

**PRESIDENTIAL POWERS REVISITED: AN ANALYSIS OF
THE CONSTITUTIONAL POWERS OF THE EXECUTIVE
AND LEGISLATIVE BRANCHES OVER THE
REORGANIZATION AND CONDUCT OF THE
EXECUTIVE BRANCH**

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PART I – INTRODUCTION

Two hundred and eighteen years after George Washington was elected to serve as the first President of the United States, the Framers of the Constitution would likely be heartened to know that over a dozen people are vying for the right to run as their party's presidential candidate in the upcoming 2008 presidential election. However, these same Framers would likely be severely disheartened to learn that the powers and responsibilities

role of national security, military affairs, and foreign affairs in structuring and reorganization attempts.

Part II of this Article starts with an examination of the early history of the powers assigned to the Continental Congress under the Articles of Confederation. From there, this part examines relevant provisions of the Constitution and the Federalist Papers to further understand the executive and legislative entities, which the Framers intended to, and did, create through the ratification of the Constitution.

Part III of this Article then examines the history of executive power to engage in security-based operations under the commander-in-chief powers, as well as military restrictions placed on the President by the Congress and selected points of congressional involvement in issues and policy areas which have been vested in the executive branch. The author has selected an examination of security issues in particular because they demonstrate how a key function of the presidency was regarded and because security-based issues are at the heart of executive branch reorganization attempts which have occurred in the wake of September 11, 2001 and which are likely to occur in the future.

Part IV of this Article discusses various statutes which affect the relationship between the executive and legislative branches and their functions. It goes on to discuss several other tools of national security policy and their relation to the executive and legislative branches.

After the extensive history provided by Parts II, III, and IV, Part V analyzes the information gleaned from history and legal precedent in order to make observations regarding the appropriate border between executive and legislative branch power over the executive branch. Part V concludes that, since the advent of the CIA as an institutionalized entity after World War II, Congresses of all political affiliations have sought to usurp the powers the President holds over his office and the executive branch—particularly in terms of national security—regardless of the President's own political affiliation or the domestic and international situations faced by the United States. Part V also concludes that this precedent is dangerous and violative of the Constitution, and suggests that the way to stop further erosion is for both future Presidents and members of Congress to understand their proper role in the constitutional system which they are, and will be, elected to protect and serve. Ultimately, the business of governing the United States is not about creating a flattering sound bite, about generating campaign images of consensus or assault on an Executive

used to denote the governor of a state, an office which was endowed with executive powers under the constitutions of the states which formed the confederacy called the United States of America.⁹ By cre-

nominations for certain officers.³³ The Framers made a distinction between funding military action and overseeing the conduct of military action by vesting these functions in different branches.³⁴

C. Pre-Ratification Debate

The extensive public debates surrounding the propriety of the proposed Constitution are historically quite useful in teasing out the legal intent of the Framers in creating the three branches of federal government and vesting them with specific powers. Through the fiery Federalist and Anti-Federalist Papers debate, an understanding of the words in the constitutional provisions began to emerge.³⁵ This understanding is vital to an examination of the appropriate powers of the executive and legislative branches, especially as they relate to control over the structure of the executive branch.

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crecy.⁴⁰ The Federalist Papers make clear that the conduct of war, foreign policy, military affairs, and diplomacy were areas which the Framers intended to be controlled by and within the sole purview of the Executive, as evidenced in Federalist Paper 74:

Of all the cares or concerns of government, the direction of war most peculiarly demands those qualities which distinguish the exercise of power by a single hand. The direction of war implies the direction of the common strength; and the power of directing and employing the common strength, forms a usual and essential part in the definition of executive authority.⁴¹

This quote is a particularly sharp indication of the way in which the Framers envisioned serious questions of national security to be areas which the

branch exercises the functions vested in another branch.⁴⁷ Inter-branch dependency involving the legislature as the predominant branch was particularly decried in Federalist Paper 51, which stated that “[w]ere the executive magistrate, or the judges, not independent of the legislature in this particular, their independence in every other would be merely nominal.”⁴⁸

