

## **Abstract**

This paper represents an in-depth examination of Separation of Power issues raised in the context of the Legislative and Executive Branch's exercise of their War Powers. Specifically, the paper considers the argument raised by the Bush Administration that Congress cannot constitutionally infringe on the President's exercise of his Commander in Chief Power in the fight against terrorism. Such an argument would effectively insulate most Presidential decisions related to terrorism from Congressional oversight. The implication being that even if Congress wanted to accomplish something like ending the detainment of detainees at Guantanamo Bay it would be outside their Constitutional authority. The paper considers whether this argument is valid under either a formalist or more contextual view of Separation of Powers, and ultimately concludes that in any Branch conflict Congress should ultimately prevail.

### **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."

- Justice Jackson on the Commander in Chief Power

#### **I. Introduction: The Independent President**

Throughout United States history Presidents have consistently argued that they have strong inherent war powers, and in this sense the position taken by Bush Administration is hardly noteworthy.<sup>2</sup> It is true that the Bush administration is arguing that the Commander in Chief Power gives the President some inherent authority to act in

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<sup>2</sup> 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).

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 over-riding 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*<sup>3</sup> went to such great lengths to find tacit Congressional support for the Iran hostage agreement was precisely because they did not want to probe the limits of inherent Presidential power and raise the specter of Congressional exclusion.<sup>4</sup> Despite the conceivable tactical disadvantages of asserting such a position, the Executive Branch contended in *Padilla v. Rumsfeld*<sup>5</sup> that his power to detain enemy non-combatant is exclusive and cannot be infringed upon by Congressional statute.<sup>6</sup> The Majority opinion 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

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<sup>3</sup> 453 U.S. 654 (1981).

<sup>4</sup> 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*).

<sup>5</sup> 352 F.3d 695 (2003).

<sup>6</sup> See Pildes and Issacharoff, *supra* note 3, at 32 (“the government argued that Congress could not constitutionally legislate to deny the President this power.”).

force.”<sup>7</sup> A similar argument is also being raised by the Administration in other contexts. In the Guantanamo Bay detainee cases the President has claimed that Congress could not constitutionally extend the jurisdiction of Article III courts to allow habeas corpus petitions by detainees because such a law would be an infringement on Presidential authority.<sup>8</sup> Also, internal memos unearthed by the New York Times also demonstrate that an argument is being raised within the Administration that the President is not bound by treaties or statutes prohibiting the use of torture since they cannot legitimately restrict his Commander in Chief Power.<sup>9</sup> Lastly, in a variety of areas the administration has used the Commander in Chief Power as a general reason to withhold information from Congress and to exclude it from decisions related to the war on terrorism.<sup>10</sup>

This paper will raise an argument that there is a danger to the political process in recognizing that the President’s authority under the Commander in Chief cannot be infringed upon by Congress. 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 decisions regardless of the division of Constitutional powers.

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<sup>7</sup> Padilla 352 F.3d at fn29.

<sup>8</sup> 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](http://www.jenner.com/files/tbl_s69NewsDocumentOrder/FileUpload500/170/respondent_brief.pdf) (“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.”).

<sup>9</sup> See Neil A. Lewis and Eric Schmitt, “Lawyers Decided Bans on Torture Didn’t Bind Bush”, New York Times June 8, 2004, available at: <http://www.nytimes.com/2004/06/08/politics/08ABUS.html>.

<sup>10</sup> See Nancy Kassop, *The War Power and its Limits*, Presidential Studies Quarterly (Sept., 2003) LEXIS; John W. Dean, *How the War on Terrorism is Shrinking Congressional Powers: Part One*, at: <http://writ.news.findlaw.com/dean/20021011.html> (October 11, 2002) (arguing that the Bush administration is using the war on terrorism to increase its powers versus Congress).

Paul Krugman points out that the legal arguments the Bush Administration is advancing in support of its right to detain are strikingly similar to those it is also making in the context of executive privilege and the right to keep secret meetings of the Energy Task Force. Consequently, it would seem that a ratification of the authority to exclude Congress could spill into other areas of the law. See Paul Krugman, A Vision of Power, New York Times April 27, 2004, available at: <http://www.nytimes.com/2004/04/27/opinion/27KRUG.html>.

Congress can assert itself by threatening to vote down legislation important to the President, holding hearings to politically pressure the President, or even invoking its impeachment power. The greater danger is that the Bush Administration may create a precedent which would allow a President to act independently of Congress in the aftermath of a crisis. Consequently, this paper will argue that Congress' war powers are sufficiently robust that it can countermand Presidential decisions justified under a broad interpretation of the Commander in Chief Power. Part II will explain the historical danger represented by national crises, and the role that isolated decision-making has played in past mistakes. Part III will detail how much authority the Bush Administration claims to possess under the Commander in Chief Power. This section will also deal with the appropriations power and explain why it is not a sufficient check on Presidential power in this context. Part IV will explore how under Separation of Powers formalism there would be an argument for excluding Congress, and the problems with this approach. Part V will compare formalism with a functionalist approach to Separation of Powers. 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. Finally, Part VI will conclude that it is imprudent and unnecessary for the Executive Branch to raise this argument about excluding Congress from important decisions related to the proclaimed "War on Terror".

