



2003


The National Security Presidency in Constitutional Context: Reflections on Terrorism and the Presidency from the Last Ten Years

James E. Baker
Georgetown University Law Center

This paper can be downloaded free of charge from:
<https://scholarship.law.georgetown.edu/facpub/1433>
<http://ssrn.com/abstract=2554489>

Miller Center Rep., Spring/Summer 19, 2003, at 12-20

This open-access article is brought to you by the Georgetown Law Library. Posted with permission of the author.
Follow this and additional works at: <https://scholarship.law.georgetown.edu/facpub>

 Part of the [Constitutional Law Commons](#), [National Security Law Commons](#), and the [President/Executive Department Commons](#)

The National Security Presidency in Constitutional Context:

REFLECTIONS ON TERRORISM AND THE PRESIDENCY FROM THE LAST TEN YEARS

BY JAMES E. BAKER

In this time of terrorist threat, there is no more important institution to study than the national security presidency. That is because the president is singularly situated to command the instruments to counter terrorism. He is also singularly situated to ensure that such instruments are used effectively, lawfully, and in a manner consistent with constitutional values. I believe I have a duty, based on where I have been, to help others observe and understand the institution of the presidency. I do so because I want the national security presidency to succeed in providing for our physical security and in upholding our constitutional way of life; or, as the president's constitutional oath states succinctly, "to preserve, protect, and defend the Constitution." Those who teach, interpret and study the presidency have an important duty to play in this process by testing the institution to ensure that these functions are successfully performed.

CONSTITUTIONAL CONTEXT AND PRACTICE

I once had occasion in a public setting while standing beside the national security adviser to describe my boss. When I launched into a description of the Constitution and Articles I, II, and III, there was a gasp in the room as it became apparent that I was not talking about the man at my side. An emerging smile on Mr. Berger's face put the audience at ease. Mr. Berger understood that our oaths of service are to the Constitution, and not to the president, or any other person.

The presidency is a creation of the Constitution. Its responsibilities are defined by the Constitution. Therefore, it must be evaluated with the Constitution in mind. So let me start with four observations regarding the Constitution in presidential practice.

First, the Constitution is opportunity and not result. The United States Constitution is history's greatest code of governmental honor. Part of its greatness derives from its success in providing for collective physical security at the same time that it provides a framework for lives of individual choice and opportunity. From a military perspective, the Constitution establishes the principle of civilian control of the military and provides for separate and shared authorities over the resort to war and the means of war. The immediate and intended advantages of

such a structure for a democracy are obvious. Less apparent are the indirect benefits resulting from a military devoted to its profession rather than to its politics, and from a military that is derivative of the people, and not beholden to a particular branch of government, person, or party.

At the same time, the Constitution acknowledges that individuals and governments do not always act with honor. "If men were angels, no government would be necessary,"¹ Madison wrote, and "if angels were to govern men, neither external nor internal controls on government would be necessary." I marvel at the drafters' ability to foresee so many of the ways that men and women within each branch might undermine the intent and spirit of the Constitution, driven by the real, and perceived, necessities of the moment. Therefore, at almost every metaphorical crossroads there is a structural "control" in the Constitution to remind us of our democratic and legal roots. And when government has strayed from the constitutional path, we have also learned that the Constitution has a heavy keel, which is capable of righting the ship of state. But it is the helmsman and the crew and not the ship that seizes the wind of constitutional opportunity.

That leads me to my second observation. The Constitution is not on autopilot. Like everyone else, I learned about the checks and balances in high school, college, and law school. Invariably, these controls were presented with operational certitude. The practice of constitutional law at the NSC taught me otherwise. I was surprised at how fragile constitutional government can be and how depend-

ent it is on the integrity and values of those who wield its power. Rule of law is a daily commitment to the process of constitutional government, and to one's individual role and duty in that process. This is particularly true in a secret war against terrorists where the ordinary mechanisms of validation and appraisal exercised by the press, the public, the Congress, and the judiciary, may be muted, deferential, or even absent.