In terms of the powers vested in the legislative branch, the Federalist Papers make clear that this branch is charged with the practical decision of declaring war,⁴⁹ and with raising, providing for, supporting, and maintaining troops of various types.⁵⁰ Interestingly, the legal definition of a “declaration of war” which has emerged is: “A country’s announcement that it is officially engaged in war against another country.”⁵¹ Parenthetically, as will be discussed in Part V below, this definition and the use of the power “to declare war” is problematic to congressional attempts to control modern wars involving fights that stem from ideology and not national identity.⁵² Additionally, the Federalist Papers shed instructive light on the intended ramifications and use of the Necessary and Proper Clause in Article I of the Constitution.⁵³ As stated in Federalist Paper 33, the Necessary and Proper Clause was inserted into the legislative powers article as a method of ensuring that Congress had adequate abilities to carry out its appropriations functions, and not for the purpose of expanding the functions of the Legislature beyond the powers to legislate and appropriate funds.⁵⁴

Thus, it is clear that the Framers meant what they said when they created three individual branches of government and vested them with distinct powers. While there is arguably an overlap of some of these powers, the overlap was in no way intended to allow one branch to subsume the other or to usurp control of that particular area. This is perhaps best demonstrated in the field of war, where Congress has ini-

what purpose separate the executive or the judiciary from the legislative, if both the executive and the judiciary are so constituted as to be at the absolute devotion of the legislative? Such a

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tial declaratory power and has overall funding power but does not have and was not intended to have the ability to act in any way to control warfare.⁵⁵ Because the Constitution is the backbone of federal law—especially as it relates to the executive and legislative

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blockade and even raise his own network of intelligence operatives.⁶⁴ Further utilizing the powers vested in him as Commander-in Chief, President Lincoln suspended habeas corpus during much of the Civil War.⁶⁵ Congress would later grant President Lincoln wide-ranging powers during the Civil War and ratify President Lincoln's actions in defense of the nation after the attack on Fort Sumter.⁶⁶ Contemporaneous to the Civil War, the Supreme Court held that President Lincoln had the ability to take such measures because of his standing as Commander-in-Chief.⁶⁷ These holdings were bolstered by the well-

Court further admonished that, when acting in these areas of policy, the President's decisions were not to be second guessed.⁷⁴

E. Cold War

After World War II ended and the Cold War quickly began, President Harry Truman realized that the OSS operation needed to be continued for the security of the nation; however, he rapidly came to realize that it needed its own funding mechanism.⁷⁵ Thus, President Truman acquiesced to the National Security Act of 1947, which established the Central Intelligence Agency (CIA) as a freestanding entity and endowed it with funding.⁷⁶ Although it is a freestanding agency, the CIA director's role in the overall national security apparatus placed him—and continues to place him—squarely within the dominion of the executive branch's policy plans and oversight.⁷⁷

President Truman also started the modern trend of using presidential signing statements as a method of communicating Executive displeasure at congressional legislation without actually using a veto.⁷⁸ Signing statements had existed for some time; however, they were largely unused since President Jackson's historic use of a presidential signing statement to voice his displeasure with the actions of Congress.⁷⁹ Since the time when President Truman embraced signing statements as a rhetorical and political tool, Presidents of all parties have used signing statements to object to the constitutionality of a variety of bills—including those which sought to circumscribe the powers of the President as granted in the Constitution.⁸⁰

During the Korean Conflict, a steel plant ceased its operations and production of steel due to a labor strike.⁸¹ President Truman became concerned that this cessation in the production of steel—a

to the strike, Congress enacted laws governing labor-related disputes such as those which plagued Youngstown Steel, and debated the possibility of placing such disputes under the jurisdiction of the executive branch. Ultimately, Congress devised a different system for handling labor disputes and did not delegate control to the Executive.⁸³ Concerned over the implications of the Youngstown Steel strike, President Truman interceded and ordered that the steel plant resume its operations, effectively seeking to break the strike so that the plant would produce steel for the war effort.⁸⁴ When sued over this decision, the Executive asserted that it was acting within the scope of the powers delegated to the President as Commander-in-Chief.⁸⁵ The Supreme Court, however, found against President Truman, holding that this was not an area over which he had inherent constitutional authority and that, because Congress debated vesting the Executive with labor-relations powers but ultimately decided not to, there was no statutory basis for President Truman's efforts to reopen Youngstown even in the face of a war-related need.⁸⁶

