

SEPARATION-OF-POWERS AND THE COMMANDER IN
CHIEF: CONGRESS'S AUTHORITY TO OVERRIDE
PRESIDENTIAL DECISIONS IN CRISIS SITUATIONS

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These cryptic words have given rise to some of the most persistent controversies in our constitutional history.¹

INTRODUCTION: THE INDEPENDENT PRESIDENT

Throughout United States history, presidents have consistently argued that they have strong inherent war powers. In this sense, the position taken by the Bush administration is hardly noteworthy.² It is true that the Bush administration is arguing that the commander-in-chief power gives the President some inherent authority to act in the domestic sphere, which has not been raised in a serious manner since World War II. However, this is still not a new position in terms of the constitutional history of the United States. What is unique to the Bush administration is a consistent argument that the inherent and extensive war powers of the President may not be infringed upon by Congress. While this implication might have been the logical result of past presidential arguments for an expansive commander-in-chief power, never before has it been straightforwardly pursued as a theory. Past presidents have realized that there was little danger to Congress overriding their decisions, and they did not want to raise such a controversial position because it would make it difficult for courts to uphold independent presidential action. For example, it is likely that the reason the Supreme Court in *Dames & Moore v. Regan*³ went to such great lengths to find tacit congressional support for the Iran hostage agreement was precisely because

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¹ *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 641 (1952) (Jackson, J., concurring) (commenting on the commander-in-chief power).

² See HAROLD HONGJU KOH, *THE NATIONAL SECURITY CONSTITUTION: SHARING POWER AFTER THE IRAN-CONTRA AFFAIR* 38 (1990) (arguing that there is a long history of President's attempting to expand their war powers).

³ 453 U.S. 654 (1981).

the Justices did not want to probe the limits of inherent presidential power and raise the specter of congressional exclusion.⁴ Despite the conceivable tactical disadvantages of asserting such a position, the executive branch contended in *Padilla v. Rumsfeld*⁵ that the power to detain enemy noncombatants is exclusive and cannot be infringed upon by congressional statute.⁶ The district court noted that “if the President's Commander-in-Chief powers were plenary, in the context of a domestic seizure of an American citizen, the government's argument that the legislature could not constitutionally prohibit the President from detaining citizens would have some force.”⁷ This was not an isolated tactical decision, as the Bush administration has raised this argument in other cases related to the war on terror and other contexts.⁸

In its June 2004 decisions, the Supreme Court refused to address the issue of whether the President has inherent constitutional authority to detain enemy combatants.⁹ Furthermore, the Court did not discuss the government's argument that Congress may not interfere with the President's exercise of his commander-in-chief powers.¹⁰ By failing to delineate more precisely the relationship between the branches in this area, the Supreme Court has created a situation in which the executive branch can plausibly continue to maintain that it has inherent and exclusive authority to combat terrorism that cannot be infringed upon by Congress. This Article argues that there is a danger to the political process in the argument that Congress has no power to contravene presidential policies made pursuant to the commander-in-chief power.

When there is some distance from a crisis, as there is currently, Congress can use informal controls to ensure that it is part of the decision making on terrorism issues regardless of the division of constitutional powers. Congress can assert itself by threatening to vote down legislation important to the President, by holding hearings to politically pressure the President, or

⁴ See Allan Ides, *Congressional Authority to Regulate the Use of Nuclear Weapons*, in *FIRST USE OF NUCLEAR WEAPONS: UNDER THE CONSTITUTION WHO DECIDES?* 73 (Peter Raven-Hansen ed., 1987) (explaining that the Supreme Court engaged in a drawn-out exercise of statutory construction to find congressional support for presidential action in *Dames & Moore*).

⁵ 352 F.3d 695 (2d Cir. 2003).

⁶ See Samuel Issacharoff & Richard H. Pildes, *Between Civil Libertarianism and Executive Unilateralism: An Institutional Process Approach to Rights During Wartime*, 5 *THEORETICAL INQUIRIES L.* 1, 32 (2004) (“[T]he government argued that Congress could not constitutionally legislate to deny the President this power.”).

⁷ *Padilla*, 352 F.3d 695, 721 n.29.

⁸ See discussion *infra* Part III.

⁹ *Hamdi v. Rumsfeld*, 124 S. Ct. 2633, 2639 (2004) (“We do not reach the question whether Article II provides [authority to detain enemy combatants], however, because we agree . . . that Congress has in fact authorized Hamdi's detention . . .”).

¹⁰ Neither *Hamdi* nor *Padilla* discussed this issue.

even by invoking its impeachment power. The greater danger is that the Bush administration may create a precedent that would allow a President to act independently of Congress in the immediate aftermath of a crisis. Consequently, this Article argues that Congress's war powers are sufficiently robust that it can countermand presidential decisions justified under a broad interpretation of the commander-in-chief power.

Part I explains the historical danger represented by national crises, and the role that isolated decision making has played in past mistakes. Part II details the level of support within the current administration for exclusive presidential War Powers, and how this view has been reflected in legal arguments made by the government. Part III introduces the concept of separation-of-powers formalism and explain how it underlies the administration's position. This section also relates how Congress has traditionally been able to ensure it has a role in war related decisions by virtue of its appropriations powers, and why this would not be possible in these circumstances. Parts IV and V detail the problems with the Bush administration's position. After considering arguments for why either Congress or the President could prevail under a functionalist balancing test, this section ultimately concludes that Congress has a stronger constitutional interest. Lastly, the final section concludes it is imprudent and unnecessary for the executive branch to raise this argument about excluding Congress from important decisions related to the proclaimed fighting against terrorism.

I. THE DANGERS OF ISOLATED DECISION MAKING

The American experience of balancing liberty and national security during crises has been riddled with mistakes—decisions that seemed to be legitimate at the time have come to be regarded as regrettable errors in judgment. Each example exhibits a similar pattern of policy makers restricting civil liberties as part of an overreaction to a perceived threat during a crisis, and of a later public recognition, after the crisis has abated, that these restrictions were unnecessary. Justice William Brennan captured the episodic nature of this response when he wrote the following:

For as adamant as my country has been about civil liberties during peacetime, it has a long history of failing to preserve civil liberties when it perceived its national security threatened. This series of failures is particularly frustrating in that it appears to result not from informed and rational decisions that protecting civil liberties would expose the United States to unacceptable security risks, but rather from the episodic nature of our security crises. After each perceived security crisis ended, the United States has remorsefully realized that the abroga-

tion of civil liberties was unnecessary. But it has proven unable to prevent itself from repeating the error when the next crisis came along.¹¹

As illustrations for this theory Brennan pointed to examples such as the Alien and Sedition Act of 1798, Lincoln's suspension of habeas corpus during the Civil War, the Espionage Act of 1917, and the internment of Japanese Americans during World War II.¹² The consistency of this failing over different historical periods and in response to varying types of crises is disturbing, particularly given that some scholars argue that the response to the terrorist attack of 9-11 evidences similarities to past overreactions.¹³ Furthermore, even if the government is properly striking a balance between civil liberties concerns and antiterrorist measures, this episodic history leads to sharply pessimistic predictions about what future reactions to domestic terrorism might look like. The nature of terrorism is such that it is intended to create a climate of fear and insecurity, the seemingly perfect ingredients for an overreaction.

Certain institutional patterns emerge from looking at the history of American reactions to security crises. One of the most evident features has been that decision makers in the quest for haste have acted to curtail civil liberties on the basis of less than compelling evidence. For example, in March 1942 during World War II, Congress, with relatively little debate, voted to ratify President Roosevelt's executive order that empowered the military to intern Japanese Americans on the basis of War Department evidence that there was a significant danger from insurgents.¹⁴ However, it turned out this "evidence" did not in fact exist, and the War Department's assessment of the danger was largely based on a report by the openly racist General John L. DeWitt.¹⁵ This example is fairly typical, given that an ex-

¹¹ William J. Brennan, Jr., *The Quest to Develop a Jurisprudence of Civil Liberties in Times of Security Crises*, 18 ISR. Y.B. HUM. RTS. 11 (1988), available at http://www.brennancenter.org/resources/downloads/nation_security_brennan.pdf; see also 149 CONG. REC. S13,904-06 (daily ed. Nov. 4, 2003) (speech of Professor Geoffrey Stone) (explaining the cyclical nature of the American response to security crises); Neal Devins, *Congress, Civil Liberties, and The War on Terrorism*, 11 WM. & MARY BILL RTS. J. 1139, 1141-43 (2003).

¹² Brennan, *supra* note 11, at 4-7.

¹³ See, e.g., Timothy Lynch, *Breaking the Vicious Cycle: Preserving Our Liberties While Fighting Terrorism*, CATO POLICY ANALYSIS NO. 443 (June 26, 2002), available at <http://www.cato.org/pubs/pas/pa443.pdf> (last visited April 5, 2005) (arguing that the current crackdown on terrorism exhibits strong characteristics of past overreactions to security threats); Kenneth Roth, *The Law of War in the War on Terror*, FOREIGN AFFAIRS (Jan/Feb 2004), available at <http://www.foreignaffairs.org/20040101facomment83101-p0/kenneth-roth/the-law-of-war-in-the-war-on-terror.html> (last visited April 5, 2005) (noting the dangers of the current approach to civil liberties in light of historical precedents).

¹⁴ See Devins, *supra* note 11, at 1142.

¹⁵ See Mark Tushnet, *Defending Korematsu?: Reflections on Civil Liberties in Wartime*, 2003

amination of similar situations reveals that “at the time the policies were chosen, at least some of the relevant decision-makers knew, and more should have known, that the policies they were adopting were either responses to exaggerated threats or likely to be ineffective in countering the real threats.”¹⁶

This pattern makes more sense if viewed from the perspective of the decision maker.¹⁷ In the early stages of a crisis there is a need to act with haste. As such, individuals have to make decisions on the basis of limited information. Under such difficult conditions mistakes are understandably made, and it is reasonable that policy makers would err on the side of restricting liberty.¹⁸ However, this practical reality does not fully account for the types of decisions that have been made in the face of security threats, or for the number of injustices that have been perpetrated in the pursuit of swift action.

A significant reason why there have historically been such difficulties in balancing interests in liberty and security has to do with the institutions that have made these calculations. History demonstrates that isolated decision makers “are more likely to succumb to the perils of groupthink, self-delusion, and hubris.”¹⁹ This finding is consistent with the psychological evidence, which tends to demonstrate that individuals who do not have to publicly defend the bases for their decisions tend to use inconsistent logic and be overly motivated by emotion.²⁰ This tendency accounts for the fact that General DeWitt, as a front-line decision maker, may have felt that he

WIS. L. REV. 273, 288 (2003) (noting that the War Department findings were based on the recommendations of General DeWitt, who was a racist).

¹⁶ *Id.* Interestingly, a similar pattern of information failure whereby decision makers acted on information known by other members of the government to be either factually wrong or inaccurate in emphasis was found to be evident in US intelligence efforts leading up to 9-11. This is indicative of the general risk of groupthink. See STAFF OF THE SENATE SELECT COMM. ON INTELLIGENCE AND THE HOME PERMANENT SELECT COMM. ON INTELLIGENCE, 107TH CONG., FINDINGS OF THE FINAL REPORT ON THE JOINT INQUIRY INTO THE TERRORIST ATTACKS OF SEPTEMBER 11, 2001, 2 (Comm. Print 2002), available at <http://intelligence.senate.gov/findings.pdf> (last visited April 5, 2005) (“Although relevant information that is significant in retrospect regarding the attacks was available to the Intelligence Community prior to September 11, 2001, the Community too often failed to focus on that information and consider and appreciate its collective significance in terms of a probable terrorist attack.”).

