, 90 Stat. 1258 (1976)). National xenophobia and paranoia resulted in this national disgrace, which was couched in terms of "safety," "security" and "necessity for the war effort." *See Korematsu*, 323 U.S. 214.

137. *Korematsu*, 323 U.S. at 215.
138. *Id.*
139. *Id.* at 220.
140. *Id.* at 223.
141. *Id.* at 223.
142. *Korematsu*, 323 U.S. at 228-29 (Roberts, J., dissenting).

Government, on a plea of military necessity, can validly deprive an individual of any of his constitutional rights is whether the deprivation is reasonably related to a public danger that is 'so immediate, imminent and impending' as not to admit of delay . . . ."[143] He concluded that no reasonable relation was made to justify the "sweeping" "racial restriction."[144] Justice Murphy further indicated that evidence from governmental papers proved a clear racial motivation behind the Executive Order that created the internment camps.[145] Justice Jackson also dissented, stating that:

> a civil court cannot be made to enforce an order which violates constitutional limitations even if it is a reasonable exercise of military authority. The courts can exercise only the judicial power, can apply only law, and must abide by the Constitution, or they cease to be civil courts and become instruments of military policy.[146]

Today, the case has questionable precedential value, and in 1988, the United States Government issued an official apology to every family affected.[147] In 1990, the federal government began paying reparations to those families.[148]

Although it was President Roosevelt who signed the Executive Order requesting the camps, and while the request was surely unconstitutional, it was the Supreme Court that failed in this instance. Instead of following the example of the *Milligan* Court, the *Korematsu* Court stated that if the President can justify his actions by referring to the safety of the United States, he is free to ignore civil liberties as he sees fit. The greatest failure of the constitutional system developed by the Framers was not the President's overreach, but was the Judicial Branch's failure to fulfill its role as a "check and balance" to the other branches. *Korematsu* still remains a dangerous example today, and though the opinion was hardly unanimous, its underlying principle — that the President can do as he pleases if the United States is sufficiently threatened — poses a hazard to our civil liberties sixty years later.

While President Roosevelt was able alter the public's perception of the presidential role and enlarge the presidential war power,

143. *Id.* at 234 (Murphy, J., dissenting).
144. *Id.* at 235.
145. *Id.* at 236-39.
146. *Id.* at 247 (Jackson, J. dissenting).
147. The Civil Liberties Act of 1988, 50a U.S.C. § 1989b (1988).
148. *Id.*

that power was not infinite. When President Harry Truman attempted to justify domestic actions under the war power, the Supreme Court delivered an opinion that finally offered some clarification on the matter.

## VI. PRESIDENT TRUMAN AND *YOUNGSTOWN SHEET AND TUBE CO. V. SAWYER*

Upon President Harry S. Truman's entry into office, he faced numerous tasks: ending the world war that President Roosevelt had been managing; deciding whether to unleash the most destructive weapon the world had ever seen; convincing Congress to help re-build Europe; managing the Berlin Airlift; and restructuring the American economy from its war footing to peacetime economics.[149] President Truman also presided over a new era of American dominance on the international scene, the American entry into the United Nations, and its first armed conflict as a member of the United Nations.[150] Considering the multitude of important programs and policies Truman had to manage, it is ironic that something as innocuous as the seizure of a steel mill prompted one of "the truly 'great' cases — in every sense of the word — in the American constitutional law canon."[151]

*Youngstown Sheet & Tube Co. v. Sawyer*[152] was decided in 1952 while the United States was involved in the Korean Conflict. The case arose when President Truman issued an order directing the Secretary of Commerce to "take possession of and operate most of the Nation's steel mills."[153] This order was issued due to a labor dispute that arose between the companies and their employees during 1951.[154] The steelworkers threatened a strike when the existing bargaining agreement expired on December 31, 1951.[155] All efforts to resolve the dispute failed, and on April 4, 1952, a nation-wide strike was called.[156]

President Truman believed that the necessity of steel as a "component of substantially all weapons and other war materials"[157]

149. *See generally* DAVID MCCULLOGH, TRUMAN (1992).
150. *Id.*
151. Michael Stokes Paulsen, *Youngstown at Fifty: A Symposium — Youngstown Goes to War*, 19 CONST. COMMENT. 215, 216 (2006).
152. 343 U.S. 579 (1952).
153. *Youngstown*, 343 U.S. at 582.
154. *Id.*
155. *Id.* at 583.
156. *Id.*
157. *Id.*

entitled him to issue an order to seize the steel mills and maintain production as an "aggregate of his constitutional powers as the Nation's Chief Executive and the Commander in Chief of the Armed Forces of the United States."[158] The mill owners argued that President Truman's order was nothing more than executive lawmaking outside the bounds of the President's constitutional powers.[159]

Justice Black delivered the opinion of the Court, focusing on two issues: "Should final determination of the constitutional validity of the President's order be made in this case which has proceeded no further than the preliminary injunction stage? . . . If so, is the seizure order within the constitutional power of the President?"[160]