A trend which emerged in the aftermath of World War II and continues on through the present day is that of the President using Executive Orders⁸⁷ to shape and guide the policies and actions of his administration and those who serve in it. Whether addressed to war-related activities, national security, espionage, foreign policy, domestic policy, or executive branch governance, Executive Orders emerged in the Cold War years as a key method by which the President himself defined his administration and the Executive Office of the President.⁸⁸ This use of Executive Orders is curious, as they are entirely beyond the realm of Congress; however, Congress attempted in recent years to supplant the content of Executive Orders.⁸⁹

In the wake of President John F. Kennedy's assassination, the

83. *Youngstown*, 343 U.S. at 586-87..8[./TT2 1 Tf5.718Tm155-0.00).0033 Tw[(to sh th58)7(3J-6.711 Tf1 0 T428 TD0.00006 TeC

Twenty-Fifth Amendment was ratified and enacted in 1965.⁹⁰ This Amendment provided for clear lines of succession in the event of the death or disability of the sitting President or Vice-President.⁹¹ More important for the issue of congressional attempts to reorganize the executive branch, this Amendment granted the President's cabinet the power to vote and declare the President disabled or incapacitated and to vote to reinstate the President when the period of disability or incapacity is deemed to have concluded.⁹² The implications of this Amendment will be discussed in Part V below.

At this time, Congress as a whole—whether controlled by Democrats or Republicans—became an activist branch. Under the guise of the regulatory powers vested in Congress by the Commerce Clause, congressional actions were taken to stop racial discrimination and segregation.⁹³ When challenged, these laws were upheld by the Supreme Court, even in instances where the Court deemed the constitutional basis to be rather shaky.⁹⁴ However, by the late Cold War and Post-Cold War period, Congress was held to have gone too far in its attempts to be an activist body and influence public opinion. Issues such as regulation of guns on school campuses⁹⁵ and liability for sexual assault under the congressionally created Violence Against Women Act⁹⁶ were found by the Supreme Court to have stretched the concept of regulating commerce and its instrumentalities too far. The Acts were overturned, irrespective of the dangers posed by the societal harms which these laws were intended to combat.⁹⁷

During this time, and in particular following the Vietnam era, Congress attempted to assert greater control and guidance over the conduct of national security policy and covert operations.⁹⁸ Congress's attempts included the advent of additional committees and subcommittees tasked with overseeing the intelligence community⁹⁹

90. See U.S. CONST. amend. XXV.

91. *Id.*

92. *Id.*

93. See, e.g.

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(without much guidance as to the constitutionality of such a committee structure),¹⁰⁰

War Powers Resolution in his veto message;¹⁰⁷ every President since President Nixon held the same view and enunciated it whenever the War Powers Resolution became an issue.¹⁰⁸ Through the War Powers Resolution, Congress fulfilled its vow of attempting to reign in the powers of the executive branch relative to the conduct of war.¹⁰⁹

upcoming war on transnational terrorism.¹²³

In the wake of September 11th and the perceived governmental failures which became part of the public understanding of the attacks of that day, Congress has repeatedly attempted to find a way to reform its intelligence oversight structure.¹²⁴ However, no concrete revision system has been proposed or debated, and there are widely differing opinions over any method of reorganizing the congressional oversight committee structure as it relates to the Executive in general and the intelligence community in particular.¹²⁵

Much has been made of the September 11th Commission Report and the legislation which was prompted by it.¹²⁶ As a result, President George W. Bush issued Executive Order 13,228, creating the Office for Homeland Security.¹²⁷ Subsequently Congress created the Department of Homeland Security (DHS), an entity which essentially recreates the Office of Homeland Security, excluding a few key areas.¹²⁸ There is uncertainty over the gray areas created by the enactment of the DHS statute after the Executive Order was promulgated; these gray areas are likely to become future problems.¹²⁹

Periodically, the executive branch has issued a formal National Security Strategy. The goal of this document has historically been to present to the Administration, Congress, the American people and, increasingly, the world, with the nation's plan for domestic and international security in light of the current state of national and world affairs. President G. W. Bush's Administration issued its first National Security Strategy in 2002.¹³⁰ The document—written before congressional involvement in the creation of DHS—plots the Administration's internal reorganization plan, which is explained as necessary in order to better handle the requirements of fighting global terrorism.¹³¹ An essential element of the Administration's reorganization plan was

123. See USA PATRIOT ACT of 2001, Pub. L. No. 107-56, 115 Stat. 272 (2001).

124. See KAISER, *supra* note 98.

125. *Id.*

126. See 9-11 COMMISSION REPORT, NATIONAL COMMISSION ON TERRORIST ATTACKS UPON THE UNITED STATES (2004), available at <http://www.9-11commission.gov/report/index.htm>.