## **II. 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 policymakers restricting civil liberties as part of an overreaction to a perceived threat during a crisis, and later a public recognition that these restrictions were unnecessary after the crisis has abated. Justice William Brennan captured the episodic nature of this response when he wrote:

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

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.<sup>12</sup> 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.<sup>13</sup> Furthermore, even if the government is properly striking a balance between civil liberties concerns and anti-terrorist measures, this episodic history leads to sharply pessimistic

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<sup>11</sup> 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](http://www.brennancenter.org/resources/downloads/nation_security_brennan.pdf). See also 143 *Cong. Rec.* S13904 (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 Terror*, 11 *Wm. & Mary Bill Rts. J.* 1139, 1141-1143.

<sup>12</sup> Brennan, *supra* note 9, at 4.

<sup>13</sup> 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> (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-p20/kenneth-roth/the-law-of-war-in-the-war-on-terror.html> (Noting the dangers of the current approach to civil liberties in light of historical precedents).

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 back 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 World War II Congress 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 with relatively little debate.<sup>14</sup> However, it turned out this 'evidence' did not in fact exist, and the War Department's assessment of the danger was largely due to a report by the openly racist General John L. DeWitt.<sup>15</sup> This example is fairly typical, given that an examination 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."<sup>16</sup>

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<sup>14</sup> See Devins, *supra* note 9, at 1142.

<sup>15</sup> See Mark Tushnet, *Defending Korematsu?: Reflections on Civil Liberties in Wartime*, 2003 Wis. L. Rev. 273, 288 (noting that the War Department findings were based on the recommendations of General DeWitt, who was a racist).

<sup>16</sup> *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. 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 (Dec. 10, 2002) (Comm. Print 2002), at <http://intelligence.senate.gov/findings.pdf> ("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.")

This pattern makes more sense if looked at from the perspective of the decision-maker.<sup>17</sup> In the early stages of a crisis there is a need to act with haste and individuals have to act on the basis of limited information. Under such difficult conditions mistakes are understandably made, and it is reasonable that policymakers would err on the side of restricting liberty.<sup>18</sup> However, this does not fully account for the types of decisions that have traditionally been made in the face of security threats. History demonstrates that isolated decision makers, “are more likely to succumb to the perils of groupthink, self-delusion, and hubris.”<sup>19</sup> This finding is also 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.<sup>20</sup> It is this tendency that accounts for the fact that General DeWitt, as a front-line decision maker, may have felt that he 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.<sup>21</sup>

It is also noteworthy that mistakes in balancing civil liberties versus security have been generally made by the Executive Branch. While this can be explained by the fact that it is that arm of government which has been faced with making these types of difficult choices, there are also reasons to be wary of unilateral Executive determinations in times of war. The Framers were well aware that the Executive Branch incentives that

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<sup>17</sup> See Tushnet, *supra* note at 290-291.

<sup>18</sup> See Richard A. Posner, *The Truth About Our Liberties*, 3 *Responsive Community* 3, 5 (Summer 2002) (arguing that policy makers should evaluate security concerns more heavily in the face of terrorist threats).

<sup>19</sup> Jack M. Balkin, *The Truth About Our Institutions*, 4 *Responsive Community* 89, 90 (Fall 2002).

<sup>20</sup> See Jennifer S. Lerner and Philip E. Tetlock, *Accounting for the Effects of Accountability*, 2 *Psychological Bulletin* 255 (1999) (reviewing the psychological literature on lack of accountability).

<sup>21</sup> See Tushnet, *supra* note 13, at 291; Balkin *supra* note 17, at 90 (“like 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.”)

differ from the other branches with respect to war. James Madison noted in a famous passage that:

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.<sup>22</sup>

Madison was primarily concerned with the temptation of the President to engage in wars, but there is a similar dynamic with respect to other types of decisions in the context of warfare. One of the reasons that the public looks to the President in times of crisis is for reassurance, and such strength is best demonstrated by actions which stress security at the expense of liberty.<sup>23</sup> 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 part of Presidential decision-making, but there is almost certainly an effect from the fact that the President's popularity is maximized by emphasizing security at the expense of liberty during war-time. The fame that Madison references also creates an accompanying sense of urgency to win swift decisive victories. Consequently, the President may feel pressured to make sacrifices of civil liberties in an effort to further the war effort, even in the absence of compelling evidence for such actions.

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<sup>22</sup> James Madison, "Helvidius" Number 4, in *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).

<sup>23</sup> See Jay Winik, *The Presidency in Wartime*, 3 *Responsive Community* 72 (Summer 2002) (explaining that the public expects decisive action from the president in times of crisis).

These errors on judgments would not be so damaging if they were short-term, but there is an institutionalization process by which temporary 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.<sup>24</sup> 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.<sup>25</sup>

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 which must be overcome. Congress has not always proven capable of exercising such will, and this represents one of the dangers of an argument that it is not allowed to infringe on the

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<sup>24</sup> See *Jackson Woods v. Cloyd W. Miller Co.*, 333 U.S. 138, 146 (1948) (“[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 1 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 Richard H. Pildes and Samuel Issacharoff, *Between Civil Libertarianism and Executive Unilateralism: An Institutional Process Approach to Rights During Wartime*, 5 *Liberty, Equality, Security* (2004) 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 9, at 1153 (“as 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”); Louis Fisher, *Litigating the War Power with Campbell v. Clinton*, *Presidential Studies Quarterly* (Fall 2000), LEXIS (arguing in the post-Vietnam era the judiciary has been largely deferential to the President on military matters); Koh, *supra* note 1 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”).

