The allocation of wartime authority between the president and Congress, always hotly contested, has been the subject of much discussion during the last two administrations. President George W. Bush invoked his constitutional authority as commander in chief, among other authorities, to order the detention, interrogation, and trial of members of al-Qaida and the Taliban, as well as the warrantless wiretapping of suspected members of al-Qaida and their contacts in the United States.

President Barack Obama relied on his constitutional powers to use force in Libya without congressional authorization and to claim that some congressional restrictions on the transfer of detainees from Guantanamo are unconstitutional.

In each of these instances, critics of expansive use of presidential power argued that the president exceeded his constitutional authority and called upon Congress and the federal courts to take action to reset the constitutional balance. This chapter lays out the framework for understanding the constitutional allocation of national security powers among the branches as it is understood today.

The text of the U.S. Constitution grants many wartime authorities to Congress. Article I grants Congress the following relevant powers:

- to declare war
- to raise and appropriate funds for the national defense
SEPARATION OF POWERS AND NATIONAL SECURITY

- to define and punish war crimes and other violations of international law
- to regulate the conduct of the armed forces, including setting rules with respect to those captured on land and at sea

Article II installs the president as commander in chief of the armed forces and also gives him the authority to negotiate treaties, subject to the advice and consent of the Senate. Article III provides the courts no particular national security powers, although they are empowered to hear cases and controversies arising under the U.S. Constitution, which frequently include national security questions.

There is scholarly debate surrounding the intention of the drafters of the Constitution with respect to the allocation of national security powers among the branches. Some believe the drafters were concerned about the aggregation of wartime powers in the hands of the executive branch in the aftermath of a revolution against monarchical rule. For these scholars, a strong congressional role in national security decisions is a popular check on executive predilections in favor of war.

A Justice Department official in the Bush administration, John Yoo, presents an opposing viewpoint, arguing that the Framers intended for a strong executive to lead during wartime, with the congressional role limited to the power of the purse. From this perspective, many congressional restrictions imposed on the president’s wartime decisions are unconstitutional.

THE REALITY

Regardless of which vision of the balance of powers between the branches is historically accurate, in practice the president has emerged as the central actor in responding to emergencies that require the use of force. The president, as a single powerful figure, has a greater capacity to respond to national security crises than the slow, deliberative, and diffuse Congress. Moreover, there is often a lack of political will in Congress to use appropriations and oversight authorities to force a change in presidential policy. Democrats, who gained a majority in both houses of Congress in 2006 based in part on opposition to the war in Iraq, nevertheless were unable to force any major changes in Bush administration policy toward that war.

Consistent with this reality, the Office of Legal Counsel at the Department of Justice has concluded that the president has the power without the authorization of Congress to commit U.S. troops abroad and take military action short of war to

Congress has declared war only five times:

- War of 1812
- Mexican-American War
- Spanish-American War
- World War I
- World War II

In recent years Congress has authorized the use of force without a formal declaration of war:

- Vietnam (Gulf of Tonkin Resolution, 1964)
- Iraq (1993)
- Afghanistan (2001)
- Iraq (2003)

But presidents have used force without any congressional authorization at all, including

- Somalia (1993)
- Haiti (1994)
- Bosnia (1995)
- Kosovo (1998)
- Libya (2011)

protect important national interests.\(^4\) Even measures amounting to war may be undertaken without congressional action in an emergency to protect the country from foreign invasion or insurrection.\(^5\) Presidents have time and again invoked their constitutional authority as justification for the use of force, both where they act without congressional authorization and even where there was arguably some congressional approval.

The president’s constitutional authority is not without bounds, however. The Supreme Court has held consistently that the president must respect limits on the exercise of his commander-in-chief authority that have been imposed by Congress in the proper exercise of its constitutional powers. In the landmark decision *Youngstown Sheet & Tube Co. v. Sawyer (Steel Seizure Case)*,\(^6\) the court struck

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4. See Memorandum from Caroline D. Krass, Office of Legal Counsel, U.S. Dep’t of Justice, to Att’y Gen. Eric Holder, Authority to Use Military Force in Libya (Apr. 1, 2011) (defending President Obama’s decision to use airpower in Libya without congressional authorization).
5. See The Prize Cases, 67 U.S. 635 (1863) (upholding President Lincoln’s blockade of the Confederate States in advance of congressional authorization on grounds of emergency authority to protect against foreign invasion or insurrection).
down President Harry Truman’s order nationalizing steel mills to prevent a strike that would have crippled steel production during the Korean War. In his famous concurring opinion, Justice Robert Jackson identified a three-category approach to presidential actions that is still used by the Supreme Court today:

**Category 1**: Where the president acts pursuant to congressional authorization, he acts with the authority of both branches. Such actions are permissible unless the federal government as a whole lacks authority to act.