127. Exec. Order No. 13,228, 66 Fed. Reg. 51,812 (Oct. 8, 2001).

128. Homeland Security Act of 2002, Pub. L. No. 107-296, 116 Stat. 2135 (2002).

129. Compare Exec. Order No. 13,228 (2001), with Homeland Security Act of 2002, Pub. L. No. 107-296. (2002).

130. THE NATIONAL SECURITY STRATEGY OF THE UNITED STATES OF AMERICA (Sept. 2002), available at <http://www.whitehouse.gov/nsc/nss/2002/nss.pdf>.

131. *Id.*

the creation of the Office of Homeland Security through Executive Order 13,228.¹³² This National Security Strategy, like its predecessors, is the embodiment of the nation's security strategy as enunciated by the executive branch¹³³

The Intelligence Reform and Terrorism Prevention Act of 2004 (IRTPA) was passed by Congress in November, 2004 and subsequently signed by the President.¹³⁴ Several of its provisions, such as the creation of the Director of National Intelligence (DNI), are discussed in greater detail below. In regards to the DNI—which was created as the ultimate buffer between much of the intelligence community and the President but placed outside of the Executive Office of the President¹³⁵—Senator Joseph Lieberman, who was instrumental in the bill's creation and passage, admitted that the DNI is essentially an executive function.¹³⁶ Despite this admission, the IRTPA of 2004 placed the DNI outside of the Executive Office of the President, while at the same time requiring the DNI to act as a buffer between security and intelligence information and the President.¹³⁷ Another important component of IRTPA was the statutory creation of the National Counterterrorism Center (NCTC).¹³⁸ This was a statutory creation as President G. W. Bush had already created such an office in Executive Order 13,354 and provided it with essentially the same powers and responsibilities as IRTPA.¹³⁹

Following Hurricane Katrina and the mountain of blame which fell on the Federal Emergency Management Agency (FEMA) as a result of its disaster response performance, Congress passed and President G. W. Bush signed into law the Post-Katrina Emergency Reform Act of 2006, a bill which sought to reform the perceived problems with FEMA.¹⁴⁰ Several provisions of this attempted reorganization are

132. *Id.* 1.5.8261.26e ncyal p)5th e6)236239 TD0. Setel4.9d e0.8(ligence cofor)md PrTrorism6.1.8f)126vtial art of 20)7064.4.9

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to the multitude of congressional committees having jurisdiction over elements of AFRICOM and the increasing incursion of congressional committees into areas which were once delegated to the executive branch, AFRICOM remains very much a plan as of the time of writing.

At the time of publication of this article, the House Foreign Affairs Committee passed legislation condemning the deaths of Armenians at the hands of the Ottoman Empire nearly a century ago and declaring these deaths to constitute genocide.¹⁶⁵ In so doing, the Foreign Affairs Committee pushed this legislation forward for consideration and eventual voting by the House of Representatives.¹⁶⁶ Despite vehement objections from the Executive and potential damage to the relationship between the United States and Turkey – a key American ally in the Middle East, which is currently facing an internal struggle over the maintenance of a secular state – the House committee leadership has refused to withdraw this legislation.¹⁶⁷ After the Turkish government withdrew diplomatic personnel from the United States in protest of the actions of the House Foreign Affairs Committee, the Executive felt it necessary to send State Department officials to meet with representatives of the Turkish government and attempt to indicate that the actions of the House do not represent the policy of the Executive or the United States *per se*.¹⁶⁸ Thus, the House has critically damaged the ability of the Executive to speak as the unified voice of the United States and has created a duality in American foreign policy which is currently threatening a key component of the Executive's established foreign policy in the Middle Eastern region, while also implicating the obligations of the United States to a NATO member.

PART IV – NATIONAL SECURITY PROTOCOLS, STATUTORY PROVISIONS, AND CONSIDERATIONS

In addition to the provisions of the Constitution, the powers of the President and the legislative branch in relation to national security issues and military powers are codified at various points throughout

130, at 37 (2006).

¹⁶⁵ See US Bill on Armenia Moves Forward (Oct. 11, 2007), <http://news.bbc.co.uk/2/hi/americas/7038762.stm>.