¹⁷ See Tushnet, *supra* note 15, at 290-91.

¹⁸ See Richard A. Posner, *The Truth About Our Liberties*, 12 RESPONSIVE COMMUNITY 3, 5 (Summer 2002) (arguing that policy makers should evaluate security concerns more heavily in the face of terrorist threats).

¹⁹ Jack M. Balkin, *The Truth About Our Institutions*, 12 RESPONSIVE COMMUNITY 89, 92 (Fall 2002).

²⁰ See Jennifer S. Lerner & Philip E. Tetlock, *Accounting for the Effects of Accountability*, 2 PSYCHOL. BULL. 255 (1999) (reviewing the psychological literature on lack of accountability).

knew better than his superiors what the true risks were and manipulated evidence to ensure that they made what he believed to be an accurate assessment.²¹

It is also significant that mistakes in balancing civil liberties versus security have generally been made by the executive branch. The Framers of the Constitution were well aware that the executive branch possesses incentives that differ from the other branches with respect to war. James Madison noted the following in a famous passage:

War is in fact the true nurse of executive aggrandizement. In war a physical force is to be created, and it is the executive will which is to direct it. In war the public treasures are to be unlocked, and it is the executive hand which is to dispense them. In war the honors and emoluments of office are to be multiplied; and it is the executive patronage under which they are to be enjoyed. It is in war, finally, that laurels are to be gathered, and it is the executive brow they are to encircle. The strongest passions, and most dangerous weaknesses of the human breast; ambition, avarice, vanity, the honorable or venial love of fame, are all in conspiracy against the desire and duty of peace.²²

Madison was primarily concerned with the President's temptation to engage in wars, but there is a similar dynamic with respect to other decisions in the warfare context. One reason why the public looks to the President in times of crisis is its need for reassurance, and such strength is best demonstrated by actions that stress security at the expense of liberty.²³ For example, the internment of Japanese Americans was a symbol of action that in the immediate aftermath of the attack on Pearl Harbor might have been justified regardless of its usefulness. This is not to say that such a calculation necessarily is a direct aspect of presidential decision making, but there is almost certainly an effect from the fact that the President's popularity is generally maximized by emphasizing security at the expense of liberty during wartime. The fame that Madison referred to also creates an accompanying sense of urgency to win swift decisive victories. Consequently, the President may feel pressured to make sacrifices of civil liberties to further the war effort, even in the absence of compelling evidence for such actions.

These errors in judgment would not be so damaging if they were short-term, but there is an institutionalization process by which temporary

²¹ See Tushnet, *supra* note 15, at 290; Balkin, *supra* note 19, at 92 (“[L]ike all those who wield power on behalf of others, [government officials] have natural incentives to abuse their authority if there are not sufficient checks and monitoring devices.”).

²² JAMES MADISON, *Helvidius Number 4*, in 15 THE PAPERS OF JAMES MADISON 106, 108 (Robert Rutland et al. eds., Virginia University Press 1985); see also William Michael Treanor, *Fame, The Founding, and the Power to Declare War*, 82 CORNELL L. REV. 695 (1997) (detailing the framers' appreciation of the dangers represented by the pursuit of glory).

²³ See Jay Winik, *The Presidency in Wartime*, 12 RESPONSIVE COMMUNITY 53, 57-58 (Spring 2002) (explaining that the public expects decisive action from the president in times of crisis).

sacrifices of civil liberties become cemented into national policy. In the initial stages of a crisis, there is a general willingness to defer to those who possess greater information. This has generally meant that the executive branch has claimed informational hegemony, and the other branches have been reluctant to question its determinations, even when they have had serious doubts.²⁴ Once this occurs a public position will have been taken with regard to the policy in question, and the different stakeholders will be reluctant to reverse their positions.²⁵

This does not mean that Congress is never willing to contradict itself on earlier policy proclamations, but it does mean that there is an institutional inertia that must be overcome. Congress has not always proven capable of exercising such will, and this represents one of the dangers of arguing that it is not allowed to infringe on the President's commander-in-chief power.²⁶ An argument for exclusive presidential authority in responding to a crisis could have the effect of chilling congressional action. Not only would such an argument raise the level of consensus and energy necessary for Congress to assume its designed role as a check on the President, but it would provide an altogether too easy excuse for inaction.

It is also true that Congress is not immune from making mistakes in its foreign policy determinations. There is a critique of congressional involvement in foreign policy decision making that challenges the institutional competency of Congress. Scholars embracing this view generally argue that Congress acts too slowly, is prone to lapses in secrecy, and is overly sus-

²⁴ See *Woods v. Cloyd W. Miller Co.*, 333 U.S. 138, 146 (1948) (Jackson, J., concurring) (“[The war power] usually is invoked in haste and excitement when calm legislative consideration of constitutional limitation is difficult. It is executed in a time of patriotic fervor that makes moderation unpopular. And, worst of all, it is interpreted by judges under the influence of the same passions and pressures.”); Brennan, *supra* note 11, at 2 (“The inexperience of decisionmakers in dealing with wartime security claims makes them reluctant to question the factual bases underlying asserted security threats.”). Richard Pildes and Samuel Issacharoff argue that judges have gradually adopted an institutional process approach centered on bilateral cooperation which allows them to resist this temptation. See Issacharoff & Pildes, *supra* note 6, at 1. However, this view is disputed by a number of scholars who argue that courts routinely defer to the Executive Branch in the post-Vietnam era. See Devins *supra* note 11, at 1152-53 (“[A]s long as the ‘country still seems emotionally engaged in this war’ . . . there is little reason to think that the Court will depart from its normal practice of deferring to executive branch claims of military necessity.”); see Louis Fisher, *The Law: Litigating the War Power with Campbell v. Clinton*, 30 PRESIDENTIAL STUD. Q. 564 (Sept. 2000) (arguing in the post-Vietnam era the judiciary has been largely deferential to the President on military matters); KOH, *supra* note 2, at 72 (“Particularly since the Vietnam War, the federal courts, through both action and inaction, have adopted an increasingly deferential attitude toward presidential conduct in foreign affairs.”).

²⁵ See Lerner & Tetlock, *supra* note 20, at 257 (“[A]fter people have irrevocably committed themselves to a decision, learning of the need to justify their actions will motivate cognitive effort—but this effort will be directed toward self-justification rather than self-criticism.”).

²⁶ See Devins, *supra* note 11, at 1149 (arguing that Congress is a poor check on the Executive because of its reluctance to act).

ceptible to changes in public opinion.²⁷ Notwithstanding the accuracy of these positions, there is still reason to believe that Congress should have some role in the process. Congress is a broad-based representative body with the power to unite the nation in a way that action by the President alone cannot. Arguably from a political philosophy perspective, Congress is the only body that has the jurisdiction to commit the nation to morally troubling action, especially if it involves strong domestic repercussions. But perhaps the most compelling response to this critique of Congress, particularly given the history of the United States in times of crisis, is the one provided by John Hart Ely. Quoting from Alexander Bickel, Ely notes, “[s]ingly, either the President or Congress can fall into bad errors . . . So they can together too, but that is somewhat less likely, and in any event, together they are all we’ve got.”²⁸

II. A COMMITMENT TO UNILATERAL DECISION MAKING

There are past examples of presidents claiming that Congress cannot infringe upon their exclusive war powers. However, in most of these instances, the claim was an isolated one, not directly linked to overall policy or the rhetoric defending the President’s authority to initiate hostilities. For example, Clinton’s Undersecretary of State, Thomas Pickering, publicly remarked that Congress had no authority to interfere with the President’s decision to employ force in Kosovo.²⁹ However, this was not a line of reasoning that the Clinton administration pursued in any serious manner. Another example is found during the Franklin Roosevelt’s presidency in the oral arguments to *Ex Parte Quirin*. Attorney General Francis Biddle stated that Congress could not interfere with an exercise of the commander-in-chief power; however, Chief Justice Stone immediately cut him off saying that no decision would need to be made on that issue. Biddle was said to

²⁷ See, e.g., Robert F. Turner, *The War Powers Resolution: An Unnecessary, Unconstitutional Source of "Friendly Fire" in the War Against International Terrorism?*, available at <http://www.fed-soc.org/Publications/Terrorism/warpowers.htm> (2003); John Norton Moore, *Do We Have an Imperial Congress?*, 43 U. MIAMI L. REV. 139 (1988).

²⁸ JOHN HART ELY, *WAR AND RESPONSIBILITY: CONSTITUTIONAL LESSONS OF VIETNAM AND ITS AFTERMATH* 9 (1993) (quoting *Hearings on War Powers, Libya, and State-Sponsored Terrorism Before the Subcomm. on Arms Control, International Security and Science of the House Comm. on Foreign Affairs*, 99th Cong. (1986) (statement of J. Brian Atwood, Director, National Democratic Institute) (quoted by J. Brian Atwood)).

²⁹ See RYAN C. HENDRICKSON, *THE CLINTON WARS: THE CONSTITUTION, CONGRESS, AND WAR POWERS* 163 (2002).

quickly give ground on this point, and the government never formally made the argument.³⁰

There is a marked difference in how the Bush administration has promulgated its position that the President's authority to combat terrorism is exclusive and cannot be infringed upon by Congress. The administration has consistently maintained, in court cases related to the detainment of enemy combatants, that the President cannot be bound by statute in this area. As explained earlier, this contention was a prominent part of the government's stance in *Padilla* at the district court level.³¹ While the government's briefs to the Supreme Court do not as heavily emphasize the point, they show a continued adherence to the basic proposition that the commander-in-chief power is exclusive of any congressional controls.³² Furthermore, the government argued in *Hamdi* that Congress could not constitutionally extend the jurisdiction of Article III courts to allow habeas corpus petitions by detainees because such a law would unconstitutionally interfere with the President's exclusive sphere of authority.³³ This argument was extraneous to the major issues of the case, and the fact it was made demonstrates the Bush administration's commitment to this position.

The Bush administration has also attempted to carve out a similar argument in the context of executive privilege. In *Cheney v. United States District Court* the government contended that reading a statute to compel public disclosures by the executive branch would be an "unconstitutional interference with the President's authority under the Recommendations and Opinions Clauses."³⁴ This position was not based on any type of balancing

³⁰ See LOUIS FISHER, NAZI SABOTEURS ON TRIAL: A MILITARY TRIBUNAL AND AMERICAN LAW 106 (2003).

³¹ See *supra* notes 5-8 and accompanying text.

³² See Brief for the Petitioner at 48, *Rumsfeld v. Padilla*, 124 S. Ct. 2711 (2004) (No. 03-1027) ("The court of appeals' construction would raise serious constitutional questions concerning whether Congress can constrain the basic power of the Commander in Chief to seize and detain enemy combatants in wartime."), at http://www.jenner.com/files/tbl_s69NewsDocumentOrder/FileUpload500/192/Padilla_BriefForThePetitioner.pdf (last visited April 5, 2005).