The procedural issue was resolved in the affirmative, and the Court focused the majority of the opinion on the second issue. The Court first noted that "the President's power, if any, to issue the order must stem either from an act of Congress or from the Constitution itself."[161] Here, there had been absolutely no congressional act or authorization. It was clear that "if the President had authority to issue the order he did, it must be found in some provision of the Constitution."[162] Truman contended that his presidential power should be implied from the cumulative effect of executive powers listed in the Constitution.[163]

The majority noted that the President relied on "particular provisions in Article II which say that the 'executive Power shall be vested in a President . . . .' and that 'he shall take Care that the Laws be faithfully executed'; and that he 'shall be Commander in Chief of the Army and Navy of the United States.'"[164] The order could not be sustained, however, as an "exercise of the President's military power as Commander in Chief . . . ."[165] While the Government relied on cases upholding broad war powers, the Court did not find those cases to be persuasive.[166] Justice Black noted that "even though the theater of war [is] an expanding concept, we cannot with faithfulness to our constitutional system hold that the

158. *Youngstown*, 343 U.S. at 582.
159. *Id.*
160. *Id.* at 584.
161. *Id.* at 585.
162. *Id.* at 587.
163. *Youngstown*, 343 U.S. at 587.
164. *Id.*
165. *Id.*
166. *Id.*

Commander in Chief of the Armed Forces has the ultimate power to take possession of private property . . . ."[167]

Nor could the order be upheld under the executive power generally. The Court stated:

> In the framework of our Constitution, the President's power to see that the laws are . . . executed refutes the idea that he is . . . a lawmaker. The Constitution limits his functions in the lawmaking process to the recommending of laws he thinks wise and the vetoing of laws he thinks bad.[168]

In the instant case, President Truman did not direct the implementation of a congressional policy in a manner indicated by Congress. Instead, he ordered that presidential policy be executed in a manner directed by him. The Court noted that, should Congress choose to adopt such a policy of seizing the mills, its authority to do so would be without question.[169]

While President Truman argued that other Presidents "without congressional authority have taken possession of private business enterprises in order to settle labor disputes,"[170] the Court was unambiguous when it stated that even if such actions have happened before, "Congress has not lost its exclusive constitutional authority to make laws necessary and proper to carry out the powers vested by the Constitution in 'the Government of the United States, or in any Department or Officer thereof.'"[171] In the majority's conclusion, Justice Black wrote that:

> The Founders of this Nation entrusted the law making power to Congress alone in both good and bad times. It would do no good to recall the historical events, the fears of power and the hopes for freedom that lay behind their choice. Such a review would but confirm our holding that the seizure order cannot stand.[172]

While the majority opinion offered a clear and concise analysis of the bounds of the President's war power, Justice Jackson's famous concurrence also defined the bounds of presidential power. In his concurrence, Justice Jackson first noted that "comprehen-

167. *Id.*
168. *Youngstown*, 343 U.S. at 587.
169. *Id.*
170. *Id.* at 588.
171. *Id.* at 588-89.
172. *Id.* at 589.

sive and undefined presidential powers hold both practical advantages and grave dangers for the country . . . in time of transition and public anxiety."[173] However, while the "Constitution diffuses power the better to secure liberty, it also contemplates that practice will integrate the dispersed powers into a workable government . . . . Presidential powers are not fixed but fluctuate, depending upon their disjunction or conjunction with those of Congress."[174]

Justice Jackson devised three categories that were illustrative of the general interactions between Congress and the President and the legal consequences in each paradigm. The first interaction occurs when "the President acts pursuant to an express or implied authorization of Congress . . . ."[175] In this instance, presidential authority is "at its maximum, for it includes all that he possesses in his own right, plus all the Congress can delegate."[176] If the President's actions in this situation are deemed unconstitutional, it is because the "Federal Government as an undivided whole lacks power."[177]

The second paradigm contemplates the President acting in "absence of either a congressional grant or denial of authority."[178] In this case, he may "only rely upon his own independent powers, but there is a zone of twilight in which he and Congress may have concurrent authority, or in which its distribution is uncertain."[179] In this type of situation, inaction on the part of Congress may "enable, if not invite" independent presidential action.[180] However, "any actual test of power is likely to depend on the imperatives of events and contemporary imponderables rather than on abstract theories of law."[181]

The final paradigm considers "when the President takes measures incompatible with the expressed or implied will of Congress."[182] In this instance, the President's power is at "its lowest ebb, for then he can rely only upon his own constitutional powers minus any constitutional powers of Congress over the matter."[183]

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173. *Youngstown*, 343 U.S. at 634 (Jackson, J., concurring).
174. *Id.* at 635.
175. *Id.*
176. *Id.*
177. *Id.* at 635-36.
178. *Youngstown*, 343 U.S. at 637 (Jackson, J., concurring).
179. *Id.*
180. *Id.*
181. *Id.*
182. *Id.*
183. *Youngstown*, 343 U.S at 637. (Jackson, J., concurring).