In national security, there is always an argument, and often a good argument, for truncating process, classifying decisions, and asserting broad authority so as not to unduly delimit responses to unknown and perilous contexts. As illustration, the National Security Act envisions three congressional reporting mechanisms for covert action: 1) prior notification of the full committees; 2) prior notification of eight leaders in "extraordinary circumstances;" and 3) post-facto notification, in undefined circumstances that, presumably, are more than "extraordinary."² In the long run, there are enduring consequences if we make the "extraordinary circumstance" the norm. And yet, we live in extraordinary times. Part of the president's duty then, and that of his lawyers, is to make decisions on a factual and constitutional continuum and to identify the short term and long term substantive and procedural consequences of decision.

Third, the Constitution functions as much through informal application as it does through formal checks and balances. Constitutional government is a daily grind of contacts and disclosure, none of which would happen without the constant effort of a few persons

James E. Baker is a judge on the United States Court of Appeals for the Armed Forces. He formerly served as special assistant to the president and legal adviser to the National Security Council (1997-2000) and as deputy legal adviser to the NSC (1994-1997). The views expressed herein are those of the author and do not necessarily represent the views of the U.S. Government or any organization within the U.S. Government. Judge Baker spoke at the Miller Center on June 11, 2003. Baker opened his remarks with a tribute to Colonel Nelson Drew, a colleague on the NSC staff and a one-time scholar at the Miller Center. He described Nelson as a good man of honor, dedication, intellect, and values, who made the ultimate sacrifice for his country while on a peace mission to Bosnia.

with the vision and commitment to meaningfully apply the process and substance of law. This means that much of the process of notification, consultation, and validation between political branches goes unseen. But the daily give and take between the political branches is oil between the gears of constitutional government. Those who focus on form alone will see only a Kosovo War Powers report of careful design and limited content and not the 48 informal congressional briefs that preceded the report. Those who focus on function alone will note only whether the president notified the congressional leadership before a terrorist strike, but not whether it was done with a receptive ear.

All of these observations lead to a fourth fundamental observation. The concept of law depends on individual conduct and vision. It depends on a president and a process of presidential decision that incorporate the meaningful application of law. For even where the legal standard is clear, someone must still identify and trigger the standard. As A. Whitney Griswold observed, while we are a nation of laws, it is men and women who write, interpret, and apply the law, which means "we have in fact a government of laws *and* a government of men."¹ The Constitution may have given us a framework for civilian control over the military, but it was George Washington five years earlier surrendering his commission to the Congress, that put this principle into practice.

Today, and for years to come, no person will have more influence on whether and how we turn constitutional principle into practice than the president.



President George W. Bush, Vice President Richard Cheney, Donald Rumsfeld, and Condoleezza Rice, at the Pentagon, September 12, 2001.

DEPARTMENT OF DEFENSE

THE NATIONAL SECURITY PRESIDENCY

During the past ten years the presidency moved from the episodic crisis and response to terrorism, to a constant state of readiness and perpetual command over the policy instruments to counter terrorism. While there may be more than one reasonable view as to when this process started, without question it was underway after the first World Trade Center attack in 1993. After the August 1998 embassy bombings, counter-terrorism command became the daily, central, omnipresent feature of the national security presidency. September 11 in turn ensured that counter terrorism would become a permanent fixture of the institution of the presidency, in the same way that atomic weapons permanently transformed the presidency after World War II.

To be sure, terrorism was among the government's highest priorities throughout the 1990s and well before. I certainly felt that way in the early

1990s when I had the counterterrorism account in the State Department's Legal Office. I was not alone in this outlook. There was always a professional cadre of officials addressing the terrorist threat, and they could always and immediately call on the attention of the principal national security officials. Serious efforts at weapons of mass destruction defense, for example, began in the mid-1990s after the Tokyo subway attack. Moreover, the full range of instruments for responding to terrorism was always on the policy table.