<sup>25</sup> See Lerner and Tetlock, *supra* note 18, at 257 (“after 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”).

President's Commander in Chief Power.<sup>26</sup> Even if there is no judicial determination on the accuracy of the Bush Administration's position, it would still have serious ramifications with regard to branch relations. The creation of it as a viable position would have the effect of chilling Congressional action. Not only would it raise the level of consensus and energy necessary to assume its designed role as a check on the President, but it would provide an altogether too easy justification for Congressional 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 susceptible to changes in public opinion.<sup>27</sup> Notwithstanding the accuracy or inaccuracy of this position, there is still reason to believe that Congress should have some sort of role in the process. Congress is a broad based representative body and as such it has 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 involved 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 he notes,

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<sup>26</sup> See Devins, *supra* note 9, at 1149 (arguing that Congress is a poor check on the Executive because of its reluctance to act).

<sup>27</sup> See e.g. Robert F. Turner, *The War Powers Resolution: An Unnecessary, Unconstitutional Source of "Friendly Fire" in the War Against International Terrorism?*, 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).

“Singly, 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.”<sup>28</sup>

### III. The Breadth of the Commander in Chief Power

Part of what makes the Bush Administration’s position regarding the independence of the Commander in Chief so problematic is their vision of what the Clause permits. They argue that it conveys authority onto the President beyond the theater of military operations, and enables him or her to act within the domestic sphere. They are not attempting to limit the scope of this position, and assert that President Bush is empowered to undertake any type of action which he believes is reasonably related to success in the war on terrorism.<sup>29</sup> The danger of giving the President such widespread authority is that it allows the President intrude deeply into internal issues, much more so than his or her normal domestic powers would allow, with an accompanying danger to civil liberties.<sup>30</sup>

Most of the recent jurisprudence on the war powers is centered on whether the President has the authority to engage in unilateral war-making, and arguments about what powers the President has in the persecution of a war have come up infrequently.<sup>31</sup> For

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<sup>28</sup> 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., 2d Sess. 88 (1986) (statement of J. Brian Atwood, Director, National Democratic Institute) (quoting Alexander Bickel)).

<sup>29</sup> See Alberto R. Gonzales, Remarks Before the American Bar Association Standing Committee on Law and National Security (February 24, 2004) (arguing that the President believes he is authorized to use whatever steps required to defeat terrorism); *Department of Justice Oversight: Preserving Our Freedoms While Defending Against Terrorism*, Before the Senate Judiciary Committee, 107th Cong., Nov. 28, 2001 LEXIS (statement of William P. Barr, Former Attorney General of the United States) (“The President, as Commander-in-Chief, is empowered to take whatever steps he deems necessary to destroy this adversary and to defend the Nation from further attack.”)

<sup>30</sup> See *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952) (Jackson, J. concurring) (arguing that domestic exercises of the war power are inherently more suspect).

<sup>31</sup> See LOUIS HENKIN, *FOREIGN AFFAIRS AND THE US CONSTITUTION* 103 (2d ed. 2002) (noting that conduct of war questions have come up infrequently in disputes between the branches).

this reason the key cases that the administration has cited in support of its policies, *Ex Parte Quirin*<sup>32</sup> and the *Prize Cases*<sup>33</sup>, are from World War I and the Civil War respectively. The President's arguments thus breathe new life into them as meaningful precedents for strong presidential powers. In the case of *Quirin*, this even involves reinterpreting its meaning. In that decision the Supreme Court specifically declined to decide whether the President had the inherent Constitutional power to convene military tribunals absent Congressional authorization.<sup>34</sup> Still, the administration points to *Quirin* as standing for the proposition that the President may detain enemy non-combatants absent any action by Congress.<sup>35</sup>

If it is true that Congress cannot infringe on the Commander in Chief Power by statute, then it is doubtful that it would be able to do so through its spending power. While Congress's ability to countermand an Executive decision to commit troops abroad is fairly well-founded, the same is not true in the context of conduct of war decisions.<sup>36</sup> When troops are sent abroad there are clear funds that must be allocated, but the same is not true of how a war is conducted. The tenuous connection between the purposes that

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<sup>32</sup> 317 U.S. 1 (1942).

<sup>33</sup> 67 U.S. 635 (1863).

<sup>34</sup> *Ex Parte Quirin*, 317 U.S. 1, 29 ("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.")

<sup>35</sup> See Gonzales, *supra* note 27 ("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. Dec. 18, 2003) ("The government argues that *Quirin* established the President's inherent authority to detain Padilla").

<sup>36</sup> 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 and 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 A.J.I.L. 758 (1989).

Furthermore, John Hart Ely argues that Congress has never attempted to use its spending power to control the Presidential conduct of an authorized war. See Ely, *supra* note 26, at 25.