Presidential control in these situations can only be sustained by a court if the court "disab[les] Congress from acting upon the subject matter."[184]

Although *Youngstown* was decided over fifty years ago, it is still relevant today. The decision "resolved a major constitutional crisis, and it did so . . . correctly."[185] *Youngstown* stands for the proposition that "the President of the United States possesses no inherent, unilateral legislative power in time of war or emergency."[186] Further, *Youngstown* made it clear that the President "is not and cannot be the sole judge of the scope of his constitutional and statutory powers."[187]

*Youngstown* remains one of the defining war powers cases and is perhaps even more relevant today as the Bush Administration undertakes activities far more serious than the relatively innocent seizure of a steel mill. The following sections of this comment will analyze the actions of the current administration in light of the history and precedents discussed above.

## VII. THE BUSH ADMINISTRATION AND USE/ABUSE OF THE WAR POWER

Upon taking office after a contentious election with questionable results and a popular vote that did not match the electoral college, it seemed that George W. Bush's Administration was destined to divide the public just as sharply as the election had. Then, on September 11, 2001, the Twin Towers fell, the Pentagon was attacked, and something as trivial as disagreement over taxes or government involvement in social matters no longer mattered. For a time, even the most liberal of Democrats stood with the most conservative of Republicans in announcing our united effort to find and punish the perpetrators of this crime against humanity — our united effort to wage a war against terrorism itself.

But in the aftermath of that visceral reaction to September 11, our Constitution may be facing its greatest threat. That reaction has entailed secret wiretapping, the return of military tribunals, internment of citizens with no due process, and unprecedented numbers of presidential signing statements. All of these activities have been casually discussed and even more casually implemented

184. *Id.* at 638.
185. Paulsen, *supra* note 151, at 215.
186. *Id.*
187. *Id.* at 216.

because we are at "war" — because we need to keep America safe. But who or what are we fighting? And are we eviscerating our Constitution to do so?

### *A. What is a "War on Terror?"*

Few words are as capable of capturing the imagination as "war."[188] In the popular sense, the term connotes "magnitude" and "resolve," and of course military action.[189] In a legal sense, it means something more. When used by international lawyers or diplomats, it denotes an armed conflict between two states or state actors, replete with its own set of rules and norms. It begins with a declaration by one or both of the states involved, and it ends with some type of peace treaty or accord.[190]

Clearly a war on terror is not a traditional war. Terrorists typically are not "state actors" (although some states may sponsor terrorism) nor are there terrorist "states" in our modern sense of the term against which we can declare war.[191] Terrorists are certainly not going to act in compliance with the rules of international law and the rules of war — their very philosophies espouse the flouting of those rules and norms, and their tactics are specifically designed to harm the non-combatants and citizens those rules and norms are meant to protect.[192] Terrorists are not easily identifiable, and there are myriad groups, cells and philosophies. Not all terrorists are Islamists, nor do all terrorist acts aim to destroy the West.[193] It is difficult to declare war against an individual terrorist leader, and there will be no peace treaty or accord after a number of years of fighting.[194] Terrorists have nothing to lose or to gain by such an accord, and there are always new recruits ready to join the cause.[195] The traditional sense of "war" can hardly apply

188. Frédéric Mégret, *"War"? Legal Semantics and the Move to Violence*, 13 EUR. J. INT'L L. 361, 362 (2002).

189. *Id.* at 363.

190. MALCOLM M. SHAW, INTERNATIONAL LAW 1069 (5th ed. 2003).

191. JESSICA STERN, THE ULTIMATE TERRORISTS 7 (1999).

192. BRUCE HOFFMAN, INSIDE TERRORISM 34-36 (1998).

193. STERN, *supra* note 191, at 6-8. Stern not only discusses the "popular" Islamist terrorist groups, but also writes about terrorist groups at work in the United States itself. *Id.* at 8. The Christian Patriots, for example, advocate a brand of survivalist ideals, racism and virulent opposition to government, and have shown an interest in obtaining biological weapons. *Id.*

194. HOFFMAN, *supra* note 192, at 41.

195. *Id.* Hoffman writes that "The terrorist is not pursuing purely egocentric goals . . . . [T]he terrorist is fundamentally an *altruist*: he believes that he is serving a 'good' cause designed to achieve a greater good for a wider constituency . . . ." *Id.* at 43.

to a conflict against terrorism. War in the legal sense is not an act of aggression against an idea or philosophy, no matter how harmful the idea may be. So why does the Administration speak about declaring a "war on terror," and what kind of "war" is it?