But in retrospect, I think the influence of terrorism on the presidency itself was at first evolutionary. After August 1998, the effect was more revolutionary as it was clear the United States was facing an organized worldwide terrorism network capable of attacking hardened targets and with an avowed intent to kill as many Americans as possible and to do so with weapons of mass destruction.

In 1990, terrorism was one of a number of important national security issues. In 1998, terrorism became the business of the day, every day, not one of a number of revolving crises. This was true for the president. It was true for the national security adviser. And, it was also true for their national security lawyer. Every day I came to work and, indeed, every time the phone rang at home—the attorney general on a Sunday afternoon, the national security adviser at 3:00 a.m. on almost any night—I anticipated that the issue was terrorism and that decision-makers were addressing an emerging target or potential threat. This required an understanding of how the president makes decisions so that I could provide legal guidance in an effective and timely manner.

National security does not wait for lawyers. In such a context, if a lawyer's advice is not immediate, or if a lawyer is not able to guide to yes, or if necessary say no, then he will not be consulted.

PRESIDENTIAL PROCESS AND DECISION

The president has traditionally used two structural resources to manage national security: cabinet government and the NSC process. Tensions can arise between the two, with Iran-Contra as a recent example. But I do not view these structures as inherently in conflict. Rather, when exercised with appropriate oversight, they are complementary mechanisms of decision, and only in rare cases where the president is directly engaged, implementation.

By president, I mean the actual holder of that office, not the NSC staff who advise and assist him. And by

decision, I mean express approval, such as a memorandum box checked or direct verbal assent. I also mean less formal approval such as the verbal assent at the close of a brief, or acknowledgment of an information memorandum read before action is taken.

In the past ten years, the critical presidential decisions on terrorism were framed and decided by the president using the NSC process. Specifically, this process centered on an NSC-led working group, the Counterterrorism Security Group (CSG), reporting directly to the Principals Committee, or a small group of principals and the president.

The threat from terrorism is real. It is imminent. It is lasting. It is potentially devastating. And, it is local. Whether by design or default, the president is singularly situated to respond. The president alone has the decisional capacity and authority to do so in a timely and effective manner. The president is also best situated to appraise the efficacy and lawfulness of U.S. actions.

Let me demonstrate what I mean. The president is the most effective engine in government. He commands response. If he holds a meeting, people come. Presidential decision-making can be extraordinarily fast. I have participated in the most difficult question of law and fact that was identified, briefed, and decided by the president, with the concurrence of the attorney general, in less than five minutes. Speaking with reference to leadership targets in Iraq, General Franks acknowledged that presidential decisions can be made on "an amazing time line[.]"¹ Based on my seven years at the

Constitutional government is a daily grind of contacts and disclosure, none of which would happen without the constant effort of a few persons with the vision and commitment to meaningfully apply the process and substance of law. This means that much of the process of notification, consultation, and validation between political branches goes unseen. But the daily give and take between the political branches is oil between the gears of constitutional government.

NSC, I am persuaded that if you give me a problem and a timeline, I can provide you with a process of decision, and if appropriate consultation, that will contextually and effectively include the application of policy and law by officials who are constitutionally accountable for their advice and their decisions.

The president can also gather and fuse multiple sources of information and perspective faster than any other official in government, which is essential when pop-up targets emerge for moments and strike decisions must be taken in difficult geopolitical contexts with imperfect information. Presidential fusion is also important where a target presents difficult factual, or intelligence judgments like an Al-Shifa. In these latter cases, additional perspective may distinguish the sound decision from the merely rapid decision.