Congress hopes to achieve and the appropriations on which it would base its authority makes it somewhat doubtful that the spending power imbues Congress with extra power in this context. Some scholars have argued on this point that the appropriations is an all or nothing grant; Congress can decide what to fund but it cannot use funding as an excuse to dictate how things bought with those funds are utilized.<sup>37</sup> There is also a strong argument to be made, based on *Lovett v. United States*<sup>38</sup>, that Congress may not achieve through appropriations that which it cannot do through its normal powers.<sup>39</sup> Essentially, if Congress cannot constitutionally overturn the President's decision to detain enemy combatants by statute then it should not be able to do so through appropriations.<sup>40</sup>

#### **IV. Formalism and the Mechanics of Congressional Exclusion**

The Executive Branch has not fully fleshed out its argument for why Congress should be excluded from interfering with the alleged power of the President to detain enemy non-combatants. This is probably due to the fact that Congress has not directly challenged any of the decisions made by the President, but it also reflects the fact that they view the argument as relatively simple. And from a strict formalist perspective it is a straightforward claim. Formalism in the Separation of Powers context is based on the premise that the Constitution sought to clearly divide all governmental powers between the three branches. The task for courts in Separation of Power disputes is thus one of

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<sup>37</sup> Symposium, *The Appropriations Power and the Necessary and Proper Clause*, 86 Wash Univ. L.Q. 623, 628-629 (1990) (William Barr)(arguing that Congress cannot use appropriations as a guise to control Executive decision-making).

<sup>38</sup> 328 U.S. 303 (1946).

<sup>39</sup> See WILLIAMS C. BANKS AND PETER RAVEN-HANSEN, NATIONAL SECURITY LAW AND THE POWER OF THE PURSE 144 (1986) (explaining that *Lovett* is the basis for the argument that the appropriations power is not plenary).

<sup>40</sup> See Barr, *supra* note 35, at 628-629 ("[The] appropriations power cannot be used to circumvent or intrude on the President's inherent authority.").

categorization, to decide where the power was meant to be allocated.<sup>41</sup> The Bush administration believes that the power to detain enemy non-combatants is part of the Commander in Chief Power, and 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.”<sup>42</sup> 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.

Beyond the general arguments for formalism, which are beyond the scope of this paper, there are some specific reasons for applying such an approach in this context. There is one judicial precedent which states that Congress cannot infringe on the President’s Commander in Chief Power, Chief Justice Chase dissenting opinion in the 1866 case of *Ex Part Milligan*.<sup>43</sup> However, he only devotes a couple of sentences to the matter, and provides little analysis in support of the conclusion.<sup>44</sup> More powerful is the

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<sup>41</sup> 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).

<sup>42</sup> *Public Citizen v. Department of Justice*, 491 U.S. 440, 487 (1989) (Justice Kennedy concurring).

<sup>43</sup> 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 a 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

<sup>44</sup> 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

historical evidence which demonstrates that the Framers conceived of the Commander In Chief Clause as a unique grant of authority to the President, outside of the reach of Congressional action. This historical evidence is also 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.”<sup>45</sup>

There was very little debate in the Constitutional Convention on the war powers clauses and this makes it difficult to fully unpack the Framers’ intent.<sup>46</sup> 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 antecedent to the Constitution, provide 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 of the clause granting authority to decide issues relating to peace and war was separated from the appointment of a commander-in-chief to direct the Army or Navy.<sup>47</sup> Additionally, under the structure of the Articles nine states would have to agree

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with the command of the forces and the conduct of campaigns. That power and duty belong to the President as commander-in-chief. 71 U.S. 2 (1866)(Chase dissenting)

<sup>45</sup> Banks and Raven-Hansen, *supra* note 37, at 150. *See also* WILLIAM HOWARD TAFT, OUR CHIEF MAGISTRATE AND HIS POWERS 212 (1925) (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 26, 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 , at 26-31 (arguing that Congress cannot usurp Presidential war powers by statute).

<sup>46</sup> See Wormuth and Firmage, *supra* note 41, at 108 (noting the absence of debate on the war powers).

<sup>47</sup> *See* Michael D. Ramsey, *Text and History in the War Powers Debate: A Reply to Professor Yoo*, 69 U. Chi. L. Rev. 1685, 1704 (2002) (“the Articles...saw the commander-in-chief power as concerning the chain of command, not the use of the army to initiate war.”).

to declare war, and separately nine states would have to agree to the appointment of a commander-in-chief. The requirement for separate supermajorities is demonstrative that the decision whether to engage in warfare was deemed to be different from the decision of how to supervise the conduct of the war.<sup>48</sup>

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 or her own 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 his command.<sup>49</sup> 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.<sup>50</sup> Evidence for this intent can be found in two places within the document. An early draft of the Constitution gave Congress the Power “make war”, and one of the primary reasons for the change to “declare war” was to make it clear that Congress was not to interfere with combat decisions.<sup>51</sup> On this point Robert Turner notes:

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 a specified date with a specified

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<sup>48</sup> *See Id.*

<sup>49</sup> *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).

<sup>50</sup> *See* Henkin, *supra* note 29, at 45 (noting widespread dissatisfaction with “War by Congress” as carried out under the Articles of Confederation)

<sup>51</sup> *See* Ely, *supra* note 26, 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.”)

military unit, such an effort would unquestionably be an unconstitutional infringement upon the powers of the President as Commander in Chief.<sup>52</sup>

However, this change does not necessarily mean that the Framers intended to significantly increase the War Powers of the Executive Branch with this change. 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.<sup>53</sup> While the linguistic change clearly 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.<sup>54</sup>

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 delegates were greatly enamored with the constitutions of New York, New Hampshire, and Massachusetts.<sup>55</sup> Alexander Hamilton in Federalist 69 also compares the powers of the President as Commander in Chief to the governor in the later two states.<sup>56</sup> 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 read.<sup>57</sup> These state Constitutions infused their governor with expansive war powers,

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<sup>52</sup> Robert F. Turner, *The Constitution and the Iran-Contra Affair: Was Congress the Real Lawbreaker?*, 11 *Houston J. Int'l L.* 83, 118 (1988).