Employing the term "war" serves a multitude of purposes in sustaining what will undoubtedly be a long conflict with few tangible victories. First, use of the term serves a useful political purpose — specifically, it unites the country, and enables the Executive to place demands on Congress in the name of national security. (Much as Roosevelt's penchant for declaring an "emergency" had the same effect.) It may also provide a legal justification that can be used in both the international and domestic sphere.[196] Labeling the current conflict a "war" also denotes that it is something operating within the confines of the laws of war and that those laws can be applied to our current actions.[197]

The Supreme Court, however, in its most recent cases dealing with the "war on terror," has been reluctant to think of it as a traditional war and even more reluctant to apply the traditional law of war to a conceivably never-ending conflict.[198] Further, while Congress granted an "Authorization for the Use of Military Force" [hereinafter AUMF] immediately after the September 11 attacks,[199] members of Congress and the Supreme Court have stated that this authorization was not meant to be a "blank check" for all matters regarding the "war on terror."[200] The present conflict does not fall neatly into any of Justice Jackson's categories of war. In some instances, it may be likened to a "Category One" conflict, under which President Bush's actions would clearly be within the bounds of constitutionality. At other times, the conflict enters the "Category Three" sphere at the other end of the spectrum, or the "zone of twilight" middle ground, also called the "Category Two" area. The Supreme Court has been immensely helpful in defining the bounds of the Executive's powers in each realm.

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196. Mégret, *supra* note 188, at 365.

197. Joanne Mariner, *The Supreme Court, the Detainees and the War on Terrorism,* FINDLAW, July 5, 2004, http://writ.lp.findlaw.com/Mariner/20040705.html.

198. *Id.*

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

200. Edward Lazarus, *Warantless Wiretapping and Why It Seriously Imperils the Separation of Powers and Continues the Executive's Sapping of Powers from Congress and the Courts,* FINDLAW, December 22, 2005, http://writ.news.findlaw.com/lazarus/20051222.html.

*B. Actions Within the Bounds of Constitutionality*

It is true that the President has "certain inherent powers that Congress may not limit."[201] Yet, those powers which are inherent to the Executive are further divided into two areas: those which are "exclusive powers — unregulable by Congress,"[202] and those which are mere "default powers — exercisable by the President . . . but nonetheless subject to Congressional override."[203]

In the area of "exclusive" powers, the Executive is largely free to do as he pleases, despite congressional displeasure. For example, Congress has no power to prevent the President from issuing pardons to anyone he chooses, nor can Congress pass legislation directing the President to take the advice of the Secretary of State over that of the Secretary of Defense.[204] Therefore, under this paradigm, President Bush is free to conduct the war in Afghanistan as he sees fit and is free to rely on the advice of the Defense Secretary when it comes to conducting operations in Iraq. No matter what the policy arguments on either side of the aisle may be, President Bush is entitled to exercise these powers without regard to congressional advice or criticism.

Additionally, pursuant to the understanding of the war power laid out in *Youngstown*, presidential power is at its highest when the President works concurrently with Congress.[205] That means that all matters exercised under the Commander in Chief power in both Afghanistan and Iraq are within the bounds of constitutionality.

Immediately after the September 11 attack on the United States, Congress issued the AUMF[206] on September 18, 2001. According to the text of that Authorization, the "President is authorized to use all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed or aided the terrorist attacks that occurred on September 11, 2001 . . . . Nothing in this resolution supersedes any requirement of the War Powers Resolution."[207]

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201. Michael C. Dorf, *What are the "Inherent" Powers of the President? How the Bush Administration Has Mistaken Default Rules for Exclusive Rights*, FINDLAW, ¶ 4 February 13, 2006, http://writ.news.findlaw.com/dorf/20060213.html.

202. *Id.*

203. *Id.*

204. *Id.*

205. Youngstown Sheet and Tube Co. v. Sawyer, 343 U.S. 579 (1952).

206. Pub. L. No. 107-40, 115 Stat. 224 (2001).

207. *Id. See also* War Powers Resolution, 50 U.S.C. § 1541 (1973). The War Powers Resolution was enacted in 1973 in response to what Congress saw as the "Imperial Presi-

While the delegation of authority is quite broad, it is limited to those who attacked the United States on September 11, 2001. After investigation and intelligence gathering, the perpetrators were determined to be members of al Q'adea, an Islamist terrorist organization led by Osama bin Laden. Intelligence further stated that bin Laden was hiding in Afghanistan and that the Taliban state there was providing aid to the al Q'adea organization.[208]

Based on this congressional authorization, President Bush has total authority to engage in armed conflict with Afghanistan, to pursue al Q'adea operatives throughout the world in a manner he deems fit — in short, to engage all of his Commander in Chief powers in the pursuit of al Q'adea. Whatever policy disagreements one might have with the conduct of the war in Afghanistan or the handling or mishandling of the search for bin Laden, President Bush is within his constitutional power in this area. Much as Presidents Lincoln, Wilson and Roosevelt were able to exercise their Commander in Chief powers in the actual conduct of war, so too may Bush conduct the actual warfare in the manner he deems most effective.

Similarly, the conflict in Iraq is within the constitutional bounds of President Bush's power as Commander in Chief. While public opinion has been extremely critical of the war with Iraq, Congress authorized a pre-emptive war against Iraq. The policy debate over whether the war with Iraq was (a) justified, (b) a violation of international law, or (c) totally unrelated to war with al Q'adea is an important and necessary debate, but it has no effect on Bush's essential constitutional authority to conduct such a war.