Presidential process, in my view, also generally contributes to better decision. First, as a bureaucratic observation, staff work tends to improve in rigor as it runs up the chain of command, particularly to the president. Second, presidential process can serve as a fail-safe where such process channels options into regular and specialized review. Significantly, the erroneous bombing of the Chinese Embassy in Belgrade during the Kosovo campaign followed the identification and generation of a target outside the normal target process. While the presumptive target designated in briefs was indeed military in nature, as is now well-known, human error placed the target at the wrong coordinates, even as the correct target was reviewed and approved by the chain of command.



President Bush with Donald Rumsfeld.

DEPARTMENT OF DEFENSE

The president is also singularly situated to address issues of interagency policy dispute. There is nothing wrong with such disputes. They help to identify issues and best options. They are problematic if they linger or if they drive principals' decisions down to lowest common consensus rather than leave hard questions up to the president.

In addition to resolving policy disputes, the president alone may have the will and the power to force decisions to the surface. Master bureaucrats know how to stop policy initiatives in their tracks through grudging staff work or the assertion of departmental authority. The CIA can invoke "sources and methods" to prevent the disclosure of information another agency might wish to disclose to win allied support or defend a decision. The Defense Department can argue that a proposed mission is outside its national security mandate. And, the State Department can and will almost always plead lack of funding.

Where persuasion fails, the president alone has the authority to compel, through exercise of his constitutional authority over state secrets; through determination as commander in chief that the proposed assistance is a national security mission; and, by directing the draw-down of government stocks and surpluses. These illustrations demonstrate the essential role that law plays in the national security presidency.

As significantly, the president can call upon "the bully pulpit" to effect counter-terrorism policy. "National security" reaches a vein of American patriotism, commitment, and sacrifice that is not tapped through other means; and no one can reach this vein like the president. As Alexander Hamilton recognized in Federalist 8: "Safety from external danger is the most powerful director of national conduct."⁵ When it comes to homeland security, the potential importance of this function is magnified.

First, the socialization of danger after 9/11 has made ordinary citizens participants in the national security process in a way not previously experienced. At the same time, as I think Secretary Ridge has recognized, the public may become hardened to perpetual alarm and in the future may hesitate to take essential actions unless asked by the president to do so. The president alone, for example, may be able to convince populations outside New York and Washington that the threat from terrorism is as real and imminent for them as it is for those cities.

Second, homeland security has placed state and local authorities on the front lines of national security. Today, vertical process is as important as national process. This is new national security ground, where the president's power to persuade is essential if traditional principles of federalism are to remain intact. Alternatively, in the absence of preemptive legislation, the exercise of presidential constitutional authority may be necessary to enforce quarantines or respond to interstate events.

Finally, while the government has so far prescribed only a limited role for the military in homeland security, there is no question in my mind that the military alone has the capacity and expertise to deal with some of the catastrophic contingencies in play. The Northern Command is the military's surge potential. Such a use of the military may transform America's perception of the military. The president alone can order such action, and it would seem, that he alone could persuade the public that such action was both necessary and temporary.

As these homeland security examples illustrate, the president is singularly situated to direct the war on terrorism because he alone wields the constitutional and statutory authority to do so. The president's core counterterrorism tools are military force, and intelligence, economic, and foreign affairs instruments.

Military force. Clearly, the president should decide that which he is constitutionally required to decide—truism. This includes the resort to force. Successive administrations have cited, in war powers reports, the president's authority as commander in chief, his control over foreign affairs, and his role as chief executive, as authority for a president's use of force. In the context of terrorism and homeland security, the president's duty "to take care that the laws be faithfully executed" is also implicated.⁶

Whether the president must also approve the methods and means of force will depend on the context. This might be the case when a targeting decision itself constitutes the constitutional authorization to resort to force; for example, the 1986 aerial raid on Tripoli, or the 1998 combined strikes on a terrorist command meeting in Afghanistan and the Al-Shifa pharmaceutical plant in Sudan. In addition, the president alone may have the authority to change a concept of operations or timeline he has previously approved, or to approve certain types of targets or the use of certain weapons. It is also clear that the president is specially situated to make the legal and policy judgments associated with the law of armed conflict. He and the Secretary of Defense are the only civilians within the military chain of command, and he

alone has the constitutional authority and duty to command U.S. forces and to uphold the law.