¹⁶⁶ *Id.*

¹⁶⁷ See *id.*

¹⁶⁸ See US Envoy Seeks to Calm Turkey Row (Oct. 13, 2007), <http://news.bbc.co.uk/2/hi/europe/7043170.stm>.

the United States Code—the codification body for the laws of the United States. Statutes which are particularly important to the executive branch reorganization topic of this Article are briefly discussed below. Also discussed in this Part are Executive Orders, Directives, and other documents, the issue of the classification of national security information and other information possessed by the government, and the national security structure.

A. Statutory Provisions

1. The President

Of particular interest to the question of the appropriate roles of the legislative branch and the executive branch in reorganization of the executive branch is 3 U.S.C. § 301, which expressly allows the President to delegate to agency and department heads within the ex-

intelligence.¹⁷⁴

Additionally, although there are statutes giving some weight to the power of a congressional subpoena, there is no enforcement mechanism for committees or subcommittees other than appropriations-based retaliation or attempts at introducing legislation aimed at the topic of a committee hearing.¹⁷⁵

3. *Homeland Security*

As described above, the Office of Homeland Security came into existence in 2002 pursuant to Executive Order 13,228.¹⁷⁶ However, Congress created the Department of Homeland Security—essentially a duplicate of the Office of Homeland Security—by statute in late 2002 as part of the Homeland Security Act.¹⁷⁷ Under the Homeland Security Act, DHS was placed within the Executive Office of the President¹⁷⁸ and its Secretary has broad powers over the designation of its staff members.¹⁷⁹ The Secretary of DHS promulgates the rules for information sharing within the many agencies which are part of the DHS.¹⁸⁰ In certain instances, such as trade regulations which will impact international trade, the Secretary of DHS is required to notify several congressional committees prior to taking any action or implementing a regulation.¹⁸¹ As referenced above, the Post-Katrina Emergency Reform Act allowed Congress to prescribe qualification requirements for the presidential nominee to head FEMA, along with several key FEMA posts which are presidential appointments.¹⁸²

As previously discussed, in 2001, President G. W. Bush created

In terms of intelligence activities, the applicable statutes demonstrate the extent to which recent congressional activities have attempted to undermine presidential control of the intelligence community and its functioning. Members of the intelligence community are required to operate within a tightened system of funding for overt and covert operations¹⁹²—a system in which it was made more difficult to transfer funds during the current war under the provisions of the IRTPA of 2004.¹⁹³

Several miscellaneous but very important provisions for the purposes of this Article are scattered throughout title 50 of the U.S. Code. One places limits and congressional oversight requirements on presidential declarations of national emergency and the continuation of such declarations.¹⁹⁴ It also creates accountability and reporting requirements for the President in certain circumstances.¹⁹⁵ Another provision provides the President with certain authority under the International Emergency Economic Powers subsection of this title.¹⁹⁶ Yet another requires that specific congressional reporting requirements be followed in regards to international embargoes against governments in armed conflict with the United States.¹⁹⁷

B. Executive Documents, Orders, and Directives

Starting with FDR, modern American Presidents have used a system of issuing national security policies, sometimes called directives, to members of the intelligence community and the executive branch. These documents are often confidential and provide authorizations and guidance to the intelligence community and those other members of the executive branch whose functions are implicated by the particular topic of the document.¹⁹⁸ Many times, such documents

192. 50 U.S.C. §§ 413, 413a (providing for restrictions on and required congressional involvement in covert operations and actions); 50 U.S.C. § 414 (providing limitations on intelligence funding and providing the level of information which congressional committees must be provided in order to consider intelligence funding).

193. Intelligence Reform and Terrorism Prevention Act of 2004, *supra* note 34, at § 6303 (2004).

194. 50 U.S.C. § 1541 (2006).

195. *Id.*

196. 50 U.S.C. § 1702 (2006). For a discussion of the Supreme Court's construction of the scope of the President's powers under the IEEPA, see *Dames & Moore v. Regan*, 453 U.S. 654 (1981).

197. 50 U.S.C. § 1707 (2006).