The government also took a strong position with regard to the President's power relative to the judiciary by arguing that broad discretion should be granted to the President to determine the extent of his own authority as Commander in Chief. "When Congress grants the President broad discretionary authority in that fashion, particularly in an area in which the President possesses independent constitutional powers, the courts can set aside the President's exercise of his authority as beyond the discretion conferred by Congress only in exceptionally narrow situations, if at all." *Id.* at 43.

³³ See Brief for Respondents at 57, 124 S. Ct. 1494 (No. 03-334), available at http://www.jenner.com/files/tbl_s69NewsDocumentOrder/FileUpload500/170/respondent_brief.pdf (last visited April 5, 2005) ("To be sure, the Constitution would limit the ability of Congress to extend federal court jurisdiction into areas that interfered with the core executive responsibilities.")

³⁴ See Brief for Petitioner, 124 S. Ct. 1494 (No. 03-334), available at http://www.jenner.com/files/tbl_s69NewsDocumentOrder/FileUpload500/192/Padilla_BriefForThePetitioner.pdf

test, but instead on the history of the Recommendations and Opinions Clauses, and judicial opinions concerning them. In effect, the government claimed that there are clear lines of authority between the branches, and those boundaries are not to be crossed. This same idea underlies the Bush administration's argument in *Hamdi* and *Padilla*, which were being argued before the Supreme Court at the same time. Together, the three cases demonstrate a consistent argument, one that is more serious and more developed than any previous presidential initiative in this area.

While these public declarations are what risk creating a precedent for excluding Congress from important decisions in the fight against terrorism, they do not tell the whole story of the Bush administration's devotion to a unilateral decision making process. Administration insiders admit that from the very beginning of the transition period there was a collective sense that the Clinton administration had ceded substantial amounts of the office's authority to Congress, particularly in the conduct of foreign affairs.³⁵ President Bush was said to share this opinion, and desired making the reclamation of the power of the office a legacy of his presidency.³⁶ This general understanding was manifested in a number of internal memoranda related to the separation of powers. For example, an August 1, 2002 memorandum prepared for Presidential Counsel Alberto Gonzales concludes: "any effort by Congress to regulate the interrogation of battlefield combatants would violate the Constitution's sole vesting of the Commander-in-Chief authority in the President."³⁷ The memorandum cites a number of late 2001 opinions as providing detailed arguments as to why Congress cannot interfere with the President's commander-in-chief power. While these memoranda have never been released (officially or unofficially), the August 2002 memorandum suggests that there was a great deal of legal thought devoted to the question of how far the President's commander-in-chief power extends, and what this means for his authority relative to Congress.³⁸ Additionally, the

ioner.pdf (last visited April 5, 2005).

³⁵ White House Chief of Staff Andy Card and former deputy assistant Attorney General John Yoo both took this position in interviews. See Alexis Simendinger, *President pulls the levers of power and privilege*, Govexec.com, April 16, 2004, at <http://www.govexec.com/dailyfed/0404/041604nj1.htm> (last visited April 5, 2005).

³⁶ See *Andy Card on Power and Privilege*, NATIONAL JOURNAL, Apr. 28, 2004, available at <http://nationaljournal.com/members/news/2004/04/0428insider.htm> (last visited April 5, 2005) ("In my conversations with the president, he thought it was very important that the institution of the presidency be respected during his presidency as a legacy to future presidents.").

³⁷ See Department of Justice, Memorandum for Alberto Gonzales, Counsel to the President (Aug. 1, 2002), available at <http://www.gwu.edu/~nsarchiv/NSAEBB/NSAEBB127/02.08.01.pdf> (last visited April 5, 2005) (regarding the definition of torture).

³⁸ See *id.* ("In a series of opinions examining various legal questions arising out of September 11,

New York Times reports it possesses a March 2003 memorandum prepared for Defense Secretary Donald Rumsfeld that maintains the President is not bound by treaties or statutes prohibiting the use of torture since they cannot legitimately restrict his authority as Commander in Chief.³⁹

While these internal memoranda provide only a limited perspective on the Bush administration's views regarding the commander-in-chief power, they do evidence a commitment to establishing an independent sphere of presidential authority. Consequently, there is a likelihood that if a triggering event occurred in President Bush's second term the administration would assert strong unilateral powers in response. Additionally, these memoranda show how such an argument for exclusive powers can be made, and are demonstrative of the danger that future administrations may take a similar position.

III. SEPARATION-OF-POWERS FORMALISM AND THE CASE FOR EXCLUSIVE PRESIDENTIAL AUTHORITY

A. *Overcoming Congress's Power of the Purse*

The argument for excluding Congress from the war on terror is based on the division of war powers between the executive and legislative branches, particularly the unique constitutional situs of the commander-in-chief power. By basing the authority to proceed against terrorism on a constitutional power allocated solely to the President, namely the commander-in-chief power, the Bush administration is arguing that it has sufficient power to act absent any congressional authorization. In terms of Justice Jackson's tripartite structure, this means that even at its lowest ebb the President has adequate constitutional power in which to ground his policies. That the President has authority to act on his own does not necessarily have to imply that Congress lacks the power to countermand the President's decision. Underlying this argument is a certain mode of constitutional analysis, namely separation-of-powers formalism.

Formalism, in the separation-of-powers context, is based on the premise that the Constitution sought to clearly divide all governmental powers

we have explained the scope of the President's Commander-in-Chief Power.").

³⁹ See Neil A. Lewis & Eric Schmitt, *Lawyers Decided Bans on Torture Didn't Bind Bush*, N.Y. TIMES, June 8, 2004, available at <http://www.nytimes.com/2004/06/08/politics/08ABUS.html> (last visited April 5, 2005).

between the three branches. The task for courts in separation-of-power disputes is thus one of categorization, to decide where a given power was meant to be allocated.⁴⁰ The Bush administration believes that the power to detain enemy combatants is part of the commander-in-chief power. Thus, by definition it cannot be infringed upon by Congress. Under formalism this ends the inquiry, and there is no need to balance the competing constitutional interests of other branches, given that “where a power has been committed to a particular branch of the Government in the text of the Constitution, the balance already has been struck by the Constitution itself.”⁴¹ While the President would still need to justify why the power to detain emanates from the Commander-in-Chief Clause, the desirability of the formalist framework for the President’s exclusionary position is fairly evident.

The Bush administration’s argument for excluding Congress cannot be understood separately from an appreciation of the academic respect accorded to Congress’s power of the purse. Modern wars have normally been fought as undeclared wars, which hampers Congress’s ability to control the initiation of hostile conflict. However, Congress is able to exercise control over the duration and intensity of the engagement through spending decisions. There is a general academic consensus that Congress can countermand an executive decision to commit troops abroad through spending restrictions.⁴² Even advocates of strong presidential power, like John Yoo, acknowledge that Congress’s power of the purse can be exercised to end a conflict. On this point, Yoo has written:

Congress needs no check on the President through the Declare War Clause because it already possesses all the power it needs. Congress at any time may use its power of the purse to counter presidential warmaking. Indeed, all Congress need do is nothing; by refusing actively to authorize the existence of armed forces or appropriate additional money to fund wars, Congress can prevent the nation from conducting any effective hostilities.⁴³

⁴⁰ See Matthew James Tanelian, Note, *Separation of Powers and the Supreme Court: One Doctrine, Two Visions*, 8 ADMIN. L.J. AM. U. 961, 1005 (1995) (explaining Separation of Powers formalism as a doctrine).

⁴¹ *Public Citizen v. Department of Justice*, 491 U.S. 440, 487 (1989) (Kennedy, J., concurring).

⁴² On the subject of Congress’s ability to end the commitment of troops abroad through the power of the purse, see generally Colonel Richard D. Rosen, *Funding ‘Non-Traditional’ Military Operations: The Alluring Myth of a Presidential Power of the Purse*, 155 MIL. L. REV. 1 (1998); Peter Raven-Hansen & William C. Banks, *Pulling the Purse Strings of the Commander in Chief*, 80 VA. L. REV. 833 (1994); Louis Fisher, *How Tightly Can Congress Draw the Purse Strings?*, 83 AM. J. INT’L L. 758 (1989).

⁴³ John C. Yoo, *War and the Constitutional Text*, 69 U. CHI. L. REV. 1639, 1674 (2002). See also John C. Yoo, *The Continuation of Politics by Other Means: The Original Understanding of War Powers*, 84 CAL. L. REV. 167 (1996) [hereinafter Yoo, *The Continuation of Politics by Other Means*].

Consequently, the spending power has become Congress's primary tool in influencing military and, to a large degree, foreign policy decisions. It also means that any argument for exclusive presidential authority must be able to respond to the issue of spending restrictions.

While Congress's power to regulate the decision to commit troops abroad is well respected, the same is not true of Congress's ability to control the conduct of a war. While certainly Congress is able to exercise some control on the conduct of a war by virtue of what level of funds it chooses to allocate, it is unclear what authority, if any, the spending power gives Congress in making more specific conduct of war decisions. As will be discussed below in great detail, the Framers conceived of tactical control of a war as distinct from the decision of whether to go to war.⁴⁴ Precedents of Congress ending military engagements through its spending power thus do not necessarily equate to justifications that Congress can use appropriations to dictate all aspects of a war. Furthermore, some scholars have argued that appropriations are an all-or-nothing grant: Congress can decide what to fund, but it cannot use funding as an excuse to dictate how items bought with those funds are utilized. They contend that although Congress provides the money for a tank, it shouldn't necessarily decide where that tank should be located.⁴⁵ There is also a case to be made, based on *United States v. Lovett*,⁴⁶ that appropriations are not a plenary power and Congress may not achieve through spending that which it cannot through its normal powers.⁴⁷ The other complicating factor is that disputes between the branches on how to fight wars have come up very infrequently, meaning that the role of appropriations in this area is largely indeterminate.⁴⁸

Consequently, if a President can justify a decision as being related to the conduct of a war, there is some reason to believe that Congress cannot interfere with that judgment, even through appropriations. For example, while John Yoo clearly respects Congress's authority on the basis of the power of the purse, he takes a very different position with regard to Con-

⁴⁴ See discussion *infra* Parts III.B, IV.A.

⁴⁵ See Symposium, *The Appropriations Power and the Necessary and Proper Clause*, 68 WASH U. L.Q. 623, 628-29 (1990) (William Barr) ("[The] appropriations power cannot be used to circumvent or intrude on the President's inherent authority.").

⁴⁶ 328 U.S. 303 (1946).

⁴⁷ See KOH, *supra* note 2, at 129-30. (explaining that *Lovett*, and subsequent decisions, have made it unclear how far Congress can go in controlling the President through purse-string limitations); WILLIAMS C. BANKS AND PETER RAVEN-HANSEN, NATIONAL SECURITY LAW AND THE POWER OF THE PURSE 144 (1994) (explaining that *Lovett* is the basis for the argument that the appropriations power is not plenary).