As has been seen previously, the President's power is at its highest when Congress has declared war or granted approval of the President's actions. Further, once war is declared, the President's power as Commander in Chief to conduct war is not often questioned. President Bush is clearly acting within the bounds of constitutionality in his conduct of war against Afghanistan, al Q'adea and Iraq. As has also been the case in the past, however, it is in the area of domestic relations and civil liberties that the President's war power is at its lowest, and it is in these areas that

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dency" of the Vietnam War. It essentially requires that the Executive and Legislature will work collectively during times of conflict, and emphasizes that the President may not place the Armed Forces in the line of fire absent a congressional declaration of war, specific authorization, or a national emergency created by attack upon the United States. *See also* Paulsen, *supra* note 151, at 251.

208. *Who is Osama Bin Laden?*, CBC In Depth, CBC News Online, Jan. 19, 2006, http://www.cbc.ca/news/background/osamabinladen/.

a President is most likely to engage in unconstitutional activities. President Bush is no exception.

### *C. Actions Outside the Bounds of Constitutionality*

Congress may limit the "the President's powers as Commander in Chief,"[209] because the war power is a concurrent power. In certain areas of the war power, the President's powers are considered "default powers."[210] That is because the President may only have exclusive authority if Congress fails to act in a manner in which it is constitutionally authorized to act. This understanding of the President's power relative to Congress's indicates that, for example, if Congress failed to prescribe rules for the discipline of the armed forces, the President could then issue any order he saw fit to deal with insubordination or deserters.[211] As commentator Michael Dorf notes, however, it is important to remember that "inherent Presidential authority . . . is only a default setting. It can be changed by Congress."[212]

The power of Congress to change the "default setting" comes directly from the Constitution itself. In the areas where the legislative authority is supreme, it would completely defeat the principles of separation of powers to allow the President to simply ignore the rules and regulations passed by Congress. This is precisely the constitutional barrier President Bush faces in regard to the wiretapping program.[213]

The Administration has claimed that the Executive has the power to order "wartime" warrantless surveillance of United States citizens. Setting aside the enormous Fourth Amendment problems with this sweeping statement, this is an area in which the President operates under his "default setting." While the President is surely the Commander in Chief of the armed services, Congress specifically has the power "to make Rules for the Government and Regulation of the land and naval Forces."[214]

In the specific area of wiretapping, Congress *has* made rules and regulations through the Foreign Intelligence Surveillance Act

209. Dorf, *supra* note 201, ¶ 10.
210. *Id.* ¶ 29.
211. *Id.* ¶ 22.
212. *Id.* ¶ 13.
213. *Id.* ¶ 3. *See also* Lazarus, *supra* note 200.
214. U.S. CONST. art. I, § 8, cl. 14.

(FISA).[215] Not only would an order for warrantless wiretapping where Congress has already passed legislation in that area violate the Constitution, it would also violate the legally enacted statute. It is impermissible for the Executive to hold himself above the law, whether in peace or in war. A recent federal court ruling on the wiretapping issue found the program to be unconstitutional and indicated great disturbance at the total disregard for separation of powers, with the court remarking "there are no hereditary Kings in America and no powers not created by the Constitution."[216]

In the wiretapping instance, the Executive is clearly acting in a "Category Three" zone — directly contrary to the expressly stated will of the Legislature. The President's power, war or any other, is at its absolute lowest in this instance, and the unconstitutionality of the act is clear — the policy debate over the necessity of such a program during wartime notwithstanding. The "zone of twilight" areas are just as troubling.

The issues of detainees' rights and the use of military tribunals have largely comprised the "zone of twilight" or "Category Two" area under this Administration. The major cases dealing with these issues, *Rasul v. Bush*,[217] and *Hamdi v. Rumsfeld*,[218] for the most part found some relief for the detainees.

In *Rasul*, aliens being detained at Guantanamo Bay brought actions contesting the legality and conditions of their confinement.[219] In the majority opinion, Justice Stevens defined the issue as "whether United States courts lack jurisdiction to consider challenges to the legality of the detention of foreign nationals captured abroad in connection with hostilities and incarcerated at the Guantanamo Bay Naval Base, Cuba."[220]

The petitioners were captured in Afghanistan during the hostilities between the United States and the Taliban and had been held

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215. 50 U.S.C. §§ 1801-11, 1821-29, 1841-46, 1861-62 (1978); *see* Dorf, *supra* note 201, ¶ 3. Dorf further notes that some supporters of the Administration argue that since the National Security Agency (NSA), the governmental body carrying out the wiretapping, is a civilian body, Congress has no power. *Id.* However, the President then, exercising his power as Commander in Chief of the *armed forces*, would have no power to executively legislate in this area either. *Id.*

216. ACLU v. Nat'l Sec. Agency, 438 F. Supp. 2d 754, 781 (E.D. Mich. 2006) (currently stayed, pending appeal to the 6th Circuit).

217. 542 U.S. 466 (2004).

218. 542 U.S. 507 (2004).

219. *Rasul*, 542 U.S. 467.