198. See Presidential Directives and Executive Orders, [h. These f://www.fasion9\(m\)6.6\(er t.S\)g/irp/offnt](http://www.fasion9(m)6.6(er t.S)g/irp/offnt)

address pressing or emerging international threats to the U.S., its allies, and its interests.¹⁹⁹ There are several unifying themes throughout the history of these documents and the diverse Administrations which have issued them. Unilaterally, these documents were used for the creation of committees and subgroups within the NSA to handle specific issues or were vested with specific jurisdiction.²⁰⁰ These entities were created entirely at the will of the sitting President and their composition was also at the sitting President's will.²⁰¹ These entities helped Presidents craft national security strategies on a small and large scale.²⁰² Additionally, these documents were typically the home of covert action directions and authorizations.²⁰³

Executive Orders are used by Presidents to promulgate rules and regulations which are binding on members of the executive branch.²⁰⁴ These Orders have been used in many realms of policy formation and implementation,²⁰⁵ however, a few deserve attention for the purposes of this paper. In Executive Order 11,051, President John F. Kennedy created the Director of Emergency Planning within the executive branch.²⁰⁶ This order is notable because, decades before September 11th, President Kennedy created a less onerous version of the Director of the Office of Homeland Security which President G. W. Bush created in 2002.²⁰⁷ Unlike his successor, President Kennedy's order was not met with a subsequent attempt at reorganization by Congress. Additionally, and without congressional incident, President Clinton established the President's Foreign Intelligence Advisory Board in Executive Order 12,863.²⁰⁸

National Security Presidential Directive 51/Homeland Security Presidential Directive 20, issued under President G. W. Bush's joint system of classifying national security and homeland security presidential directives together, establishes the requirements for executive

199. *See id.*

200. *See id.*

201. *See id.*

202. *See id.*

203. *See id.*

204. *See* Selected Executive Orders on National Security, t Kennea51-0.0008 Tc9 Tw()Tjsupraf1.5 0 TD-0.Nf1.m-0.3(t Kennea51-

203. *See* *attemptsNo.ivh a la l Ken,051 Ken,-0.Nf1.m-0.3(FD9ersE(on jem*

branch continuity of control.²⁰⁹ Since September 11, 2001, continuity of control planning—culminating in the G. W. Bush Administration's National Continuity Policy—has been a key area of concern and importance.²¹⁰ These directives require that entities within the executive branch establish continuity protocols and establish a liaison between the Executive and the legislative and judicial branches for the purpose of ensuring that continuity is provided at all levels of government.²¹¹ These directives make clear that the covered agencies are under the exclusive jurisdiction of the Executive in terms of the formulation and implementation of continuity planning and that the Executive is not interested in the continuity plans of the other branches.²¹²

Another area over which the Executive exercises primary control is the national threat level system.²¹³ Adopted in the wake of September 11th, this system is likely familiar to readers, especially those who have traveled in commercial airplanes since the attacks. This system uses color-coding to inform executive branch and DHS-related agencies of the level of known and/or expected threats to the nation.²¹⁴ It also acts as an index for individuals and corporations, and changes to the threat level have affected everything from family holiday plans to stock exchange rates.²¹⁵

C. The Classification System

Prior to FDR's Executive Order relating to the regulation of state secrets made during World War II, control over state secrets—ive branch and DHS-rR264

other members of the intelligence community.²²⁴ The national security structure itself includes military information from the Department of Defense—which is separate from the overall National Security Agency apparatus—and a host of agencies, such as DHS, FBI, and CIA.²²⁵ DHS comprises myriad agencies, ranging from the Coast Guard to FEMA.²²⁶ Unlike the National Security Agency, the newly created position of the DNI is a presidential appointee but his office is not located within the Executive Office of the President.²²⁷

PART V – THE EXECUTIVE, CONGRESS, AND THE EXECUTIVE BRANCH

Beyond its general historical and legal interest, the above information was presented in order to create a foundation and context for the principle arguments of this Article. The crux of this Article’s argument is that only the Executive has the constitutional and operational power to reorganize the executive branch, especially in regards to issues of national security, military operations, and foreign affairs, and that congressional attempts to do so are legally void. This argument is based on two underlying principles: (1) the provisions of the Constitution itself—bolstered by legislative intent from the Framers, jurisprudential findings, and historical constructs; and (2) the recently emerging pattern of congressional usurpation of executive powers and

ers intended to defeat the possibility of tyranny within America and ensure a stable democracy for generations of Americans.²²⁸ The Framers carefully and clearly vested substantive powers and responsibilities in each branch, mindful of the need to weight each branch separately to preserve governmental and societal liberty.²²⁹

For the purposes of this Article, it is important to remember that the Framers vested the executive branch with the Commander-in-Chief function,²³⁰ the overall requirement to serve as the Chief Executive of the nation,²³¹ the ability to negotiate treaties and thereby fashion American foreign policy and conduct foreign relations,²³² the abil-

proper to carrying out its functions,²⁴¹ and for the Senate to give its advice and consent on presidential nominees and treaties.²⁴² These powers were retained from the powers possessed by the Continental Congress and were similar to those powers vested in the majority of state legislatures through state constitutional provisions.