⁴⁸ See LOUIS HENKIN, FOREIGN AFFAIRS AND THE US CONSTITUTION 103 (1996) (noting the infrequency of branch disputes over how to fight wars); ELY, *supra* note 28, at 25-26. (explaining that Congress has never attempted to use its spending power to control the presidential conduct of an authorized war).

gress's ability to restrict presidential decisions taken in furtherance of the current war on terror. In a 2002 article, Yoo argued that the September 11 attacks are a formal act of war to which the President is empowered to respond as Commander in Chief.⁴⁹ He unequivocally argues:

[Congress cannot] place any limits on the President's determination as to any . . . terrorist threat, the amount of military force to be used in response, or the method, timing, and nature of the response. Those decisions, under our Constitution, are for the President alone to make.⁵⁰

The plausibility of this argument—that Congress cannot use its spending power to control the conduct of a war—is one of the reasons why the Bush administration position is so problematic. The traditional academic debate has centered on whether the President has the unilateral authority to commit troops abroad. This always took on less meaning because Congress could use purse-string restrictions if it possessed the political will. A spending bill passed for the sole purpose of controlling the management of the war on terror would always be constitutionally questionable, sapping the will of Congress to confront the President and leaving open the possibility that it could just be ignored.⁵¹

⁴⁹ The Administration has generally characterized the September 11th attack as an act of war, which the President as Commander in Chief is both obligated and empowered to counter. *See* Roth, *supra* note 13 (arguing that the Bush Administration has purposefully cast the fight against terrorism as a “war”).

The argument that the nation is in a state of war, and the corresponding power to prosecute that war, also serves as the basis for the Administration's authority to detain enemy combatants. In an important February 2004 speech meant to stake out the Administration's position with respect to the Guantanamo detainees, Alberto Gonzales, the President's Counsel, contended that:

Certain propositions are, in my view, clear. First, the brutal attacks of September 11th, which killed nearly three thousand people from more than ninety countries, were not only crimes but acts of war. Since at least that day, the United States has been at war with al Qaeda While different in some respects from traditional conflicts with nation states, our conflict with al Qaeda is clearly a war.

See Alberto Gonzales, Remarks to the ABA Standing Committee on Law & National Security (Feb. 24, 2004), at http://www.abanet.org/natsecurity/judge_gonzales.pdf (last visited April 5, 2005).

⁵⁰ Robert J. Delahunty & John C. Yoo, *The President's Constitutional Authority to Conduct Military Operations Against Terrorist Organizations and the Nations That Harbor or Support them*, 25 HARV. J.L. & PUB. POL'Y 487, 517 (2002).

⁵¹ *See* Jacques B. LeBouef, *Limitations on the Use of Appropriations Riders to Effectuate Substantive Policy Changes*, 19 HAST CONST. L.Q. 458, 489-91 (1992) (Explaining different scenarios whereby the President could plausibly question the constitutionality of an appropriations bill and ignore it). For example, the Reagan Administration consistently maintained that congressional restrictions on funding the Contras in Nicaragua, the Boland Amendments, were unconstitutional. That administration's circumvention of the Boland Amendments is also indicative of the danger that spending restrictions in the war on terror could be disregarded. *See* KOH, *supra* note 2, at 127-30.

B. *Historical Support for an Exclusive Commander-in-Chief Power*

The case for formalism in the war powers context cannot be easily predicated on past judicial treatment of the issue. There is only one judicial opinion that openly contends that Congress cannot infringe on the President's commander-in-chief power, Chief Justice Chase's dissenting opinion in the 1866 case *Ex Parte Milligan*.⁵² Chase only devotes a couple of sentences to the matter, and provides little analysis in support of the conclusion.⁵³ Furthermore, it is a single decision, quite old, and has not proven argumentatively persuasive in the ensuing years. The more compelling support for formalism comes from the historical evidence that the Framers intended the commander-in-chief power to be an exclusive grant of authority to the President. This historical evidence is so widely accepted that arguably "there is a broad scholarly consensus that Congress may not interfere with the President's day-to-day command of an authorized war, or defense against sudden attack."⁵⁴

Since there was very little debate in the constitutional Convention on the war powers clauses, it is difficult to fully understand the Framers' intent.⁵⁵ It is still possible to reach conclusions regarding the allocation of war powers, but scholarship in this area has had to interpret from the structure of the clauses. For this reason, the Articles of Confederation, as the antecede-

⁵² *Ex Parte Milligan*, 71 U.S. 2, 132-42 (1866). Wormuth and Firmage argue that this is the only judicial opinion which contains dictum concerning whether Congress can restrict the Commander in Chief. See FRANCIS D. WORMUTH AND EDWIN B. FIRMAGE, *TO CHAIN THE DOG OF WAR: THE WAR POWER OF CONGRESS IN HISTORY AND LAW* 112 (1986). However, Robert Turner points to an 1897 decision of the US Court of Claims on this point. See ROBERT F. TURNER, *THE WAR POWERS RESOLUTION: ITS IMPLEMENTATION IN THEORY AND PRACTICE* 27 (1983). However, this opinion suffers from the same defects as that of Chase, and does not provide a more compelling precedent.

⁵³ The relevant section of the Chase opinion says 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 carrying on war. This power necessarily extends to all legislation essential to the prosecution of war with vigor and success, except such as interferes with the command of the forces and the conduct of campaigns. That power and duty belong to the President as commander-in-chief.

Milligan, 71 U.S. at 139 (Chase, J., dissenting).

⁵⁴ BANKS & RAVEN-HANSEN, *supra* note 42, at 150. See also WILLIAM HOWARD TAFT, *OUR CHIEF MAGISTRATE AND HIS POWERS* 129 (2002) (In carrying on of war as Commander-in-Chief, it is he who is to determine the movements of the army and of the navy. Congress could not take away from him that discretion . . . nor could they themselves, as the people of Athens attempted to, carry on campaigns by votes in the market-place.); ELY, *supra* note 28, at 25 ("It was the point of the Commander-in-Chief Clause to keep Congress out of day-to-day combat decisions once it had authorized the war in question."); TURNER *supra* note 52, at 26-31 (arguing that Congress cannot usurp presidential war powers by statute).

⁵⁵ See WORMUTH & FIRMAGE, *supra* note 52, at 108 (noting the absence of debate on the war powers).

dent to the Constitution, provides an important historical foil for understanding the later distribution of war powers. Drafted in 1777 and ratified in 1781, the United States was governed by the Articles of Confederation until 1788. The Articles vested all national powers in the Continental Congress, including all those related to warfare. However, the Articles also show a clear demarcation of the war powers in that the clause granting authority to decide issues relating to peace and war was separated from the clause appointing a commander-in-chief to direct the Army or Navy.⁵⁶ Additionally, under the structure of the Articles nine states would have to agree to declare war, and nine states would have to agree to the appointment of a commander in chief. The requirement for separate supermajorities demonstrates that the decision whether to engage in warfare was deemed to be different from the decision concerning how to supervise the conduct of the war.⁵⁷

While this difference between conduct and declaration of war existed in the Articles of Confederation, there was no indication that the commander in chief of the armed forces would be independent in his sphere. In practice, the Continental Congress saw itself as superior to George Washington in deciding how the Revolutionary War was to be fought, and meddled with many aspects of his command.⁵⁸ There was great dissatisfaction with this arrangement, and in drafting the Constitution the delegates sought to grant the President more direct power to carry out a war.⁵⁹ Evidence for this intent can be found in two places within the document. An early draft of the Constitution gave Congress the power to “make war,” and one of the primary reasons for the change to “declare war” was to clarify that Congress was not to interfere with combat decisions.⁶⁰ On this point Robert Turner relates:

The decisions associated with actually conducting hostilities are vested by the Constitution in the Commander in Chief—and, indeed, the draft constitution was specifically amended on August 17, 1787, to make this separation of powers more clear. Should Congress, therefore—to give an extreme hypothetical—seek to direct the President to attack a certain hill on

⁵⁶ See Michael D. Ramsey, *Text and History in the War Powers Debate: A Reply to Professor Yoo*, 69 U. CHI. L. REV. 1685, 1703-04 (2002) (“[T]he Articles . . . saw the commander-in-chief power as concerning the chain of command, not the use of the army to initiate war.”).

⁵⁷ See *id.*

⁵⁸ See Michael J. Glennon, *Strengthening the War Powers Resolution: The Case for Purse-Strings Restrictions*, 60 MINN L. REV. 1, 8 (1975) (discussing the Continental Congress’s relationship with General Washington); see also *supra* note 22 and accompanying text.

⁵⁹ See HENKIN, *supra* note 48, at 45 (noting widespread dissatisfaction with “War by Congress” as carried out under the Articles of Confederation).

⁶⁰ See ELY, *supra* note 28, at 5 (“This change was made . . . to make clear that once hostilities were congressionally authorized, the president, as ‘commander in chief’, would assume tactical control (without constant congressional interference) of the way they were conducted.”).

a specified date with a specified military unit, such an effort would unquestionably be an unconstitutional infringement upon the powers of the President as Commander in Chief.⁶¹

However, this change does not necessarily mean that the Framers intended to provide the presidency with robust war powers. The decision to change the language was made partially in response to a proposal by Pierce Butler to vest the entire war power in the President and thus represents something of a compromise.⁶² While the alteration signaled a desire to solely vest the President with tactical decision making power, it is not clear that it was meant to accomplish anything more.⁶³

The other indication of this desire to entrust the responsibility for directing the military to the President has to do with the precursors to the Commander-in-Chief Clause. Dissatisfied with the inability of the Continental Congress to effectively govern, many of the Constitutional Convention delegates were greatly enamored with the constitutions of New York, New Hampshire, and Massachusetts.⁶⁴ Alexander Hamilton in *Federalist 69* also compares the powers of the President as Commander in Chief to the governor in the later two states.⁶⁵ Consequently, there is a reason to believe that the war powers of the President were modeled upon these state constitutions, and the wording of these documents can provide insight into how the Commander-in-Chief Clause was meant to be interpreted.⁶⁶ These state constitutions infused their governor with expansive war powers, particularly in how a war could be carried out. Massachusetts and New Hampshire granted the governor, as commander in chief, the authority to fully control the military, and to use it to “‘kill, slay, and destroy’ by any appropriate means anyone who attempted or planned to attack or even ‘annoy’ [the state].”⁶⁷ Furthermore, provisions found in other state constitutions that would have severely limited the power of the Commander in Chief to direct a war, such as the formation of a joint council with control over the military, were expressly not included.⁶⁸ Taken together, the historical evidence

⁶¹ Robert F. Turner, *The Constitution and the Iran-Contra Affair: Was Congress the Real Law-breaker?*, 11 HOUS. J. INT'L L. 83, 118 (1988).

⁶² See Ides, *supra* note 4, at 78 (discussing the decision to change the language of the War Clause).

⁶³ See *id.*

⁶⁴ See Yoo, *The Continuation of Politics by Other Means*, *supra* note 41, at 252-53.

⁶⁵ See THE FEDERALIST NO. 69 (Alexander Hamilton), available at <http://federalistpapers.com/federalist69.html> (last visited April 5, 2005).

⁶⁶ See Yoo, *The Continuation of Politics By Other Means*, *supra* note 43, at 253 (“Reading the proposed Constitution in the context of the state constitutions would have come naturally to an eighteenth-century American, because, at the time, the state texts constituted the only other documents that bore a similar level of legal significance to the Constitution.”).

⁶⁷ *Id.*

⁶⁸ See *id.* at 254 (“Provisions found in the state constitutions that were not included in the Consti-

provides support for the argument that the judiciary should exercise special scrutiny when evaluating possible congressional infringements on the commander-in-chief power.