220. *Id.* at 470.

at Guantanamo since 2002.[221] The petitioners alleged that they had never been combatants against the United States and had not engaged in terrorist acts.[222] Further, they alleged that they had been held captive without having been charged with a crime, arguing that they were denied access to counsel and the courts.[223] The district court dismissed the action on the basis that "aliens detained outside the sovereign territory of the United States may not invoke a petition for a writ of habeas corpus,"[224] and the court of appeals affirmed.[225]

The Supreme Court reversed, noting that the standards and scope of habeas corpus had developed since the seventeenth century.[226] The Court focused on whether the habeas statute "confers a right to judicial review of the legality of Executive detention of aliens in a territory over which the United States exercises plenary and exclusive jurisdiction, but not 'ultimate sovereignty.'"[227] Distinguishing the present case from earlier decisions of the Court, Justice Stevens held that:

> in the end, the answer to the question presented is clear. Petitioners contend that they are being held in federal custody in violation of the laws of the United States . . . . Section 2241, by its terms requires nothing more. We therefore hold that Section 2241 confers on the District Court jurisdiction to hear petitioners' habeas corpus challenge . . . .[228]

The majority went even further, stating unequivocally that "federal courts have jurisdiction to determine the legality of the Executive's *potentially indefinite* detention of individuals who claim to be wholly innocent of wrongdoing."[229] Maintaining a *Milligan*-like approach, the Supreme Court asserted its constitutional power to review the legality of the acts of the Executive Branch, a power essential to the separation of powers.

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221. *Id.* at 470-71.
222. *Id.* at 471-72.
223. *Id.* at 72.
224. *Rasul*, 542 U.S at 472-73 (citing Rasul v. Bush, 215 F. Supp. 2d 55, 68 (D.D.C. 2002), *reversed and remanded by* Rasul v. Bush, 542 U.S. 466 (2004)).
225. *Id.* at 473.
226. *Id.*
227. *Id.* at 475. *See also* Lease of Lands for Coaling and Naval Stations, Feb. 23, 1903, U.S. – Cuba, Art. III T.S. No. 418.
228. *Rasul*, 542 U.S. at 483-84.
229. *Id.* at 487 (emphasis added).

While the *Rasul* decision set the stage for the allowance of detainee petitions, it was the *Hamdi* case that actually examined the legality of the detention itself. *Hamdi* dealt with the "legality of the Government's detention of a United States citizen, on United States soil, as an 'enemy combatant,'"[230] and addressed the "process that is constitutionally owed to one who seeks to challenge his classification as such."[231]

The Court, in an opinion by Justice O'Connor, first dealt with the threshold question of "whether the Executive has the authority to detain citizens who qualify as 'enemy combatants.'"[232] The Court, clearly uncomfortable with the notion of a pervasive "war on terror," confined the phrase "enemy combatant" to mean one who was "part of or supporting forces hostile to the United States or coalition partners in Afghanistan."[233]

The Government immediately asserted that no congressional authorization was needed to detain Hamdi because the "Executive possesses plenary authority to detain pursuant to Article II of the Constitution."[234] The Court chose not to reach that question, instead finding authorization to detain those involved in the conflict in Afghanistan under the AUMF.[235] Justice O'Connor again was careful to limit the discussion to the tangible conflict in Afghanistan, rather than the more nebulous "war on terror." Thus, while the Court did find a basis for Hamdi's detention, it was not in the sweeping power of the Executive, but rather in congressional authorization.

The Court also determined that Hamdi was entitled to due process. The majority felt a balancing test would be most appropriate in determining what process is due.[236] Stating that "it is during our most challenging and uncertain moments that our Nation's commitment to due process is most severely tested; and it is in those times that we must preserve our commitment at home to the principles for which we fight abroad,"[237] the Court held that a "citizen-detainee seeking to challenge his classification as an enemy combatant must receive notice of the factual basis for his classification, and a fair opportunity to rebut the Government's

230. Hamdi v. Rumsfeld, 542 U.S. 507, 509 (2004).
231. *Hamdi*, 542 U.S. at 509.
232. *Id.* at 516.
233. *Id.*
234. *Id.*
235. *Id.* at 517.
236. *Hamdi*, 542 U.S. at 532.
237. *Id.*

factual assertions before a neutral decisionmaker."[238] Furthermore, the Court stated:

> In sum, while the full protections that accompany challenges to detentions in other settings may prove unworkable . . . in the enemy combatant setting, the threats to military operations posed by a basic system of independent review are not so weighty as to trump a citizen's core rights to challenge meaningfully the Government's core case . . . .[239]

The majority also stated that its holding indicated a rejection of the Government's "assertion that separation of powers principles mandate a heavily circumscribed role for the courts in such circumstances."[240] The view that courts may not examine individual cases "cannot be mandated by any reasonable view of separation of powers" and serves only to "*condense* power into a single branch of government."[241] The Court stressed that even "the war power does not remove constitutional limitations safeguarding essential liberties."[242]

Thus, in these "Category Two" or "zone of twilight" areas, the Supreme Court has been careful to remind the Executive that constitutional rights may not be suspended for enemy combatants, especially citizens who have been labeled as such. Particularly in *Hamdi*, the Supreme Court envisioned a robust role for itself in policing the "zone of twilight" in the war on terror. The Court has been reluctant to embrace the war on terror as an over-arching justification for all that the Executive seeks to do and has also been reluctant to embrace it as a legal paradigm within in which to work. Sighting the perhaps indefinite nature of a war on terror, the Court refuses to employ that rubric in determining issues such as habeas corpus or due process for detainees. Instead, the Court has fulfilled its role in the constitutional scheme and has indicated just how far the Executive may go before treading into unconstitutional actions.