<sup>53</sup> See Ides, *supra* note 3 at 78 (discussing the decision to change the language of the War Clause).

<sup>54</sup> See Id.

<sup>55</sup> See John C. Yoo, *The Continuation of Politics by Other Means: The Original Understanding of War Powers*, 84 *Calif. L. Rev.* 167, 253-254 (1996).

<sup>56</sup> See Alexander Hamilton, *Federalist 69: The Real Character of the Executive*, available at: <http://federalistpapers.com/federalist69.html>.

<sup>57</sup> See Yoo, *supra* note 53, at 254 (“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

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]”.<sup>58</sup> Furthermore, provisions found in the other state constitutions which 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.<sup>59</sup> Taken together, the historical evidence provides support for the argument that the judiciary should exercise special scrutiny when evaluating possible Congressional infringements on the Commander in Chief Power.

Given that Congress was never meant to intrude upon the Commander in Chief’s discretion to conduct a war, the key question becomes whether the decision to detain enemy non-combatants is a proper exercise 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.<sup>60</sup> In most instances the text itself is sufficient for the inquiry. For example, the Bicameral Requirement at issue in *INS v. Chadha*<sup>61</sup> 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

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texts constituted the only other documents that bore a similar level of legal significance to the Constitution.”)

<sup>58</sup> *Id.*

<sup>59</sup> *See Id.* (“Provisions found in the state constitutions that were not included in the Constitution 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.”)

<sup>60</sup> *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).

<sup>61</sup> 462 U.S. 919 (1983)

signature before becoming law.”<sup>62</sup> Similarly, in *Public Citizen v. United States Department of Justice*<sup>63</sup> it was apparent that the statute interfered with the President’s Appointments Power, because the Appointments Clause establishes the “powers of the Executive and Legislative Branches with admirable clarity”.<sup>64</sup> 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 war powers assigned to Congress.<sup>65</sup>

When the text of the Constitution is not explicit, formalism does look to history and usage to determine how powers were meant to be allocated.<sup>66</sup> In *Loving v. United States*<sup>67</sup> 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, § 8, which grants Congress the power to promulgate rules for “the Government and Regulation of the land and naval forces”.<sup>68</sup> 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.<sup>69</sup> He concluded that, “the history does not require us to read Clause 14 as granting to Congress an exclusive, non-delegable power to determine military punishments.”<sup>70</sup> Article 14 is certainly more clearly defined

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<sup>62</sup> *Public Citizen v. United States Department of Justice*, 491 U.S. 440, 487 (1989) (Justice Kennedy).

<sup>63</sup> 491 U.S. 440, 487 (1989)

<sup>64</sup> *Public Citizen*, 491 U.S. 487.

<sup>65</sup> See Banks and Raven-Hansen, *supra* note 37, 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?* 115 (Peter Raven-Hansen ed., 1987) (there is widespread scholarly dispute as to what the Commander in Chief Clause means).

<sup>66</sup> See Yoder, *supra* note 58, at 177 (“Formalism also stresses the importance of history and practice when the Court labels a power as executive, legislative, or judicial.”)

<sup>67</sup> 517 U.S. 748 (1996).

<sup>68</sup> *Loving*, 517 U.S. 761

<sup>69</sup> See *Id.*

<sup>70</sup> *Id.*

than the Commander in Chief Clause, as it includes verbs within it which 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 that would be independent on Congress, most of the evidence suggests they felt this power would be very 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 want to instill the President with authority as broad as that argued for by the Bush Administration. The available historical evidence backs up this contention, as it demonstrates that the Framers intended that the Commander in Chief Clause would convey nothing more than that the President would have independent authority in battlefield decisions. This is not to say that the detention of enemy non-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 formalism is based on an originalist position regarding the division of constitutional authority that is inflexible in application, and the original understanding of the Commander in Chief Clause is simply not consistent with the Administration's argument for Congressional exclusion.<sup>71</sup>

One of the strongest indications that the Framers had a narrow vision of what the Commander in Chief Clause was supposed to mean is the possible war time authority which they declined to entrust to the President. While the failures of the Continental

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<sup>71</sup> Public Citizen, 491 U.S. 487 (suggesting that the Supreme Court could not tolerate even minor "tinkering" with how the Framers' divided power).

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. Despite the fact that George Washington's inability to independently raise supplies had proven costly during the Revolutionary War, the Framers still did not feel comfortable with giving the President such authority.<sup>72</sup> Furthermore, the broad language of the war clauses from the Massachusetts and New Hampshire constitutions, which were the model 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, they choose a title which at the time of the Constitution's drafting was a generic term denoting the highest officer in a particular chain of command.<sup>73</sup> In all probability, the Framers probably sought to do little more than confirm that the President would be the final authority on battlefield decisions, 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."<sup>74</sup>

There was little debate during the Continental 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 the fact 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

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<sup>72</sup> See Wormuth and Firmage, *supra* note 41, at 107 (explaining the significance of the Framers not giving the President the authority to raise supplies).

<sup>73</sup> See *Id.*; Ely, *supra* note 26, at 142.