IV. THE FAILURE OF FORMALISM IN THE CONTEXT OF WAR POWERS

A. *The Problem of Scope*

Given that Congress was never meant to intrude open the Commander in Chief's discretion in conducting a war, the key question becomes whether the decision to detain enemy combatants is a proper expression of the commander-in-chief power. Consistent with its presumption that all powers are allocated by the Constitution, formalism looks to the text of the Constitution itself to determine how to categorize exercise of a power.⁶⁹ In most instances, the text itself is sufficient for the inquiry. For example, the bicameral requirement at issue in *INS v. Chadha*⁷⁰ is clear on its face; no textual or historical analysis is necessary to understand the meaning of the "explicit constitutional requirement that all legislation be presented to the President for his signature before becoming law."⁷¹ Similarly, in *Public Citizen v. United States Department of Justice*,⁷² it was apparent that the statute in question interfered with the President's appointments power, because the Appointments Clause establishes the "powers of the executive and legislative branches with admirable clarity."⁷³ This type of clarity is missing with the Commander-in-Chief Clause, as there is an inherent ambiguity to what the term connotes and how it interacts with the war powers assigned to Congress.⁷⁴

tution also demonstrate the Framers' intent to create a strong executive in the war powers arena . . . The Constitution did not establish a council with joint control over the military, nor did it require the President to seek legislative permission before engaging the military.").

⁶⁹ See Michael L. Yoder, *Separation of Powers: No Longer Simply Hanging in the Balance*, 79 GEO. L.J. 173, 185 (1990) (explaining that the text of the Constitution is usually determinative).

⁷⁰ 462 U.S. 919 (1983).

⁷¹ *Public Citizen v. U.S. Dep't of Justice*, 491 U.S. 440, 486 (1989) (Kennedy, J., concurring).

⁷² *Id.* at 440.

⁷³ See *id.* at 487 (Kennedy, J., concurring).

⁷⁴ See BANKS & RAVEN-HANSEN, *supra* note 47, at 146 (arguing that national security powers are not sufficiently explicit for formalist analysis); Stephen L. Carter, *War Making Under the Constitution and the First Use of Nuclear Weapons*, in *FIRST USE OF NUCLEAR WEAPONS: UNDER THE CONSTITUTION WHO DECIDES?* 109, 112-16 (Peter Raven-Hansen ed., 1987) (illustrating that there is widespread scholarly dispute as to what the Commander-in-Chief Clause means).

When the text of the Constitution is not explicit, formalism looks to history and usage to determine how powers were meant to be allocated.⁷⁵ For example, in *Loving v. United States*,⁷⁶ the petitioner argued that only Congress could make rules for the application of the death penalty in military courts based on Clause 14 of Article I, Section 8, which grants Congress the power to promulgate rules for “the Government and Regulation of the land and naval forces.”⁷⁷ Clause 14 would seem to be an explicit grant of authority to the legislative branch, but in a majority opinion Justice Kennedy noted that it was necessary to do an exhaustive examination of English constitutional history in order to determine whether the power was intended to be exclusive.⁷⁸ He concluded, “the history does not require us to read Clause 14 as granting to Congress an exclusive, non-delegable power to determine military punishments.”⁷⁹ Article 14 is certainly more clearly defined than the Commander-in-Chief Clause, as it includes verbs within it that give meaning to the type of actions that can be justified as part of the power. *Loving* thus suggests that in order to determine the meaning of the Commander-in-Chief Clause it is necessary to look to what the Framers intended to convey through the power.

While the Framers intended that the Commander-in-Chief Clause would convey a power to the President independent of Congress, most of the evidence suggests they felt this power would be sharply limited. Indeed, given the system of checks and balances found throughout the Constitution, it would seem incongruous that in one of the most important areas of governance they would instill the President with authority as broad as that argued for by the Bush administration. The available historical evidence supports this contention. It demonstrates that the Framers intended the Commander-in-Chief Clause to convey nothing more than that the President would have independent authority in battlefield decisions. This is not to say that the detention of enemy combatants cannot be justified under the President’s commander-in-chief power, on which this paper does not take a position. Rather, the point is that separation-of-power formalism is based on an originalist position regarding the division of constitutional authority that is simply not compatible with the current administration’s view of the breadth of the commander-in-chief power.⁸⁰

⁷⁵ See Yoder, *supra* note 69, at 177 (“Formalism also stresses the importance of history and practice when the Court labels a power as executive, legislative, or judicial.”).

⁷⁶ 517 U.S. 748 (1996).

⁷⁷ *Id.* at 759.

⁷⁸ See *id.* at 760.

⁷⁹ *Id.*

⁸⁰ *Public Citizen*, 491 U.S. at 487 (suggesting that the Supreme Court could not tolerate even minor “tinkering” with how the Framers’ divided power).

One of the strongest indications that the Framers had a narrow vision of the Commander-in-Chief Clause is the possible wartime authority that they declined to entrust to the President. While the failures of the Continental Congress to manage the Revolutionary War might have been the impetus for the Framers to give the Commander in Chief independent authority to conduct a war, it is significant that they did not address the major failing of the Continental Congress. Although George Washington's inability to independently raise supplies had proven costly during the Revolutionary War, the Framers still did not feel comfortable giving the President such authority.⁸¹ Furthermore, the broad language of the war clauses from the Massachusetts and New Hampshire constitutions, which were the models for the Commander-in-Chief Clause, was also not included in the Constitution. These clauses gave the chief executive of their respective states wide discretion to choose when and how a war was to be conducted. Instead, the Framers choose a title that at the time of the Constitution's drafting was a generic term denoting the highest officer in a particular chain of command.⁸² Furthermore, one of the complaints found in the Declaration of Independence was that King George III had given too much power to the military and had threatened to make it independent of civil control.⁸³ In all probability, the Commander-in Chief Clause is a response to this concern; an attempt to ensure that the Army and Navy would always be subject to civilian control, or as Louis Henkin notes: "there is little evidence that, by [the Commander-in-Chief Clause], the Framers intended more than to establish in the Presidency civilian command of the armed forces."⁸⁴

There was sparse debate during the Constitutional Convention on the Commander-in-Chief Clause, which in of itself suggests something about the clause. The delegates expressed great trepidation in general about powers conferred to the President, and that so little discussion was generated by the clause is indicative that they felt it bestowed little power. Wormuth and Firmage note on this point that, "even the most apprehensive members of the Convention did not fear the legal powers conferred by the Commander in Chief Clause."⁸⁵ Additionally, the few contemporary writings on the Clause are consistent with this limited view of its breadth.⁸⁶ For example,

⁸¹ See WORMUTH & FIRMAGE, *supra* note 52, at 107 (explaining the significance of the Framers not giving the President the authority to raise supplies).

⁸² See *id.*; ELY, *supra* note 28, at 5.

⁸³ See LOUIS FISHER, *PRESIDENTIAL WAR POWER* 12 (2d ed, rev., Univ. Press of Kan. 2004).

⁸⁴ HENKIN, *supra* note 48, at 45; See also FISHER, *supra* note 83, at 12 ("Designating the President as Commander in Chief represented an important technique for preserving civilian supremacy over the military.").

⁸⁵ See WORMUTH & FIRMAGE, *supra* note 52, at 107-09.

⁸⁶ Parts of the Federalist Papers, which are contemporaneous with ratification demonstrate that Congress's war powers, were intended to far exceed those of the President. See Jeffrey D. Jackson,

Hamilton explained in the Federalist Papers that it “would amount to nothing more than the supreme command and direction of the military and naval forces”⁸⁷ While Hamilton’s writing cannot be considered dispositive, the Supreme Court relied on it in one of its few pronouncements on the commander-in-chief power and it is generally considered the most direct explanation of the clause’s meaning.⁸⁸

While the Supreme Court made no definitive rulings on the content of the commander-in-chief power in *Padilla* or *Hamdi*, it is noteworthy that Justice Scalia supported this limited view during oral arguments:

How does [the President] get [the authority to detain Padilla] from just being commander-in-chief? I mean, I understand the commander-in-chief power to be a power over the military forces, when they’re being used as military forces, the General Washington power, you know, to command the forces tactically and everything else. It doesn’t mean he has the power to do whatever it takes to win the war. I mean, the Steel Seizure case demonstrates that well enough.⁸⁹

Scalia’s words underscore how broad a conception of the commander-in-chief power is needed to support the Bush administration’s argument that there is an inherent power to detain enemy combatants, particularly those that are citizens like Padilla.⁹⁰ While there may have been tactical aspects to the decision to detain Padilla, these are not concerns solely intrinsic to combating terrorism. Also, given the manner in which the Revolutionary War was fought, the Framers would have been aware of military issues involved with the capture of enemy combatants, yet they decided to reserve the power to suspend habeas corpus to the Congress.⁹¹ Thus, while it may be possible to locate an inherent presidential power to detain, such an argument would have difficulty being predicated on a strictly originalist position. While the Commander in Chief possesses exclusive authority to

Note, *The Dog of War as a Puppy: The Constitutional Power to Initiate Hostilities as Answered by the Framing*, 1 GEO. J.L. & PUB. POL’Y 361, 368 (2003) (drawing upon the academic work of Taylor Rev-
eley and Charles Lofgren for this conclusion).

⁸⁷ THE FEDERALIST NO. 69 (Alexander Hamilton).

⁸⁸ *Fleming v. Page*, 50 U.S. 603, 615 (1850) (“As commander-in-chief, [the president] is authorized to direct the movements of the naval and military forces placed by law at his command, and to employ them in the manner he may deem most effectual to harass and conquer and subdue the enemy.”); See ELY, *supra* note 28, at 142 (arguing that the language of *Fleming v. Page* was based on Hamilton’s writings).

⁸⁹ Oral Argument of Paul D. Clement on Behalf of Petitioner, *Rumsfeld v. Padilla*, 2004 WL 1066129, at *22 (U.S. Apr. 28, 2004).

⁹⁰ The *Youngstown* decision, and its internal/external dichotomy, is discussed in *Padilla v. Rumsfeld*, 352 F.3d 695, 711-23 (2d Cir. 2003).

⁹¹ *Hamdi v. Rumsfeld*, 124 S. Ct. 2633, 2674 (Scalia, J., dissenting).

direct the Army and Navy on the battlefield, it is hard to justify that presidential decisions external to that limited sphere deserve the same degree of exclusivity. Or at the very least, it seems clear that there is a severe disconnect between an expansive view of the commander-in-chief power and an argument from formalism that Congress cannot infringe on that power.

B. *The Problem of Concurrent Powers*

The second problem with applying the formalist position is that there is overlapping and tangled authority between the branches in the war powers in a way that is distinct from other parts of the Constitution.⁹² It is not just that the clause itself is ambiguous, but the overall text does not sufficiently reveal how the Framers intended it to interact with Congress's war powers. This problem is compounded by the lack of definitive historical information on how the Framers anticipated the war power clauses to interrelate. Stephen Carter goes so far as to argue that "despite the devoted efforts of legions of scholars to unpack the history of these clauses, I fear . . . the legislative history of the war making power teaches us almost nothing concrete about the Framers' understanding."⁹³ Consequently, the clear demarcation of powers ideal that lies at the heart of the formalist understanding is difficult to sustain in the context of war powers.