The last area in which the Executive has displayed disregard for the Constitution and the principles of American Government is not precisely a "war power" area, but President Bush's unprece-

238. *Id.* at 533.
239. *Id.* at 535.
240. *Id.*
241. *Hamdi*, 542 U.S. at 536-37.
242. *Id.* at 537.

dented use of signing statements, which is also indicative of a larger disregard for constitutional boundaries.

According to a recent study by the American Bar Association, President Bush has issued signing statements for over 800 statutes, more than all previous Presidents *combined.* The signing statements, in effect, state that "Bush reserves a right to revise, interpret or disregard measures [of bills he is signing] on national security and constitutional grounds."[243] According to Michael Greco, then president of the ABA, "'The report raises serious concerns crucial to the survival of our democracy. If left unchecked, the president's practice does grave harm to the separation of powers doctrine, and the system of checks and balances that have sustained our democracy for more than two centuries.'"[244]

The strategic use of signing statements has raised serious concerns. First, Congress is unable to respond to signing statements; therefore, it may "hamstring" the signed bill and the Legislature in the future. Second, such an employment of the signing statement, normally a rare event, indicates the Executive's confusion regarding his role, as well as his disregard for the other branches of government. The problem is deemed serious enough that Republican Senator Arlen Specter, Chairman of the Senate Judiciary Committee, stated that he was planning to submit legislation to "authorize the Congress to undertake judicial review of those signing statements with the view to having the President's acts declared unconstitutional."[245]

Overall, the Executive's tendency to use the war on terror as a justification for acts that range from questionably valid to patently unconstitutional is troubling. Further, President Bush's disregard for basic separation of powers principles and his notion that neither the Supreme Court nor Congress should challenge his decisions, point to the possibility of a constitutional crisis. The Executive shows contempt for the Constitution and a disregard for his own role that has not often been evidenced in American history. The problem is not that the President takes actions with which some may disagree; the problem is that these actions "make

243. *ABA: Bush Violating Constitution,* AP WIRE SERVICE, July 24, 2006, http://www.foxnews.com/story/0,2933,205205,00.html.

244. *Id.*

245. *Sen. Specter Ready to Challenge Signing Statements,* AP WIRE SERVICE July 25, 2006, http://www.cbsnews.com/stories/2006/07/25/politics/main1833432.shtml.

a mockery of much of the Constitution the President has sworn to uphold."[246]

### *D. Avoiding a Constitutional Crisis*

The Constitution is more than a mere document; it is the living blueprint to our uniquely American system of government. That system has largely worked and worked well for over two centuries because of the flexibility of the Constitution. It can expand and contract as is necessary; it protects the power of the people and concurrently limits the power of government, lest it become too intrusive, too monarchical.

The success of our constitutional system as it applies to the federal government is largely predicated on the separation of powers principles and mixed government principles that the Framers wove into it. Above all, the Framers wanted to check every branch of government, lest one become too powerful. It is unfortunate that oftentimes during a state of military crisis, the Executive Branch exceeds its constitutional framework in many areas. This tendency has been well documented throughout our history, and during these times, it is imperative that the Legislative and Judicial Branches perform their functions. For the most part, our constitutional system does work, and during wartime, the Legislative and Judicial Branches have been willing and able to assure that the Executive remains in his proper sphere of power.

In the past, wartime has meant a traditional understanding of war. There was a fixed period of hostilities, a known enemy, and set rules to follow. Wartime oversteps by the Executive would be quickly corrected when peace returned. The conflict we are currently facing does not fit this mold. The "war on terrorism" will not likely conclude the minute President Bush leaves office and his successor is sworn in. While President Bush has certainly overstepped the boundaries of his office into unconstitutional territory, his successor may be in danger of committing similar unconstitutional acts. It is imperative that we develop a framework to prevent a continual erosion of the separation of powers and system of checks and balances in the name of a never-ending war.

First, it is undisputed that when a properly authorized instance of armed conflict occurs, the President's power is at its highest, and historically, his actions are not subjected to strict constitu-

246. Dorf, *supra* note 201, ¶ 32.

tional scrutiny. The real danger is in the use of the war power to erode civil liberties and the use of "war" to justify unconstitutional domestic actions.