**Category 2**: Where the president acts without any relevant congressional action, he is in a “zone of twilight,” meaning there may be concurrent authority for the president and Congress to act. A long pattern of congressional inaction in the face of presidential action is treated as acquiescence to presidential authority.

**Category 3**: Where the president acts against the express or implied will of Congress, he acts illegally unless the congressional restrictions imposed are unconstitutional.\(^7\)

Given this framework, presidents generally claim that their national security actions are pursuant to congressional authorization, which will almost always render them lawful. President Bush claimed that Congress granted him authority in the Authorization for Use of Military Force after the 9/11 attacks to conduct warrantless foreign intelligence surveillance within the United States. The program, called the Terrorist Surveillance Program or TSP, would have been on much firmer constitutional footing if it were more clearly authorized by Congress, since it would then be lawful provided that the government had authority to undertake the activity.

While courts have never opined on whether the TSP was authorized by Congress, they have on other occasions been circumspect in concluding that Congress authorized presidential action. In *Hamdan v. Rumsfeld*\(^8\) the Supreme Court considered whether Bush had lawfully created military commissions to prosecute alien enemy combatants detained at Guantanamo Bay. Among other arguments, Bush argued that Congress had authorized the commissions in the Detainee Treatment Act (DTA) when it created federal court review procedures for military commission convictions. The Supreme Court rejected this argument, explaining that while the DTA recognized commissions, it did not authorize them.

Even without congressional authorization, presidential action may be lawful if Congress acquiesces to the president’s actions. In *Dames & Moore v. Regan*,\(^9\) the Supreme Court rejected President Jimmy Carter’s argument that Congress had authorized him to dismiss claims against Iran pending in federal courts as part of

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7. Id. at 635–38 (Jackson, J., concurring).
an agreement ending the Iran hostage crisis. The Court nevertheless upheld the president’s actions because Congress had long allowed the executive authority to enter into claims settlement agreements. This long-standing pattern in effect constituted a form of approval of executive actions. The Justice Department Office of Legal Counsel has made similar arguments to justify presidential use of force short of war without congressional authorization.

The Supreme Court considers numerous factors when it reviews whether Congress has acquiesced to presidential action, including the consistency, density, frequency, duration, and normalcy of the practice. In the Steel Seizure Case, Justice Felix Frankfurter’s concurring opinion rejected Truman’s argument that Congress had acquiesced to presidential authority to seize steel mills. Frankfurter found that there were just three isolated instances where the president had seized private property without congressional authorization or declaration of war, a level of activity insufficient to constitute acquiescence.

In those instances where Congress does exercise its prerogative to restrict presidential authority in the national security area, those restrictions must be followed except where unconstitutional. For example, in Hamdan the Supreme Court found that Congress had specifically authorized the use of military commissions in the Uniform Code of Military Justice subject to several conditions. The president was bound to follow these conditions because they were passed pursuant to Congress’s war powers.

### POST-9/11 U.S. SUPREME COURT NATIONAL SECURITY DECISIONS

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<th>Case Name</th>
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<td>Ashcroft v. al-Kidd, 131 S. Ct. 2074</td>
<td>2011</td>
<td>Government does not violate the Fourth Amendment when it uses properly obtained material witness warrants for the purpose of detaining terrorism suspects.</td>
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<tr>
<td>Holder v. Humanitarian Law Project, 130 S. Ct. 2705</td>
<td>2010</td>
<td>Government does not violate the First Amendment when it criminalizes speech that is directed by or coordinated with a foreign terrorist organization.</td>
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<td>Boumediene v. Bush, 553 U. S. 723</td>
<td>2008</td>
<td>Detainees held at Guantanamo Bay, Cuba, are protected by the Suspension Clause of the U.S. Constitution. The case-by-case review scheme created by Congress in the Detainee Treatment Act and Military Commissions Act constitutes an unconstitutional suspension of the writ of habeas corpus.</td>
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11. 343 U.S. at 611 (Frankfurter, J., concurring).
12. 548 U.S. at 593.
### SEPARATION OF POWERS AND NATIONAL SECURITY