In light of the overlap of the war powers, even some of the Court's staunchest supporters of a formalist position have tended toward a balancing approach in war powers cases. For example, in *Dames & Moore v. Regan*, Justice Rehnquist employed the more functionalist approach of Justice Jackson's concurrence in *Youngstown Sheet & Tube v. Sawyer*⁹⁴ in analyzing the separation-of-powers issues, though he was careful to qualify that the method was not proper for all such cases.⁹⁵ Even more telling may be the separate opinions of Justices Kennedy, Scalia, and Thomas in *Loving*. That case involved a grant of war power to the Congress, the Regulation Clause, which is much more explicit in being an exclusive grant of power than the Commander-in-Chief Clause. However, all three justices saw some degree of concurrent authority for the executive branch by virtue of the commander-in-chief power. *Loving* thus demonstrates that the Supreme Court has difficulty employing a straight formalist approach to the war powers.

⁹² See Carter, *supra* note 74, at 111 (arguing that one must use greater interpretation with war powers because the lines of authority are not clear).

⁹³ *Id.* at 112.

⁹⁴ 343 U.S. 579 (1952).

⁹⁵ *Dames & Moore v. Regan*, 453 U.S. 654, 678 (1981).

In his majority opinion, Justice Kennedy explained that one of the reasons that Congress could delegate authority to make regulations for the military death penalty was that the executive has some concurrent authority from the commander-in-chief power.⁹⁶ Even more revealing was his statement that by virtue of the Regulation Clause, “Congress . . . exercises a power of precedence over, not exclusion of, executive authority.”⁹⁷ This is something of a strange conclusion since the history detailed by Kennedy uses the strongest possible language in articulating that the Regulations Power was given exclusively to Congress and was not meant to be subject to limitation.⁹⁸ He does not completely clarify the reason for this conclusion, but the language implies this is due to the executive’s concurrent authority. It would seem Kennedy is rejecting some of the central tenets of formalism by finding that the text and the history of Clause 14 are not conclusive in a separation-of-powers evaluation.

The concurring opinions of Justices Scalia and Thomas also acknowledge the existence of some blurring between congressional and presidential war powers. While he is referring to an instance of cooperation between the branches, as opposed to conflict, Scalia noted:

[Article 14] does not set forth any special limitation on Congress's assigning to the President the task of implementing the laws enacted pursuant to that power. And it would be extraordinary simply to infer such a special limitation upon tasks given to the President as Commander in Chief, where his inherent powers are clearly extensive.⁹⁹

This language is far from a conclusion that a balancing test should be utilized in war powers disputes between the branches, but it is an acknowledgment that the President’s war powers may overlay those of Congress. If not for some concurrent authority, there would be no reason to afford special respect to an assignment of authority by Congress in this area. Thomas is even more candid in conceding that the commander-in-chief power gives the President shared authority.¹⁰⁰ Thomas explains that there is a history of

⁹⁶ See *Loving v. United States*, 517 U.S. 748, 768 (“[I]t would be contrary to the respect owed the President as Commander in Chief to hold that he may not be given wide discretion and authority.”).

⁹⁷ *Id.* at 767.

⁹⁸ *Id.* Kennedy stresses that Clause 14 was intended to be a grant of exclusive power to Congress. For example, he notes from the writings of Alexander Hamilton that Clause 14 was given to Congress: [W]ithout limitation: Because it is impossible to foresee or define the extent and variety of national exigencies, or the corresponding extent & variety of the means which may be necessary to satisfy them. The circumstances that endanger the safety of nations are infinite, and for this reason no constitutional shackles can wisely be imposed on the power to which the care of it is committed. *Id.* (citing THE FEDERALIST NO. 23, at 147).

⁹⁹ *Loving*, 517 U.S. at 776 (Scalia, J., concurring).

¹⁰⁰ *Id.* at 778 (Thomas, J., concurring) (“[H]eightedened deference extends not only to congressional action but also to executive action by the President, who by virtue of his constitutional role as Com-

according congressional decisions on military discipline great respect, as well as the traditional deference given to the Commander in Chief. The convergence of these two lines of thought means that separation-of-power decisions are unique in this area, as Justice Thomas stated:

I write separately to explain that by concurring in the judgment in this case, I take no position with respect to Congress' power to delegate authority or otherwise alter the traditional separation of powers outside the military context.¹⁰¹

While Thomas confines this statement to military matters, the same would seem to be true of presidential decisions lying at the edge of the commander-in-chief power.

In *Hamdi*, the Supreme Court had an opportunity to clarify many important Constitutional questions related to allocation of war powers. Not only did the plurality not take up this challenge, but the decision raises far more theoretical questions than it answers. What is clear, however, is that the methodological approach of the plurality bears almost no resemblance to the logic of *Chadha* or *Public Citizen*. Indeed, O'Connor apparently desired to get away from past separation of powers or war powers decisions, as her decision draws heavily from the Supreme Court's due process precedents. That past proponents of Separation of Power formalism, like Justices Kennedy and Rehnquist, joined the decision is an indication of how out of favor formalism has become in the context of the war powers. Although Scalia took a strong formalist position in *Hamdi*, he alone viewed the Constitutional issues in this manner. While the following discussion of *Hamdi* is necessarily truncated for space considerations, what is clear from the decision is that the was definitively rejected by the plurality opinion.

In formulating her plurality opinion, Justice O'Connor was faced with Justice Scalia's forceful dissent that the Suspension Clause clearly forbids the Executive to suspend habeas corpus relief.¹⁰² In his dissent, Scalia contends that the right to suspend habeas corpus is an exclusive Congressional Power, and absent suspension no level of governmental exigency can justify detention without formal charges.¹⁰³ He sees no need for any judicial balancing test since "the Founders warned us about the [dangers of sacrificing liberty for security], and equipped us with a Constitution designed to deal with it."¹⁰⁴ Scalia's argument is wholly consistent with the logic of

mander in Chief . . . possesses shared authority over military discipline.").

¹⁰¹ *Id.* (Thomas, J., concurring).

¹⁰² *Id.* at 2660.

¹⁰³ *Id.*

¹⁰⁴ *Id.* at 2674 (Scalia, J., dissenting).

Public Citizen: he locates the power to suspend habeas corpus in a particular branch and that ends the inquiry.

O'Connor's response is to cite as precedent *Ex Parte Quirin* for the authority that the government may detain, in some circumstances, absent formal suspension of habeas corpus.¹⁰⁵ However, she refuses to refute the extensive history that Scalia cites, and largely relies on the fact that "brushing aside such precedent [i.e. *Quirin*]—particularly when doing so gives rises to a host of new questions never dealt with by this Court - is unjustified and unwise."¹⁰⁶ *Quirin* was decided under highly unusual circumstances, and the result is a very terse and conclusory opinion that is not forward-looking.¹⁰⁷ The opinion clearly takes no position on the inherent powers of the presidency,¹⁰⁸ and is so vague that the executive branch has argued that it stands for the proposition that the President has the intrinsic authority to detain enemy combatants.¹⁰⁹ O'Connor's refusal to distinctly locate the authority to detain in a structural sense, or confront the government's interpretation of *Quirin*, and instead rely on the ambiguities of that decision, is an implicit rejection of formalism in a war powers context.

While O'Connor is willing to accept the proposition that *Quirin* instructs that the President can detain enemy combatants when so authorized by Congress, she wants to limit the exercise of this authority. In her decision, she made an early finding was that the decision to detain enemy combatants was a joint one based on Congress passing the Authorization of Use of Force, and consequently, that two branches of government assigned the constitutional duties to decide matters of war and peace were in agreement on this issue. Habeas corpus appears to be the only individual right imperiled by the confinement of enemy combatants, but in light of her acceptance of *Quirin*, it is not clear how much it is implicated. O'Connor glosses over the tension between *Quirin* and habeas corpus concerns, and contends that Congress and the President implicitly recognized that, in light of the writ not having been officially suspended, detainees would have some ability to challenge their detention.¹¹⁰ This allows her to bring in the Supreme Court's due process precedents, and the *Matthews v. Eldridge* balancing

¹⁰⁵ *Id.* at 2642.

¹⁰⁶ *Id.* at 2643.

¹⁰⁷ See generally FISHER, *supra* note 30.

¹⁰⁸ *Ex Parte Quirin*, 317 U.S. 1, 29 (1942) ("It is unnecessary for present purposes to determine to what extent the President as Commander in Chief has constitutional power to create military commissions without the support of Congressional legislation.").

¹⁰⁹ See Gonzales, *supra* note 49 ("The Supreme Court's 1942 decision in *Ex parte Quirin* acknowledged that the President's war powers include the authority to capture and detain enemy combatants at least for the duration of a conflict."); Padilla v. Rumsfeld, 352 F.3d 695, 709 (2d Cir. 2003) ("The government argues that *Quirin* established the President's inherent authority to detain Padilla.").

¹¹⁰ *Hamdi*, 124 S. Ct. at 2633.

test, to decide what procedural protections are constitutionally sufficient.¹¹¹ By giving courts so much discretion to define the procedures, and allowing courts to alter these procedures to take into account the particulars of any detention situation, the power of Congress and the President to detain combatants in wartime is rendered moot. A court, by choosing how to engage in a due process balancing test, can make it exceedingly difficult or overwhelmingly simple for detainees to challenge their confinement. Justice Scalia argued against this aspect of the plurality opinion:

The problem with this approach is not only that it steps out of the courts' modest and limited role in a democratic society; but that by repeatedly doing what it thinks the political branches ought to do it encourages their lassitude and saps the vitality of government by the people.¹¹²

Hamdi is not just a rejection of separation-of-powers formalism, but its expanded role for the judiciary is arguably a rejection of the importance of the separation-of-powers in general. The core of the separation-of-powers doctrine is that when institutions properly engage in their constitutionally defined roles then good decisions result. By giving no consideration to the institutions involved, or how their decisions fit within their assigned roles, the decision demonstrates that constitutional outcomes, in terms of due process balancing, are far more important than constitutional procedures.

V. BALANCING: CONGRESS VERSUS THE COMMANDER-IN-CHIEF POWER

Opposed to formalism is a functionalist perspective, which holds a different view regarding the clarity of constitutional allocations of power. Functionalism is predicated on the idea that it is not always clear how the Framers intended powers to be allocated between the branches; indeed, this is of secondary importance. According to functionalism, what matters most is strengthening the overall aim of the Framers, namely, a proper functioning system of checks and balances.¹¹³ In the war powers context, functionalism is best articulated in Justice Jackson's famous concurrence in *Youngstown*.¹¹⁴ Jackson emphasized the importance of how the disparate war powers were designed to interact as a structure. In rejecting an approach that would simply try to categorize powers as belonging to a par-

¹¹¹ *Id.* at 2646.

¹¹² *Id.* at 2673 (Scalia, J., dissenting).

¹¹³ See Tanelian, *supra* note 40, at 966-67 (explaining Separation of Powers functionalism as a doctrine).