To prevent such actions, the Legislative Branch must be careful in assuring it does not delegate its constitutional power to the Executive whenever an "emergency" is declared. Acts such as the War Powers Resolution have been helpful in the past to remind the Executive of the bounds of his war power; new legislation which specifically deals with the difficulties inherent in the war on terror should be drafted to codify Supreme Court decisions which have thus far defined the boundaries of the Executive. Clear statutory schemes will aid future Presidents in operating within their constitutional bounds. Additionally, Congressional Oversight Committees must vigorously examine Executive actions, not hesitating to indicate which programs run afoul of the Constitution.

The Judicial Branch also plays a great role in maintaining the boundaries set by the Constitution. Thus far, the current Court has done an admirable job of deciding difficult "Category Two" issues. The Court must follow the example set by the *Milligan* Court and dispassionately examine the issues before it. As multiple Courts have said, there is no separate Constitution in wartime, and the President has no more powers in war than he does in peace. Clear rulings, based on consistent constitutional readings in the areas of civil liberties and the war power, must continue to be issued by the Supreme Court. These rulings may then be codified by the Legislature, providing a legal framework in which the Executive may be sure he has the greatest power to both protect our shores and the liberties that set us apart from those who would do us harm.

## VIII. CONCLUSION

In examining the war power, this comment first provided an historical overview of the development of the Constitution and its application by Presidents such as John Adams, Thomas Jefferson, Abraham Lincoln, Woodrow Wilson, Franklin Roosevelt, Harry Truman and, finally, George W. Bush. This overview indicated that the Framers originally viewed the Executive Branch as the least powerful of the branches and deemed it the most likely to pose a danger to American citizens.

An examination of earlier Presidents' actions during times of war illustrated the importance of the constitutional boundaries

the Framers erected. Declaring war or involving the United States in armed conflict was never intended to be an easy task, and few Presidents have found it so. When a state of war exists, however, it is then that the Executive has found it easiest to overstep his constitutional boundaries. While the President often conducts the actual warfare in a manner that may have constitutional implications, these small problems are largely overlooked in deference to the powers of the Commander in Chief. Most problematic is that, historically, the Constitution has been ignored in areas of civil liberties during times of war.

President Lincoln felt little restriction in eviscerating the Bill of Rights, President Wilson was more than willing to use wartime as an excuse to restructure the Executive Branch in a manner more to his liking, and President Roosevelt's disturbing executive order regarding internment camps cannot be constitutionally justified. The Executive's tendency to stretch the boundaries of the Constitution is, therefore, nothing new in American history. What is new is both the type of war in which we are currently engaged and the sheer breadth of civil liberties President Bush is willing to ignore in forging what several commentators have termed, at best, an "imperial presidency," at worst, a monarchy.

This comment further examined what a "war on terror" might mean and why the Administration would employ the term "war" in dealing with a clearly non-traditional conflict. Public unity and political expediency both may explain the strategic decision to term this current crisis a "war on terror." Accepting the war paradigm as a means for analysis, this comment also concluded that President Bush has used his Commander in Chief powers with regard to the armed conflicts in Afghanistan and Iraq no differently than his predecessors — that is, his actions are constitutionally supported in this area.

What this comment truly questions is Bush's use of the war power to trample civil liberties and exceed the authority of the Executive far beyond what the Framers would have imagined. The secret wiretapping program was patently unconstitutional, and the Supreme Court carefully delineated the Executive's boundaries in detainee situations. What was especially troubling, however, was not the response of the other branches — indeed the separation of powers principles have worked thus far in checking the Administration — but the utter disregard the Executive has shown for that principle.

Particularly illustrative is the overuse of signing statements employed by President Bush. The Executive is not a Court or a

Legislature. It may not interpret laws, nor hold that it will only follow those laws with which it agrees. There is no supreme branch of government in our system, and this Administration's unconstitutional use of executive power to create such a supreme branch is the real danger. As Justice Jackson wrote, "With all its defects, delays and inconveniences, men have discovered no technique for long preserving free government except that the Executive be under the law, and that law be made by parliamentary deliberations."[247] Inconvenient as it may be, that is our American system of governance, and today it is under attack by an Executive who would place himself above the very laws and Constitution that he swore to uphold.

In order to prevent further abuses by this President and his successors, this comment suggests the development of a legal framework incorporating new legislative measures defining the executive power during a non-traditional conflict, the codification of recent Supreme Court rulings in this area, and the continued willingness of the Court to dispassionately examine the issues before it and not be swayed from enforcing the Constitution even in the face of a war on terrorism. In doing so, future lawmakers would do well to keep in mind the words of Justice Warren:

> Implicit in the term "national defense" is the notion of defending those values and ideas which set this Nation apart . . . . It would indeed be ironic if, in the name of national defense, we would sanction the subversion of . . . those liberties . . . which makes the defense of the Nation worthwhile.[248]

*Sarah M. Riley*

247. Youngstown Sheet and Tube Co. v. Sawyer, 343 U.S. 579, 655 (1952) (Jackson, J., concurring).

248. United States v. Robel, 389 U.S. 258, 264 (1967).