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<tr>
<th>Case Name</th>
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<td><em>Munaf v. Geren,</em> 553 U.S. 674</td>
<td>2008</td>
<td>The federal courts have jurisdiction over the habeas claim of a U.S. citizen detained by U.S. forces acting as part of an international coalition overseas. The court will defer to the government’s determination that a U.S. citizen will not be tortured after transfer to the custody of a foreign state.</td>
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<tr>
<td><em>Hamdan v. Rumsfeld,</em> 548 U.S. 557</td>
<td>2006</td>
<td>The executive must abide by restrictions on his authority to convene military commissions imposed by Congress in the Uniform Code of Military Justice.</td>
</tr>
<tr>
<td><em>Hamdi v. Rumsfeld,</em> 542 U.S. 507</td>
<td>2004</td>
<td>A U.S. citizen detained in the United States has a constitutional right to notice of the reasons for his detention and the ability to contest those reasons in front of a neutral fact finder with the assistance of counsel.</td>
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In rare instances, the Supreme Court has found that Congress exceeded its constitutional role by infringing on an enumerated presidential power. In *INS v. Chadha* the Court struck down a provision of the Immigration and Naturalization Act that gave the House of Representatives the authority to override, by resolution, immigration determinations made by the attorney general. The Supreme Court held that the so-called legislative veto infringed upon the president’s sole authority, found in the Presentment Clause, to decide whether to sign or veto legislation. While the courts have rarely found such infringements, this line of argument is frequently advanced by scholars and executive-branch lawyers to claim that restrictions imposed on Congress by the president’s commander-in-chief power are unconstitutional.

The most extreme example of this argument was made by the Office of Legal Counsel at the Justice Department in the now infamous “torture memo.” That memo concluded that capture, detention, and interrogation of enemy combatants is a core function of the commander in chief, and therefore is not subject to regulation by Congress. As a consequence, the memo recognized the authority of the president to ignore the federal statute criminalizing torture by U.S. officials in conducting interrogations pursuant to his commander-in-chief authority.

The “torture memo” is inconsistent with the approach to separation of powers taken by the Supreme Court. The Court has found that while the Constitution prohibits infringements on enumerated presidential powers, it permits restrictions on implied or aggregated powers provided that any such restriction advances a congressional power and is proportionate to the aims sought. The authority to

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interrogate enemy combatants is implied from the president’s commander-in-chief authority. The criminal prohibition on torture was passed pursuant to enumerated congressional powers, including the power to define and punish offenses against the law of nations and to set rules for captures on land and at sea, and does not prevent the president from exercising his duties as commander in chief. The Office of Legal Counsel in the Justice Department subsequently withdrew the “torture memo” and accepted that the statute criminalizing torture is constitutional as applied to interrogations undertaken during armed conflict.16

Similar questions surround the TSP authorized by President Bush. The warrantless domestic wiretapping permitted by the order creating the program deviated from the Foreign Intelligence Surveillance Act (FISA), which requires warrants for domestic surveillance. While the Justice Department argued this program was authorized by Congress, as discussed above, it also contended that FISA would be unconstitutional if it did not permit the wiretapping at issue because it would prevent the president from carrying out core duties as commander in chief.17

This argument is extremely controversial. The Office of Legal Counsel memo portrayed surveillance operations as a core wartime tactic, which the commander in chief must be free to employ in a conflict authorized by Congress. It relied on historic practice predating FISA in which the president had engaged in similar activities to protect national security.

Critics responded that wiretapping is an implied presidential power subject to proportionate restrictions by Congress issued pursuant to its wartime powers. They defend the constitutionality of FISA because it was made pursuant to the power of Congress to make rules for the regulation of land and naval forces.18 And they reject the relevance of pre-FISA practice because whatever inherent authority the president had to conduct surveillance before FISA, he must now follow restrictions imposed by Congress. No court has ever ruled on whether the presidential justification for the TSP was valid.

Despite the requirement that the president follow congressional restrictions on his emergency powers that are constitutional, courts are often unwilling to get involved in disputes regarding the exercise of wartime authority. Courts have used a variety of doctrines to refuse to adjudicate on the merits disputes regarding the exercise of wartime authority. Three are worth noting here.

First, courts will decline to hear cases that require the adjudication of a political question, meaning an issue that the Constitution assigns to the political

16. See Memorandum from Steven G. Bradbury, Office of Legal Counsel, Dep’t of Justice, to File (2009) (“[T]he sweeping assertions . . . that the President’s Commander in Chief authority categorically precludes Congress from enacting any legislation concerning the detention, interrogation, prosecution, and transfer of enemy combatants are not sustainable.”).
17. U.S. Dep’t of Justice, Legal Authorities Supporting the Activities of the National Security Agency Described by the President (Jan. 19, 2006).
branches or that is a purely political dispute. In *Corrie v. Caterpillar*\(^{19}\) the family of a woman killed by an Israeli bulldozer sued Caterpillar, alleging it aided and abetted Israel’s violations of international law when it sold the bulldozer. Caterpillar did so as part of a U.S. government program aiding the sale of military equipment to allies including Israel. The Ninth Circuit Court of Appeals affirmed dismissal of the case on political question grounds. Holding Caterpillar liable for participation in a U.S. government program would require second-guessing the government’s decision to authorize the sale, a discretionary decision best left in the hands of the government.