Intelligence. Intelligence is the oxygen of counter-terrorism. As is well understood now, but has always been the case, the national intelligence capacity is diffuse and the responsibility over its priorities and functions at times is uncertain. Certainly, the Department of Defense and the CIA comprise the central components of national intelligence. But the National Security Act accepts a bifurcation in responsibility over the day-to-day intelligence functions between the secretary of defense and the director of central intelligence, the exact split of which is not always certain. Moreover while the majority of intelligence assets, measured in terms of production, personnel and cost, reside within the Department of Defense, the majority of domestic intelligence capabilities are regulated by the Department of Justice and/or Department of Homeland Security. At the same time, Executive order 12333 recognized 14 components to the "intelligence community."⁷ In fact, there are more, if one considers that the Centers for Disease Control, USDA, or the local sheriff also may be critical conduits of actionable information.

Understanding this breadth, the coordination challenge is clear. Even if agencies consisted entirely of angels, they might differ on the best means to accomplish common goals. In reality, the only official with the necessary legal and policy authority to centrally control the entirety of America's national intelligence function is the president. Thus, the question is not whether the secretary of defense, the DCI, or the secretary of homeland

... all presidents deeply and sincerely feel a duty to protect American lives. I found this pressure palpable when observing the president I worked for and I think it is evident in the language and actions of President Bush and presidents before him. But it must be exercised in coordination with his duty to uphold the Constitution.

security should direct and control a central intelligence function, but how these officials might best advise and assist the president in fulfilling his constitutional responsibilities over intelligence, found in Article II, recognized in executive practice, identified in those few Supreme Court decisions that address intelligence, such as *Totten*⁸ (1875), *Curtiss-Wright*,⁹ and *Egan*,¹⁰ and legislated in the National Security Act. Administrations that do not fully grasp the president's central intelligence role will increase the risk of another 9/11.

With respect to covert action, the president's role is defined and certain. Resort to covert action requires the president to determine that an activity "is necessary to support identifiable foreign policy objectives of the United States and is important to the national security of the United States."¹¹ Thus, covert action is an instrument of presidential policy.

Economic and Diplomatic Instruments. Similarly, the International Emergency Economic Powers Act (IEEPA), which provides authority to freeze and seize terrorists' assets and prevent transactions with terrorist states, requires a presidential declaration of national emergency finding an "unusual and extraordinary threat to the national security, foreign policy, or economy of the United States."¹² Likewise, many of the most significant exceptions to the Foreign Assistance Act, permitting the provision of counter terrorism and other assistance notwithstanding statutory limitations that might otherwise apply to allies cooperating in the war on terrorism, are contingent on particularized presidential determinations of national security need.¹³

Presidential Reporting. The president is also responsible for a large volume of annual and episodic reports to Congress. The breadth of the president's reporting requirements is incredible, and probably not apparent to all but those few persons who review (or sign) every report. There are too many reports for sure, and this is an area where presidential process should be streamlined. But I should note as well that some reports might have useful and unanticipated function in the terrorism context. Let me give you one example.

The War Powers Resolution requires the president to submit a report to the Congress within 48 hours after introducing United States armed forces into hostilities or into situations where hostilities are imminent; into the territory, airspace, or waters of a foreign nation while equipped for combat; or in numbers that substantially enlarge U.S. armed forces equipped for combat already located in a foreign nation.¹⁴ As a matter of longstanding practice, the executive branch does not indicate under what section a report is filed. This reflects the difficulty in drawing legal lines between "imminent hostilities," "ongoing hostilities," and scenarios where forces are "equipped for combat," particularly where it is hoped that the latter will deter the former.¹⁵ As importantly, reports involving "hostilities" are inextricably linked to the 60-day clock, which is, in theory, triggered by "hostilities."¹⁶ Among other things, the resolution requires the president to report on the circumstances necessitating deployment, the legal authority for the deployment, and the estimated scope and duration of the hostilities or involvement.¹⁷