<sup>74</sup> Henkin, *supra* note 29, at 45.

apprehensive members of the Convention did not fear the legal powers conferred by the commander in chief clause.”<sup>75</sup> In one of the few contemporary writings on the Clause, 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...”.<sup>76</sup> While Hamilton’s writing cannot be considered dispositive on the extent of the power, the Supreme Court relied on it in one of its few pronouncements on the Commander in Chief Power:

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.<sup>77</sup>

If the Framers intended for the Commander in Chief Clause to only convey authority to direct the Army and Navy on the battlefield then the logical conclusion would be that Presidential decisions external to that limited sphere would not be deserving of the same degree of exclusivity. Or at the very least, it seems clear that there is a disconnect between an expansive view of the Commander in Chief Clause and the argument from formalism that Congress cannot infringe on the Power.

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 different way than other parts of the Constitution.<sup>78</sup> It is not just the clause itself is ambiguous, but the text does not sufficiently reveal how the Framers intended it to interact with Congress’ war powers. This problem is compounded by the lack of definitive historical

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<sup>75</sup> See Wormuth and Firmage, *supra* note 41, at 107-109.

<sup>76</sup> Hamilton, *supra* note 54.

<sup>77</sup> *Fleming v. Page*, 50 U.S. 603, 615 (1850). See Ely, *supra* note 26, at 142 (arguing that the language of *Fleming v. Page* was based on Hamilton’s writings).

<sup>78</sup> See Carter, *supra* note 62 at 111 (arguing that one must use greater interpretation with war powers because the lines of authority are not clear).

information on how the Framers intended 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.”<sup>79</sup> 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 strongest supporters staunchest supporters of a formalist position have tended towards a balancing approach in war power 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*<sup>80</sup> in analyzing the Separation of Powers issues, though he was careful to qualify that the method was not proper for all such cases.<sup>81</sup> 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* is thus demonstrative that in practice the Supreme Court has difficulty in employing a straight formalist approach to the war powers.

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 on the basis of the Commander in Chief

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<sup>79</sup> *Id.*, at 112.

<sup>80</sup> 343 U.S. 579 (1952).

<sup>81</sup> *Dames & Moore*, 453 U.S. 939.

Power.<sup>82</sup> 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.”<sup>83</sup> This is something of a strange conclusion given that 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.<sup>84</sup> 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 that 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 the Congressional and Presidential war powers. While he is referring to an instance of cooperation between the branches, as opposed to conflict, Scalia does note that:

[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.<sup>85</sup>

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 acknowledgement that the President’s

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<sup>82</sup> See *Loving*, 517 U.S. 768 (“it 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.”)

<sup>83</sup> *Loving*, 517 U.S. 768.

<sup>84</sup> 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:

“without 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.”  
*Loving*, 517 U.S. 765.

<sup>85</sup> *Loving*, 517 U.S. 771 (Justice Scalia concurring).

war powers may overlie those of Congress. If not for some concurrent authority then 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 in this area.<sup>86</sup> Thomas explains that there is a history of 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:

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.<sup>87</sup>

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. This point will become more apparent in the next part of the paper, which demonstrates the degree to which Congress' war powers give it concurrent authority in how a war is conducted.

## **V. Balancing: Congress versus the Commander in Chief Power**

Opposed to formalism is a functionalist perspective, which holds a different view of 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, and indeed, this is of secondary importance. According to functionalism what matters most is strengthening the overall aim of the Framers, namely a proper

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<sup>86</sup> Loving, 517 U.S. 778 (Justice Thomas concurring) (“heightened deference extends not only to congressional action but also to executive action by the President, who by virtue of his constitutional role as Commander in Chief...possesses shared authority over military discipline.”)

<sup>87</sup> Loving, 517 U.S. 778 (Justice Thomas concurring).

functioning system of checks and balances.<sup>88</sup> In the war powers context, functionalism is most fully articulated in Justice Jackson’s famous concurrence in *Youngstown*.<sup>89</sup> 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 particular branch he noted that, “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.”<sup>90</sup> 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 which 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.<sup>91</sup> It was also on this basis that he 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 the conduct of war.

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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

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<sup>88</sup> See Tanelian, *supra* note 39, at 966-967 (explaining Separation of Powers functionalism as a doctrine).

<sup>89</sup> See Koh, *supra* note 1, at 78 (noting the lasting influence of *Youngstown*).

Given how widely understood Jackson’s concurrence is I will not digress into an explication of the tripartite structure.

<sup>90</sup> See *Youngstown*, 343 U.S. 635.

<sup>91</sup> See Koh, *supra* note 1, at 73 (arguing that an ideal of balanced participation underlies Jackson’s concurrence).

<sup>92</sup> See *Youngstown*, 343 U.S. 644 (“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 own commitment of the Nation’s armed forces to some foreign venture.”).

sometimes overlooked is that it is a framework that is supposed to be used for analyzing Presidential power, and not for analyzing the Separation of Powers. Consequently, in a zone three situation, where the President's power is at its lowest, his or her 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 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.<sup>93</sup>

Essentially, Jackson was advocating a balancing test to decide where the power lies, though the test would be broad in scope, looking to the overall Constitutional structure to see which branch had more inherent authority. 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."<sup>94</sup> 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 compared formalism, it just appears that way because the tripartite structure favors cooperation between the branches. However, in certain instances cooperation is

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<sup>93</sup> Roy E. Brownell, *The Coexistence of United States v. Curtiss-Wright and Youngstown Sheet & Tube v. Sawyer in National Security Jurisprudence*, 16 J. L. & Politics 1, 53 (2000).