Second, plaintiffs must have alleged a concrete injury to themselves perpetrated by the government. In *ACLU v. National Security Agency*\(^{20}\) the Sixth Circuit Court of Appeals upheld dismissal on standing grounds of claims by journalists, academics, and civil liberties groups alleging they had been the subjects of unlawful wiretapping as part of the TSP. Plaintiffs lacked standing because they could not demonstrate they had been the victims of wiretapping. The standing analysis was not affected by the fact that FISA prevented plaintiffs from learning whether they had been wiretapped. The Second Circuit Court of Appeals recently reached the opposite conclusion, and the Supreme Court has now agreed to resolve the matter.\(^{21}\)

Third, courts will decline to hear cases that require disclosure of state secrets damaging to the country’s national security. In *Mohamed v. Jeppesen Dataplan*\(^{22}\) the Ninth Circuit affirmed dismissal of claims that the defendant had aided the Central Intelligence Agency in its program of extraordinary rendition, which moved terrorist suspects from one country to another, allegedly for the purpose of interrogation using torture. The court concluded that the nature of the claims and defenses raised required the exposure of secret information regarding the rendition program that would have damaged national security, thereby mandating dismissal.

To overcome some of these institutional and structural limitations on its role in regulating the use of force, Congress passed the War Powers Resolution (WPR) in the aftermath of the Vietnam War. The WPR attempts to enforce a role for Congress in the use of force by

- terminating the president’s authority to use force within 60 days unless Congress authorizes the use of force, extends the 60-day period, or cannot meet due to armed attack upon the United States, and
- granting Congress the authority to terminate the use of force by concurrent resolution.

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19. 503 F.3d 974 (9th Cir. 2007).
20. 493 F.3d 644 (6th Cir. 2007).
22. 614 F.3d 1070 (9th Cir. 2010) (en banc).
President Nixon vetoed the WPR, arguing that these provisions unconstitutio-
nally restricted the president’s commander-in-chief authority, but Congress
overrode his veto. Subsequent presidents have maintained that aspects of the WPR
are unconstitutional but have largely claimed they have acted consistently with its
provisions.

The WPR is generally viewed as a failure in restricting the president’s use
of his emergency powers. Presidents have narrowly interpreted the 60-day-clock
provision to claim that apparent uses of force did not start the 60-day window.
Most recently, President Obama argued that his decision to commit U.S. airpower
to the U.N.-authorized mission to protect civilians in Libya did not amount to
introduction of armed forces into “hostilities or into situations where imminent
involvement with hostilities is indicated by the circumstances,” which triggers the
clock. State Department legal adviser Harold Koh identified four features of the
use of force in Libya, which he argued collectively precluded the 60-day clock
from being triggered:

1. U.S. forces played a constrained and supporting role in the mission;
2. No U.S. casualties or substantial risk of U.S. casualties;
3. Limited risk of escalation;
4. Modest U.S. military engagement.23

While some scholars and members of Congress have been critical of this
interpretation, the WPR fails to provide meaningful enforcement for its provi-
sions. The federal courts have found that members of Congress lack standing to
enforce the provisions of the WPR in court because they have legislative options
to stop presidential action that violates the WPR.24 But these steps—cutting off
funding for military missions or even impeaching the president—were available
to Congress prior to passage of the WPR, and their illusory nature was justifica-
tion for passage of the WPR in the first place. Thus, whether WPR requirements
are met becomes largely a discretionary decision for the president and therefore
serves only as a limited check on his emergency powers.

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23. Press Release, U.S. Dep’t of State, Harold H. Koh, Testimony Before the Senate Foreign
lacked standing to bring a claim alleging a violation of the WPR).
SEPARATION OF POWERS AND NATIONAL SECURITY

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RESOURCES

Memorandum from Steven G. Bradbury, Office of Legal Counsel, Dep’t of Justice, to File (2009) (providing analysis of current Justice Department views on the ability of Congress to restrict the president’s wartime authority).

Dep’t of Justice, Legal Authorities Supporting the Activities of the National Security Agency Described by the President (Jan. 19, 2006) (Bush administration justification for the TSP).