¹¹⁴ See KOH, *supra* note 2, at 78 (noting the lasting the influence of *Youngstown*). Given how widely understood Jackson's concurrence is, I will not digress into an explication of the tripartite structure.

ticular branch, he noted “the actual art of governing under our Constitution does not and cannot conform to judicial definitions of the power of any of its branches based on isolated clauses or even single Articles torn from context.”¹¹⁵ In terms of war powers, the division of authority between the branches suggested to him that the Framers were trying to create a model of balanced institutional participation in war decisions. It is this idea that underlies his tripartite method for analyzing presidential power, as it stresses that the President’s power is at its highest when he or she cooperates with Congress.¹¹⁶ It was also on this basis that Jackson rejected Truman’s argument for inherent, and thus exclusive, authority to seize the steel mills. He felt that it would subvert the Framers’ intent to so completely unfetter the President in conduct of a war.¹¹⁷

While Jackson ruled against the President in *Youngstown*, there is a difference between the method he employed and his arguments that were specific to the facts of the case. Jackson’s opinion is best known for the tripartite structure he outlines, but what is sometimes overlooked is that it is a framework that is supposed to be used for analyzing presidential power, not for analyzing the separation-of-powers. Consequently, in a zone-three situation, where the President’s power is at its lowest ebb, his power is only low compared to where it could be if he or she were cooperating with Congress. It does not necessarily mean that the President’s power is low *relative to Congress*. When Congress and the President are in conflict, a decision still needs to be made about which branch possesses the power. Roy Brownell delineates how Jackson suggested such a determination should be made:

A third category action taken by the President would involve a constitutional calculus just as it would for first and second category actions. The powers of Congress would be subtracted from those of the President. If the President were ‘in the red’ so to speak, the action would be struck down, but if the President had sufficient inherent power to overcome those of Congress, his action would be upheld.¹¹⁸

¹¹⁵ See *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 635 (1952) (Jackson, J., concurring).

¹¹⁶ See KOH, *supra* note 2, at 73 (arguing that an ideal of balanced participation underlies Jackson’s concurrence).

¹¹⁷ See *Youngstown*, 343 U.S. at 642 (Jackson, J., concurring). As Justice Jackson stated: But no doctrine that the Court could promulgate would seem to me more sinister and alarming than that a President whose conduct of foreign affairs is so largely uncontrolled, and often even is unknown, can vastly enlarge his mastery over the internal affairs of the country by his commitment of the Nation’s armed forces to some foreign venture.

Id. at 642 (Jackson, J., concurring).

¹¹⁸ Roy E. Brownell II, *The Coexistence of United States v. Curtiss-Wright and Youngstown Sheet & Tube v. Sawyer in National Security Jurisprudence*, 16 J. L. & POL. 1, 53-54 (2000).

Jackson advocated looking to the overall constitutional structure to see which branch had more inherent authority. Although broad in scope, this balancing test would be used to decide where the power lies. The consequence of finding that the President had more inherent authority would be significant, because, “courts can sustain exclusive presidential control in such a case only by disabling the Congress from acting upon the subject.”¹¹⁹ Consequently, it would still be possible for a President to argue for exclusive control under the logic of Jackson’s opinion. It is not even necessarily more difficult when compared with formalism. It just appears that way because the tripartite structure favors cooperation between the branches. However, in certain instances cooperation is not going to be possible, or perhaps even desirable, and at that point a calculus will need to be made of which branch has more claim to authority based on inherent powers.

A. *Why the President Should Win a Balancing Test*

While Jackson interpreted the structure of the Constitution as favoring Congress in a zone-three situation, there is reason to believe that most courts would conduct such a balancing test in a way that would be favorable to the executive branch. There is a line of cases separate from the *Youngstown* strain that is sympathetic to claims of broad executive authority. In *United States v. Curtiss-Wright Export Corp.*,¹²⁰ the Supreme Court held that great deference should be given to presidential determinations in the context of foreign policy, given the executive branch’s inherent policy-making advantages.¹²¹ For example, while the power to make treaties is divided equally between the President and the Senate, Justice Sutherland argued for a sharply limited congressional role:

In this vast external realm, with its important, complicated, delicate and manifold problems, the President alone has the power to speak or listen as a representative of the nation. He makes treaties with the advice and consent of the Senate; but he alone negotiates. Into the field of negotiation the Senate cannot intrude; and Congress itself is powerless to invade it.¹²²

Curtiss-Wright, and its progeny, have come to stand for the proposition that broad deference should accorded presidential determinations in foreign policy, even when they come into conflict with Congress.¹²³

¹¹⁹ See *Youngstown*, 343 U.S. at 637-38 (Jackson, J., concurring).

¹²⁰ *United States v. Curtiss-Wright Exp. Corp.*, 299 U.S. 304 (1936).

¹²¹ See *id.* at 319.

¹²² *Id.*

¹²³ See Brownell, *supra* note 119, at 41 (arguing that *Curtiss-Wright* has been used by the Execu-

One of the pillars of the decision is that foreign affairs are different from domestic affairs, and the special challenges of the external sphere are better suited to the strengths of the executive branch.¹²⁴ Beyond the accuracy of this line of reasoning, which many scholars find dubious, the case does not seem to support presidential claims to domestic power.¹²⁵ This point was made by the district court in *Padilla*, which contended that *Curtiss-Wright* was not implicated because at issue was the power to detain an American citizen seized inside the United States.¹²⁶ This oversimplifies *Curtiss-Wright*'s meaning, because there was certainly strong international component involved in *Padilla*, but it does underscore that this line of cases does not carry the same logical force when domestic concerns are involved. Furthermore, as Justice Jackson emphasized in *Youngstown*, the use of the war powers to justify action in the domestic sphere is particularly suspect.¹²⁷ As the earlier words of Madison indicate, the Framers were well aware that times of war present an opportunity for the executive branch to seize power.¹²⁸ The internal/external dichotomy is the equivalent of a logical Rubicon, a clear marker that will signal when there is a danger that the President has overstepped the bounds of his mandate to lead the nation.

In addition to the general respect afforded the President in foreign affairs, there is another argument for presidential authority beyond his inherent powers. The President may lay claim to special power on the basis of an emergency, or authorization by Congress that would trigger his general executive Power. The *Prize Cases* demonstrate that, in a national crisis, the President can accomplish things that would not be normally possible under the Constitution.¹²⁹ Arguably, the *Prize Cases* represent a very special ex-

utive Branch to exclude Congress from policy-making decisions); Charles Tiefer, *The FAS Proposal: Valid Check or Unconstitutional Veto*, in *FIRST USE OF NUCLEAR WEAPONS: UNDER THE CONSTITUTION, WHO DECIDES?* 143, 149 (Peter Raven-Hansen ed., 1987) (“*Curtiss-Wright* was a decision of towering importance . . . its expansive view of presidential power . . . provided the constitutional justification for presidential exercise of vast power.”).

¹²⁴ See Brownell, *supra* note 119, at 28-29 (noting the internal/external dichotomy of *Curtiss-Wright*).

¹²⁵ See *id.* (noting the heavy criticism that Sutherland’s arguments about presidential superiority in foreign affairs has received); KOH, *supra* note 2, at 94-95 (explaining the many problems with *Curtiss-Wright*).

¹²⁶ See *Padilla*, 352 F.3d 695, 714 (2d Cir. 2003).

¹²⁷ See *Youngstown*, 343 U.S. 579, 660 (Jackson, J., concurring) (“No penance would ever expiate the sin against free government of holding that a President can escape control of executive powers by law through assuming his military role.”).

¹²⁸ See *infra* note 22.

¹²⁹ See, e.g., *Padilla*, 352 F.3d at 727 (Wesley, J., dissenting) (“As I read *The Prize Cases*, it is clear that common sense and the Constitution allow the Commander in Chief to protect the nation when met with belligerency and to determine what degree of responsive force is necessary.”).

ception, but there is an inescapable logic to the reality that compelling circumstances might justify executive claims to strong powers. One of the advantages of the executive branch that Sutherland emphasized in *Curtiss-Wright* is the speed with which the President can act, and it seems reasonable that in the immediate aftermath of a crisis this characteristic might need to be called upon. However, this power would seemingly decrease in direct proportion to the amount of time that has elapsed since the crisis. Furthermore, this advantage of swift decision making would be negated by congressional action, so it is not clear on what basis the *Prize Cases* would empower the President in a branch conflict.¹³⁰ Indeed, the Supreme Court in the decision stressed that one of the bases of its decision was that Congress later ratified the action. The different concurring opinions in the *Prize Cases* actually “offer affirmative support for the view that the President’s commander in chief power can be limited by the Congress in the exercise of its own powers. They lend no support at all to the opposite proposition.”¹³¹

The opposite of the emergency power situation is when Congress has acted to ratify presidential action, as was done in *Quirin*.¹³² Under the *Youngstown* tripartite structure the President’s power would be at its zenith, and in a branch conflict, subsequent attempts to control this power may be frowned upon. Congressional flip-flopping on important issues plays into the critique of Congress as an institutionally flawed actor, and undercuts arguments for its inclusion in the decision-making process. Just how much weight congressional ratification should be given is difficult to quantify. In *Hamdi*, the Supreme Court refused to use a lower standard of review because the President and the Congress had arguably concurred in judgment on the issue of detaining enemy combatants.¹³³ However, Congress did not explicitly endorse the President’s line of action, and if this had been the case it is possible the Court might have given it more weight. Regardless, the situation in which the Commander in Chief would have the best argument for exclusivity would be when there has been an official declaration of war, since this is the fullest expression of Congressional ratification. Consequently, precedents that demonstrate that Congress can change the parameters of a conflict after a declaration of war, are the most compelling evidence that Congress should prevail under any sort of balancing test in

¹³⁰ While there are conflicting indications in *Hamdi* regarding whether a crisis grants special authority to the President, the plurality opinion concludes that, “We have long since made clear that a state of war is not a blank check for the President when it comes to the rights of the Nation’s citizens.” *Hamdi*, 124 S. Ct. 2633, 2650 (2004).

¹³¹ Carter, *supra* note 72, at 115.

¹³² See *Quirin*, 317 U.S. 1, 26-27 (1942).

¹³³ See *Hamdi*, 124 S. Ct. at 2650-52 (arguing that due process balancing is appropriate regardless of how detention was authorized).

this area. This will be explored in greater detail in the next section, as well as arguments for why Congress's war powers empower it to regulate the conduct of a war.¹³⁴

B. *Why Congress Should Win a Balancing Test*

Congress's own war powers and the structural considerations that underlie them must be weighed against the powers of the President. The case for Congress winning a balancing test is predicated on two of the three congressional war powers: the War Clause and the Army Clause.¹³⁵ While it simplifies the war powers structure, it is evident that without an army to command or a war to fight the commander-in-chief power would have no meaning. In a sense, President's war power is contingent on Congress exercising its own powers. This situation is evident in that the War Clause and the Army Clause empower Congress to set substantive limits on the parameters of the commander-in-chief power. If Congress limits the scope of a war to a particular theater, or only allocates a certain amount of manpower, then the President must work within these limits. These powers extend so far as to allow Congress to change the boundaries of the President's mandate to direct a war after it has commenced. Consequently, while it was not contemplated that Congress would make tactical decisions, the Framers imparted onto Congress substantial authority to direct the conduct of a war. To the extent that Congress is superior to the Commander in Chief in making these determinations, there is strong support for the proposition that in a branch conflict it has a stronger constitutional interest in seeing its will asserted, and should prevail over the President.

The War Clause grants Congress the power to declare war, grant letters of marque and reprisal, and make rules concerning captures on land and water. Important to the question at hand is that in a series of early cases the Supreme Court decided this included the authority to declare limited wars, and Congress could determine the scope of those limits.¹³⁶ These cases were decided in a period from 1800 to 1804, and their historical proximity to the writing of the Constitution gives them special importance. The Supreme Court has recognized that contemporaneous legislative determinations of the meaning of the Constitution are to be accorded a marked degree

¹³⁴ See *infra* text accompanying footnotes 136-43 (explaining the meaning of the naval war cases).