Successive administrations have submitted "war powers" reports, always preserving as a matter of record that the report is submitted "consistent" with the War Powers Resolution, but not "pursuant" to it, which in legal theory would imply acceptance of its constitutionality and binding nature. In practice, grudging and pedantic debates over whether a soldier was "equipped for combat" have given way to a general executive and bureaucratic acceptance that war powers reports are part of the national security process, and ultimately a useful method of creating a paper trail of congressional consultation for long term deployments. As a result, the executive on my watch put as much time into preparing the reports as they used to put into thinking of reasons why a report need not be submitted.

The majority of war power reports are inconsequential and ministerial. Nonetheless, the reports sometimes serve a useful purpose if executed in good faith. The reporting elements force the executive branch to consider at the outset of a deployment questions involving scope and duration, at a time when policymakers are almost exclusively focused on the predicate reasons for deployment. Further, because the report is sent under presidential signature, and not directly from one department or another, the report can serve as a useful test of purpose. Do the national security agencies agree on the characterization of the mission, its goals, and its anticipated length? Does the president agree with the bureaucracy's characterization in the draft report? In addition, the report makes the president accountable for the exercise of presidential authority. For these

same reasons the reports are often diluted to the lowest common denominator of agreement. Nonetheless, in the process, the executive may find fissures within the bureaucracy that while not ultimately reflected in a generic report, serve as the touchstone for internal consideration.

In reality, the Congress if not the public at large, will be informed of most operations in advance, or immediately after, through the process of consultation or by the press. However, in a war on terrorism, where the president has emphasized the necessity of engaging in secret and covert operations, war power reporting may take on added importance. The reports may serve as a trip wire to ensure notification to the Congress of deployments that may not warrant individual consultation in the context of an overall campaign.

Appraisal. Harold Lasswell and Myres McDougal, in their study of government process identified seven functional components to decision: intelligence, promotion, prescription, invocation, application, termination, and appraisal. So far, I have identified for you reasons why the national security president is singularly situated to perform the first four of these functions. I would like to conclude by discussing why the president is also singularly situated to perform the appraisal function in a war on terrorism. I am not expressing a value judgment. My observation is not intended to dissuade other branches of government, the public, the press, and the academy, from engaging in the appraisal function. Quite the contrary, my goal is to help those who study the presidency to determine how they might

most appropriately and effectively perform this function, aware of the factual, prudential, and legal influences that may apply. Nonetheless, the reality is that the president is specially situated to perform the appraisal function. By appraisal, I mean the considered application of constitutional structure, executive process, legal substance, and the review of decisions both before and after they occur.

Appraisal, I believe, is the least understood and defined aspect of the national security presidency. And for a presidency conditioned to crisis and command, it is the most difficult decisional function to implement. However, it may be the most important function in a war against terrorism. Appraisal tells you whether your policy is working. The benefit of such review is obvious where the margin for error is small, resources are finite, the threat is WMD, and the enemy is global. So too, events are intertwined; each decision will bear both intended and unintended consequences.

An effective process of appraisal, in my view, should also be the sine qua non for the broad and flexible grant of authority necessary to detect and respond to terrorism. However, ordinary mechanisms of appraisal are often muted in the national security, and particularly the terrorism, context. First, counter-terrorism efforts are often and necessarily secret; therefore the press and the public are not as able to perform their ordinary function of testing and validating executive action. Second, the Congress and the Judiciary apply principles of deference to national security generally, and no more so than when lives are at stake. Thus, ordinary constitutional processes of

democratic and constitutional legitimization may be less effective. Finally, in no area of policy will the pressure to “get it right” be strong as within the executive branch; in no area should it be as strong.