<sup>94</sup> See *Youngstown*, 343 U.S. 638.

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.

### **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*<sup>95</sup>, the Supreme Court held that great deference should be given to Presidential determinations in the context of foreign policy, given the Executive Branches inherent policy-making advantages.<sup>96</sup> 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.”<sup>97</sup>

*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.<sup>98</sup>

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<sup>95</sup> 299 U.S. 304 (1936)

<sup>96</sup> See *Curtiss-Wright*, 299 U.S. 309.

<sup>97</sup> 299 U.S. 304, 319 (1936).

<sup>98</sup> See Brownell, *supra* note at 41 (arguing that *Curtiss-Wright* has been used by the Executive 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?* 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”).

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.<sup>99</sup> 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.<sup>100</sup> This point was made by the Majority 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.<sup>101</sup> This is something of an over-simplification of *Curtiss-Wright*'s meaning, as there is a strong international component involved, but it certainly limits how compelling the case is as a precedent. Furthermore, as Justice Jackson emphasized in *Youngstown*, the use of the war powers to justify action in the domestic sphere is particularly suspect.<sup>102</sup> As the earlier words of Madison indicated, the Framers were well aware that times of war presented an opportunity for the Executive Branch to seize power.<sup>103</sup> 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 over-stepped the bounds of his or her mandate to lead the nation.

In addition to the general respect to be afforded the President in foreign affairs, there is another argument for Presidential authority beyond his or her inherent powers. The President may be able to lay claim to special power on the basis of an emergency, or authorization by Congress which would trigger his or her general Executive Power. The *Prize Cases* demonstrate that in times of a national crisis the President can accomplish

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<sup>99</sup> See Brownell, *supra* note at 28-29 (noting the internal/external dichotomy of *Curtiss-Wright*).

<sup>100</sup> See *Id.*, (noting the heavy criticism that Sutherland's arguments about Presidential superiority in foreign affairs has received); Koh, *supra* note 1 at 94-95 (explaining the many problems with *Curtiss-Wright*).

<sup>101</sup> See *Padilla* 352 F.3d 714.

<sup>102</sup> See *Youngstown*, 343 U.S. 660 (Justice Jackson 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.").

<sup>103</sup> See *infra* note 20.

things that would not be normally possible under the Constitution.<sup>104</sup> Arguably, the *Prize Cases* represent a very special exception, but there is an inescapable logic to the fact that compelling circumstances might justify Executive claims to strong powers.<sup>105</sup> 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. 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.”<sup>106</sup>

The opposite of the emergency power situation is when Congress has acted to ratify Presidential action. Under the *Youngstown* tripartite structure the President’s power would be at its zenith, and in a branch conflict later attempts to control this power may be frowned upon. Congressional flip-flopping on important issues plays into the critique of

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<sup>104</sup> See e.g. Padilla 352 F.3d 728 (Justice Wesley 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.”)

<sup>105</sup> Wormuth and Firmage argue that the *Prize Cases* were decided upon by a slim 5-4 majority, and the decision was carefully circumscribed in what it would permit. They also point out that at the most the *Prize Cases* justify is a triggering of a state of war, which would do no more than allow the President to exercise his or her normal Commander in Chief Powers. See Wormuth and Firmage, *supra* note 41, at 68-70. Their points are well taken; however, the paper is open to the possibility that terrorism could conceivably justify grants of power to the President by analogy to the *Prize Cases*. More important is whether such enhanced powers would be exclusive or not.

<sup>106</sup> Carter *supra* note, at 115.

Congress as an institutionally flawed actor, and undercuts arguments for their inclusion. Just how much weight Congressional ratification should be given is difficult to quantify. However, in a structural sense something very similar happens when Congress declares war, triggering the full force of the Commander in Chief Power, and later attempts to change the parameters of the conflict. This will be explored in greater detail in the next section, as well as arguments for why Congress' war powers empower it to regulate the conduct of a war.<sup>107</sup>

### **Why Congress Should Win a Balancing Test**

What must be weighed against the powers of the President are Congress' own War Powers, and the structural considerations which underlie them. 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.<sup>108</sup> While it is somewhat a simplification of 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, the existence of the President's war power is contingent on exercises of Congressional power. This situation is reflected in the fact 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

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<sup>107</sup> See *infra* pp. 31-31 (explaining the meaning of the naval war cases).

<sup>108</sup> Congress has a third major war power, Clause 14, however it only concerns internal military discipline.

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 marquee and reprisals, and make rules concerning captures on land and water. What is important for the question at hand is the fact that in a series of early cases the Supreme Court decided that this included the authority to declare limited wars, and that Congress could determine the scope of those limits.<sup>109</sup> 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 of interpretive weight.<sup>110</sup> Here there are not only not only legislative acts which demonstrate that Congress can define the limits to a war, but judicial decisions as well.

These cases involved a naval war with France in which Congress placed both use and area restriction 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.<sup>111</sup> The fact that these limits changed over time is important, because the cases, “suggest that

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<sup>109</sup> See Wormuth and Firmage, *supra* note 41, at 58-60 (noting that the possibility of limited war was decided by *Bas v. Tingy* (1800), *Talbot v. Seeman* (1801), and *Little v. Barreme* (1804)).