Beyond the face of the Constitution, the Framers provided illuminating statements regarding their intent in creating each branch of government throughout the Federalist Papers. In these publications, the Framers demonstrated time and again that their main aim in creating the Constitution—and the tripartite system of federal government which it installed in America—was the protection of the safety of the American people from international threats, rebellions, and the instability and duplicity which emerged under the loose federation memorialized in the Articles of Confederation. Overall, the Framers were adamant that the use of a tripartite system was intended to vest each branch with its own independence and that no one branch should attempt to perform the functions of another branch because this could lead to the tyranny of one branch at the expense of the other branches and the system of liberty created in the constitution.²⁴³

In terms of the executive branch, the Federalist Papers make it clear that the Executive was given primacy in the area of negotiating treaties because of the secrecy and intelligence which is necessary in order for treaties to be properly negotiated.²⁴⁴ It was also expressly stated that the Senate's power in the confirmation process was to issue advice and consent to the President—if deemed appropriate—and not to direct the President's nominee.²⁴⁵ To the Framers, the executive branch was the appropriate branch for the conduct of war and the handling of military affairs, of diplomacy, and of foreign affairs because of its inherently and uniquely unitary quality, which devolved to one person who spoke for and represented the nation and its people.²⁴⁶ Thus, it is clear that both the Constitution and its Framers had a particular role in mind for the Executive and did not intend for any

nation's security and intelligence policy.²⁵⁵ Throughout history, the President's ability to act as the sole organ of American foreign policy and diplomacy has been largely unchallenged, although, as discussed below, this trend has slowly and dangerously become subject to slight erosion and has been threatened with further erosion during the nation's current fight against terrorism.

Finally, the enactment of the Twenty-Fifth Amendment to the Constitution elevated the role of executive branch cabinet members from their previous positions as overseers of their particular administrative domains and oracles to and of the President in their specific fields of agency and policy control. Under the provisions of the Twenty-Fifth Amendment, these cabinet members are also arbiters of the President's incapacity and/or disability for the purpose of certifying whether a President should be temporarily removed from office in favor of the Vice President or the next in the established line of succession.²⁵⁶

Taken together, the Constitution and its several forms of inter-

creasingly contentious,²⁵⁹ several administrations have decided to

functions by attempting to legislate at least some aspects of the security classification process.

Similarly, Congress created the War Powers Resolution in an attempt to reign in the powers of the Executive under the Commander-in-Chief Clause and its associated historical construction without regard to the strictures of the Constitution or its Framers regarding the primacy of the Executive in military affairs.²⁶⁹ Although it has never been challenged in court, current and past members of Congress agree that the War Powers Resolution is inherently unconstitutional, and the signing statements of every President since Nixon indicate that this belief is shared by the executive branch regardless of party affiliation.²⁷⁰

Recent attempts by Congress to use its appropriations powers to force the Executive to change its stance on and course in the Iraq war²⁷¹ are current illustrations of the fact that the same mindset which created the War Powers Resolution still exists in Congress today and that it has become so seethingly anti-Executive that it threatens to undermine the role of the President as the arbiter of American national security policy, military policy, and foreign policy. Further, scant attention has been paid to the question of whether the current “war on terrorism” is in fact a “war” which the Congress can declare or seek to control through measures other than appropriations restrictions. Using the legal definition of a declaration of war requires that a nation declare war on another nation.²⁷² While the war on terror has effectively targeted the former regimes in Afghanistan and Iraq, the current phase of the war is truly fighting terrorists of all nationalities, who have flocked to an ideology rather than a flag. This issue has not been properly addressed as members of Congress from both political parties have eagerly attempted to denigrate the presidency rather than determining the bounds of their own constitutional abilities.