¹³⁵ Congress has a third major war power, Clause 14. However, it only concerns internal military discipline.

¹³⁶ See WORMUTH & FIRMAGE, *supra* note 52, at 58-60 (noting that the possibility of limited war was decided by *Bas v. Tingy*, 4 U.S. 37 (1800), *Talbot v. Seeman*, 5 U.S. 1 (1801), and *Little v. Barreme*, 6 U.S. 170 (1804)).

of interpretive weight.¹³⁷ In this instance, there are not only legislative acts that demonstrate that Congress can define the limits to a war, but judicial decisions as well.

These cases involved a naval war with France, called the Quasi-War, in which Congress placed both use and area restrictions on the exercise of military power. The original legislation provided that only public ships could engage French ships found to be “hovering” off the U.S. coast. Later, the use restrictions were broadened to include armed U.S. merchantmen, and the area restrictions were changed to allow the engagement of all French ships.¹³⁸ In upholding these restrictions, the Quasi-War cases demonstrate that Congress can define the limits as to how a conflict is to be fought by the Commander in Chief, even absent a formal declaration of war.¹³⁹ Additionally, that these limits changed over time is important, because the cases “suggest that Congress may change the limits and therefore the scope of [a war] while it is being fought.”¹⁴⁰

In the last of these cases related to the Quasi-War, *Little v. Barreme*, the President’s orders conflicted with the dictates of Congress, but Congress’s will was still considered determinative. Chief Justice Marshall explained that the fact the presidential directive violated a statute meant that it was null and could not insulate the captain of the naval vessel from liability.¹⁴¹ Marshall pointed out that the captain had to be held liable no matter how pressing the circumstances that might have justified his belief that he should seize the vessel in question. He thus recognized that even in the rapidly changing circumstances of naval engagement the will of Congress with respect to how the war was to be fought had to take precedence.¹⁴² This is strong support for the proposition that the War Clause allows Congress to define significant aspects of how the Commander in Chief can conduct a war.

The Constitution was written prior to the existence of a standing army, and consequently, it was only when the Congress called forces into exist-

¹³⁷ *Id.* at 61 (arguing that special weight should be given to the three decisions).

¹³⁸ See BANKS & RAVEN-HANSEN, *supra* note 42, at 155 (discussing the legislation involved in the naval war); WORMUTH & FIRMAGE, *supra* note 52, at 58.

¹³⁹ See Fisher, *supra* note 83, at 25 (“the Quasi-War clarified . . . military conflicts could be ‘limited’, ‘partial’, and ‘imperfect’ without requiring Congress to make a formal declaration.”).

¹⁴⁰ BANKS & RAVEN-HANSEN, *supra* note 42, at 155; see also HENKIN, *supra* note 48, at 103-04 (arguing that Congress can limit the scope of a war in the middle of the conflict).

¹⁴¹ See WORMUTH & FIRMAGE, *supra* note 52, at 60 (“Since the President’s instructions collided with the act of Congress, they were illegal and could neither justify the seizure nor excuse Captain Little from damages.”).

¹⁴² See *id.* (relating the meaning of Marshall’s opinion); Fisher, *supra* note 83, at 26 (arguing that the case demonstrates that Congress can restrict the operation of the commander-in-chief power).

tence that the President could exercise his commander-in-chief power.¹⁴³ The Framers also clearly envisioned the power to fund the military as continuing to give Congress the authority to rein in executive war making even after such a force had been called into existence.¹⁴⁴ Less evident is what authority the power to raise and supply the army gives Congress to control the combat decisions of the Commander in Chief. Congress plays some role by virtue of that it makes the decisions concerning what type of army to fund.¹⁴⁵ This necessarily impacts some parameters of the President's authority, as it dictates what number and type of forces can be deployed. On this point Stephen Carter relates:

Unless there is a Platonic essence called "army" . . . then the most sensible understanding of the constitutional language is surely that the Congress can raise the army it wants: no other army exists for the President to command. If the Congress says the army shall consist of no more than one million soldiers, I see no way that the President can recruit one million and two. If the Congress says the army shall have no more than two thousand tanks, the President possesses no authority to purchase three thousand instead.¹⁴⁶

That there is currently a standing army should not decrease the authority that the clause was meant to express. The modern army is a convenience that allows the nation to facilitate deterrence by acting with speed in responding to a threat. Congress may delegate this authority to the President. However, the only way to give the Clause substantive meaning is to assume that with each new conflict the Congress gets to decide the composition of the force. For example, Congress could decide that nuclear weapons are not to be part of the arsenal allocated to a particular conflict, which would have the effect of only allowing the President to use conventional weapons.¹⁴⁷

Similar to the decision to not allocate to the President nuclear weapons for a conflict, Congress could seemingly not fund troops for a particular theater of operation. Congress has the power to decide whether or not to raise an army for a particular war, so there is no reason why it could not dictate that the army was brought into being only to fight in one country, but not another. Carter uses the example of an army that was restricted from fighting against Canada to explain why the distinction between size/component decisions and area restrictions is arbitrary:

¹⁴³ See Carter, *supra* note 74, at 113 ("[F]ew would quarrel with the conclusion that the armed forces which the President commands are the ones that Congress raises and supports.").

¹⁴⁴ See *supra* note 45 (explaining the importance of appropriations in the military context).

¹⁴⁵ See BANKS & RAVEN-HANSEN, *supra* note 47, at 152-53 (noting that all military appropriations are based in the power to raise and support armies).

¹⁴⁶ Carter, *supra* note 74, at 113.

¹⁴⁷ See Peter Raven-Hansen, *Nuclear War Powers*, 83 AM. J. INT'L L. 786, 789-90 (1989) (arguing that the President cannot escalate a conventional war to a nuclear war absent congressional authorization).

Nothing in the language or structure of the Constitution suggests a distinction between rules limiting the number of tanks and limiting the theater of operations . . . the rule prohibiting war making against Canada is also a restriction on what the armed forces shall be: they shall not be the sort of armed forces that fight a war with Canada, just as they shall not be the sort of armed forces that . . . purchase more tanks than three thousand.¹⁴⁸

While Carter's point is well taken that the decision to raise a particular army involves more than simple numbers of arms and manpower, it is easy to understand how this could overwhelm any sense of an independent Commander in Chief. Given the existence of a standing army, and because most wars are not officially declared by Congress, Congress may tacitly have agreed to the existence of a certain "type" of army for purposes of a conflict. Allowing Congress to later decide that this army was not created to participate in a particular theater of combat would seem to intrude upon the President's core commander-in-chief power. After a war has been authorized, the practical dictates of combat mean that the Commander in Chief must be given some leeway to determine what the proper field of combat is and how to make best use of the available manpower. Just how far the Army Clause allows Congress to control an army in a declared war is unclear; but given the lack of a standing army in the Framers' time, it is apparent that the Army Clause was meant to convey a great deal of influence to Congress. Consequently, in most situations where there would be a conflict between the branches, the Army Clause should tip a balancing test in favor of Congress.

There is additional evidence for why Congress should prevail in a balancing test beyond the War and Army clauses. Historical practice demonstrates that Congress has repeatedly infringed upon the commander-in-chief power, including its core meaning of tactical decision making. For example, on a number of occasions Congress has directly mandated or limited the movement of troops. In 1794, Congress authorized the stationing of up to 2,500 militiamen in Pennsylvania.¹⁴⁹ In 1836, Congress appropriated money for the removal of Fort Gibson from Indian Territory to a location near the border of Arkansas.¹⁵⁰ In 1940, Congress provided that no military selectee could be stationed outside of the Western Hemisphere.¹⁵¹ Wormuth and Firmage contend this practice has been historically widespread and that "it is not for want of constitutional power that Congress has not controlled

¹⁴⁸ Carter, *supra* note 74, at 113. See also Symposium, *The President's Powers as Commander-in-Chief Versus Congress' War Power and Appropriations Power*, 43 U. MIAMI L. REV. 17, 27-28 (William Van Alstyne) (1988) (arguing similarly that the Army Clause gives Congress the power to enact area restrictions).

¹⁴⁹ See WORMUTH & FIRMAGE, *supra* note 52, at 113.

¹⁵⁰ See *id.*

¹⁵¹ See *id.* at 113-14.

the movement of troops more directly; it is because the problems of military management do not lend themselves to legislative decision.”¹⁵²

Wormuth and Firmage also point to the large number of instances in which Congress has limited presidential access to the military. For example, in 1947, Congress enacted the National Security Act, which established the chief of staff system. This made it impossible for the President to convey an order except through a designated subordinate, the Secretary of Defense. If the subordinate was recalcitrant, there would be no way for the President to issue orders to the lower echelons of the military hierarchy.¹⁵³ Similarly, in 1908, Congress acted to limit the circumstances in which the President could request assistance from the National Guard, and entrusted state governors with the task of calling out the Guard.¹⁵⁴ These statutes set up structures that limited the President’s ability to command the military and as such are significant invasive infringements on the commander-in-chief power. Presidential acquiescence to these limits thus supports the conclusion that it is within the power of Congress to limit the authority of the Commander in Chief.

CONCLUSION

While some of the subsidiary arguments within this paper could be extended further, in reality, this paper stands for a very limited proposition; it would be imprudent and contrary to the constitutional structure to argue that Congress does not have the power to override presidential decisions justified by an expansive view of the commander-in-chief power. In most eras, this would also be considered to be a fairly uncontroversial position. For example, in a 1990 academic work Dick Cheney was sharply critical of what he considered to be congressional overreaching in foreign policy; however, he explicitly related that Congress has a role to play in formulating a successful foreign policy. He explained each branch’s role in relation to what he considered to be its strengths:

Congress was intended to be a collective, deliberative body. When working at its best, it would slow down decisions, improve their substantive content, subject them to compromise, and help build a consensus behind general rules before they were to be applied to the citizenry. The presidency, in contrast, was designed as a one-person office to ensure that it

¹⁵² *See id.* at 114.

¹⁵³ *See id.* at 92-93.

¹⁵⁴ *See id.* at 93.

would be ready for action. Its major characteristics, in the language of *Federalist* No. 70, were to be “decision, activity, secrecy and dispatch”¹⁵⁵

Cheney’s statements are consistent with this paper’s conclusions, as certainly the speed and decisiveness of the executive branch are considerable advantages in responding to a crisis. However, deliberation and consensus-building are also valuable characteristics, and given this nation’s history of overreacting to crisis situations, there is good reason to believe they may be of primary importance. Since several years have now passed since the 9-11 attack, which the executive branch argues is the trigger for its expanded authority, it seems unrealistic to continue to be stressing speed over deliberation. At the very least, it seems important to hold open the possibility of congressional action. Arguments for excluding Congress create the possibility that the executive branch will be wholly unaccountable, with the accompanying traditional dangers associated with insulated decision making. There may also be a value to having uncertainty and a certain degree of flux in the demarcation of war powers, that risks being lost by aggressive steps by one branch to carve out an area of exclusive authority. The fact such a position has never been fully advanced by a President in United States constitutional history should make the executive branch pause, and consider, that perhaps engagement with Congress would be more fruitful than attempts to exclude it as an actor.

¹⁵⁵ Dick Cheney, *Congressional Overreaching in Foreign Policy*, in FOREIGN POLICY AND THE CONSTITUTION 101, 102 (Robert A. Goldwin & Robert A. Licht eds., 1990).