<sup>110</sup> *Id.* at 61 (arguing that special weight should be given to the three decisions).

<sup>111</sup> See Banks and Raven-Hansen, *supra* note 37, at 155 (discussing the legislation involved in the naval war); Wormuth and Firmage, *supra* note 41, at 58.

Congress may change the limits and therefore the scope of [a war] while it is being fought”.<sup>112</sup>

In the last of these cases related to the naval war, *Little v. Barreme*, the President’s orders conflicted with the dictates of Congress, but Congress’ 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.<sup>113</sup> 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.<sup>114</sup> 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 existence that the President could exercise his Commander in Chief Power.<sup>115</sup> 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.<sup>116</sup> What is less evident is what authority does the power to raise and supply the army give

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<sup>112</sup> Banks and Raven-Hansen, *supra* note 37, at 155; *See also* Henkin, *supra* note 29, at 103-104 (arguing that Congress can limit the scope of a war in the middle of the conflict).

<sup>113</sup> *See* Wormuth and Firmage, *supra* note 41, 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.”).

<sup>114</sup> *See Id.* (relating the meaning of Marshall’s opinion).

<sup>115</sup> *See* Carter, *supra* note 62, at 113 (“few would quarrel with the conclusion that the armed forces which the President commands are the ones that Congress raises and supports”).

<sup>116</sup> *See infra* note 31 (explaining the importance of appropriations in the military context).

Congress to control the combat decisions of the Commander in Chief. Congress plays some role by virtue of the fact that it makes the decisions concerning what type of army to fund.<sup>117</sup> This necessarily impacts some of the 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.<sup>118</sup>

Just because 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 act with speed in responding to a threat, thus facilitating deterrence. It may delegate this authority to the President, but 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, this means that 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.<sup>119</sup>

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

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<sup>117</sup> See Banks and Raven-Hansen, *supra* note 37, at 152-153 (noting that all military appropriations are based in the power to raise and support armies).

<sup>118</sup> Carter, *supra* note 62 at 113.

<sup>119</sup> See Peter Raven-Hansen, *Nuclear War Powers*, 83 A.J.I.L. 786, 789 (1989) (arguing that the President cannot escalate a conventional war to a nuclear war absent Congressional authorization).

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:

Nothing in the language 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 tanks more than three thousand.<sup>120</sup>

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 the fact that most wars are not officially declared by Congress, Congress may have tacitly 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. So 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 Clause was meant to convey a great deal of influence to Congress. Consequently, in most

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<sup>120</sup> Carter, *supra* note 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, 28 (William Van Alstyne) (1988) (arguing similarly that the Army Clause gives Congress the power to enact area restrictions) .

situations where there would be a conflict between the branches the Army Clause should tip a balancing test in favor of Congress.

Beyond the two Clauses there is additional evidence for why Congress should prevail in a balancing test. 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.<sup>121</sup> In 1836 Congress appropriated money for the removal of Fort Gibson from Indian Territory to a location near the border of Arkansas.<sup>122</sup> In 1940 Congress provided that no military selectee could be stationed outside of the Western hemisphere.<sup>123</sup> 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 the movement of troops more directly; it is because the problems of military management do not lend themselves to legislative decision.”<sup>124</sup>

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 had the effect of making it impossible for the President to convey an order except through the medium of 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

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<sup>121</sup> See Wormuth and Firmage, *supra* note 41, at 113.

<sup>122</sup> See *Id.*

<sup>123</sup> See *Id.*, at 113-114.

<sup>124</sup> See *Id.*, at 114.

of the military hierarchy.<sup>125</sup> Similarly, in 1908 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.<sup>126</sup> These statutes set up structures that limited the President to command the military, and as such are arguably invasive infringements on the Commander in Chief Power. Presidential acquiescence to them thus supports the conclusion that it is within the power of Congress to limit the authority of the Commander in Chief.

## **VI. Conclusion**

While some of the subsidiary arguments within this paper could be extended further; in reality, the 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 over-ride Presidential decisions justified by an expansive view of the Commander in Chief Power. In most time periods this would also be considered to be a fairly uncontroversial position. For example, in a 1990 academic work Vice President Cheney was sharply critical of what he considered to be Congressional overreaching in foreign policy; however, he was also explicit in relating that Congress has a role to play in the formulation of a successful foreign policy. He explained each branches role in relation to what he considered to be their 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 compromises, 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 would be ready for action. Its major

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<sup>125</sup> See *Id.*, at 92-93.

<sup>126</sup> See *Id.*, at 93.

characteristics, in the language of *Federalist* No. 70, were to be ‘decision, activity, secrecy and dispatch’.<sup>127</sup>

Everything that Cheney said is 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. As the third anniversary of 9-11 approaches, which the Executive Branch argues is the trigger for its expanded authority, it also 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 fully insulated decision-making. There may 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 that such a position has never been advanced by a President in our Constitutional history should make the Executive Branch, and the Supreme Court for that matter, pause; and consider that perhaps engagement with Congress would be more fruitful than attempts to exclude it as an actor.

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<sup>127</sup> Dick Cheney, “Congressional Overreaching in Foreign Policy” in *FOREIGN POLICY AND THE CONSTITUTION* 102-103 (Robert A. Goldwin and Robert A. Licht eds., 1990).