At the same time, Speaker of the House Nancy Pelosi recently

which has not historically been a strong U.S. ally—despite criticism and discouragement from the Administration against taking such a trip.²⁷⁴ When asked whether she would go to Iran—a nation with which the United States has even more fragile diplomatic relations, which is known to harbor terrorists who seek to kill American troops, and which is currently attempting to become a nuclear power to a chorus of international condemnation—to meet with its leadership, Speaker Pelosi refused to rule out such an excursion.²⁷⁵

As referenced above, the Senate confirmation process has gone from a given to a huge hurdle for several Presidents and nominees. Even for successful nominees, the process is arduous not only because of inquiry into credentials but also because of its often embarrassing focus on a multitude of personal detail about a nominee's life.²⁷⁶ Senators are unafraid to tell the President who he should and should not nominate, as evidenced by the recent decision of President G. W. Bush not to re-nominate General Peter Pace to the position of Chairman of the Joint Chiefs of Staff because of concern that the Senate would not confirm him.²⁷⁷ In another incident, Senators publicly informed President G. W. Bush's Administration of the characteristics they expected to see in his nominees to fill the seats on the Supreme Court vacated by Sandra Day O'Connor and the late William Rehnquist within hours of the time these seats became vacant.²⁷⁸ There is perhaps no more striking a way to demonstrate the overreach of the Congress into the executive branch than with this trend in confirmation history, because it has resulted in the exact situation which the Framers denounced in the Federalist Papers.²⁷⁹

During much of this same time period of congressional overreaching, Congress became more activist and attempted to extend the

274. White House Criticizes Pelosi's Planned Syria Visit, (Mar. 30, 2007), <http://www.cnn.com/2007/POLITICS/03/30/pelosi.trip/index.html>.

275. See Carla Marinucci, Pelosi, Lantos May Be Interested in Diplomatic Trip to Iran (Apr. 10, 2007), <http://sfgate.com/cgi-bin/article.cgi?f=/c/a/2007/04/10/BAGV9P6C0S6.DTL>.

276. For example, during the recent confirmation hearings for now-Supreme Court Justice Samuel Alito, the inferences which some Senators attempted to draw from previous statements he made were such that they drove his wife from the hearing chamber in tears. See Bill Mears, Democrats Grill Supreme Court Nominee (Jan. 12, 2006), <http://www.cnn.com/2006/POLITICS/01/11/alito/index.html>.

277. Head of US Military 'Forced Out,' (June 15, 2007), <http://news.bbc.co.uk/2/hi/americas/6759115.stm>.

278. See Democrats Set for US Court Fight, (Nov. 1, 2005), <http://news.bbc.co.uk/2/hi/americas/4395668.stm>.

279. See *supra* Part II.C.

PART VI—CONCLUSION

From the Framers to the voters, it is expected and understood that the President speaks for his country. In times of crisis, it is the President who addresses the nation. In times of sorrow, it is the President who seeks to comfort the nation. The perception of the President of the United States as “the most powerful man in the world” is still a common one anywhere across the globe. This is not because George Washington never told a lie, or was the general who helped secure our independence; it is not because FDR reassured the American public through his fireside chats; it is not because of the universally appealing idealism of President Kennedy’s tenure; or because of the image of President Ronald Reagan demanding the Berlin Wall come down. These men and their enduring images are the result of the Framers of the Constitution and the document which vested American Presidents with strong executive powers and intended for them to speak as the voice of the nation.

The idea of legislative branch involvement in the structure or reorganization of the executive branch beyond the appropriations and confirmation functions is inappropriate under constitutional law. It is especially inappropriate given the sustained modern trend of congressional self-enlargement at the expense of areas of executive prerogative which have historically been squarely within executive purview. And it is also inappropriate because it undermines the tenet that the President—and his office—function in a separate realm from the Legislature and form the one voice which represents America at law and war, in peace and mercy, throughout the course of history.

This Article has explained the history of the executive and legislative branches relative to each branch’s individual functions and to each other with an eye on the handling of national security, intelligence, military, and general foreign affairs policy. The aim of this Article is to demonstrate that the structure of the executive branch—and any attempts to reorganize it—are solely within the boundaries of the executive branch except for the role of Congress in appropriating funds to it and confirming various presidential nominees. This argument is advanced not because of a desire to afford one branch supremacy over another, but rather because attempts by Congress to enter into the realm of executive branch function hurts the Constitution, the executive branch, the legislative branch, and the nation as a