I am confident that all presidents deeply and sincerely feel a duty to protect American lives. I found this pressure palpable when observing the president I worked for and I think it is evident in the language and actions of President Bush and presidents before him. But it must be exercised in coordination with his duty to uphold the Constitution. This means that the president must ensure that he has a process that meaningfully appraises as well as decides. In my view, this requires role-playing; that is, the designation of officials who have as their responsibility ensuring that ongoing operations are conducted consistent with law and in a manner consistent with presidential direction. Do presidential directives work in practice? Has presidential process delayed decision, or put U.S. persons at risk? If so, is such process well founded? Do policy or legal directives, which provide for headquarters exception, nonetheless chill agency risk-taking as a matter of bureaucratic culture? Where the President has provided limited or nuanced authorization have circumstances changed?

In the case of a campaign conducted with embedded journalists reporting 24/7, the answers to these questions may be self-evident without need for inquiry. But where clandestine operations are involved, or serial conflicts outside the public eye, e.g., the Iraq No Fly Zones (1991-2003) or Somalia, such questions are more relevant.

I believe this also means that while

presidential decisions should provide for speedy and flexible response, they should also be crafted with sufficient specificity so that it is clear to the president what he is deciding and the implications of doing so, and so it is clear to those implementing the decision what they are authorized to do. Operators will almost always push for more flexibility. Presidents should be careful they do not go too far and surrender authority over the actual substance of a decision. For you cannot have effective appraisal, and accountability, if there is no discernible standard against which to measure result. Moreover, presidential decision is an essential source of democratic and constitutional legitimacy for actions taken in secret with limited external input or review.

* * *

Much about presidential decision-making properly derives from the personality and style of each president. Presidential process will also be shaped by the president’s views, and those of his senior staff, regarding the role of the president as commander in chief. It will also reflect the level of confidence a president has in his subordinates and, perhaps, his confidence in his own substantive and moral command over security. However, I believe after August 1998, that there are aspects of the national security presidency that must and will remain constant.

First, the presidency must continue to be defined and evaluated in a constitutional context. The Constitution provides a framework for opportunity that embraces national security and a process of lawful and democratic decision. Second, in light of the imminent and potentially catastrophic threat we

face, the president must daily exercise effective command over all the instruments to counter terrorism. As importantly, the president and his immediate staff must recognize that the president alone is singularly situated to perform this function. Third, the president must appraise the manner in which these instruments are used to ensure that they are employed effectively and lawfully.

Finally, with counter-terrorism the constitutional buck will indeed always stop on the president’s desk. ♦

- 1 *The Federalist* NO. 51, at 322 (James Madison) (Clinton Rossiter, ed., 1961).
- 2 50 U.S.C. § 413b(c)(1)-(3) (2000) (as amended).
- 3 A. Whitney Griswold, “The Basis of Rule of Law” in *Liberal Education and the Democratic Ideal* (Yale University Press, 1959).
- 4 CENTCOM Commander General Tommy R. Franks, Briefing on Military Operations in Iraq (March 22, 2003).
- 5 *The Federalist*, No. 8, at 67 (Alexander Hamilton) (Clinton Rossiter ed., 1961).
- 6 U.S. Constitution. art. II, § 3.
- 7 Exec. Order No. 12333, 46 Fed. Reg. 59941 (Dec. 8, 1981).
- 8 *Totten v. United States*, 92 U.S. 105 (1875).
- 9 *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304 (1936).
- 10 *Dep’t of the Navy v. Egan*, 484 U.S. 518 (1988).
- 11 50 U.S.C. § 413b(a) (2000) (as amended).
- 12 50 U.S.C. § 1701 et seq. (2000).
- 13 22 U.S.C. § 1215 et seq. (2000).
- 14 50 U.S.C. § 1543(a) (2000).
- 15 *Ibid.*
- 16 50 U.S.C. § 1544(b).
- 17 50 U.S.C. § 1543(a)(A)-(C).