A FUTURE CHALLENGES ESSAY

The Power to Make War in an Age of Global Terror

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One might think that there can be few surprises in the constitutional law of the United States; after all, there is an enormous literature on this subject with a well-defined canon and we have in our Supreme Court the equivalent of *L'Académie française* to police errant opinion.

In the following essay, however, I will discuss two claims that would surprise most persons familiar with the war powers debate. The first of these, unveiled in a recent article in the *Harvard Law Review*, aims to startle us with the discovery that, contrary to the universal expectations of constitutional scholars, the president has no substantive exclusive powers of tactical command in war and until relatively recently has rarely exercised any; the second aims to remind us that, contrary to the apparently universal expectation of the public, the framers specifically denied to both the executive and legislative branches the enumerated power to make war which therefore falls into the category of implied powers—with radical consequences for the war powers debate.

In discussing these claims, I will argue that some essential elements have been largely missing from the analysis of the president's powers to prosecute a war on terror:

- Argumentative clarity regarding the *modes* of constitutional argument that must be deployed to resolve this debate
- An appreciation of the dynamic relationship between changes in the strategic context and the evolution of constitutional structures
- A realistic constitutional doctrine that can sustain the United States as it confronts the novel and threatening developments that have spawned this conflict.

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Modal clarity is important because this debate is supremely constitutional in nature and constitutional debate is legitimated by the use of constitutional modalities of argument; yet, attention to the changes under way in the strategic environment has often been avoided precisely because it is feared that, as a practical matter, the consideration of strategic imperatives would swallow up the constitutional grounds for decision. In fact, as I will argue, one cannot satisfactorily engage either of these elements without the other, nor craft a satisfying and supple doctrine—the final missing element—without engaging both of the others.

These surprising claims and missing essential elements make the war powers controversy, at present, a debate that is unknown to itself.

I.

During the period following World War II, the chief constitutional dispute over war powers in the United States concerned the president's power to initiate the use of force in the absence of a congressional declaration of war. Before the U.S. "police action" in Korea, however, this was an almost unknown topic of scholarly and political attention. Indeed, this was the case despite so many examples of executive intervention without a declaration of war that one might conclude that there was a doctrinal rule during this period that could roughly be expressed as follows:

> *If Congress provides the wherewithal, the president may dispose of the forces and materiel provided as he pleases including the initiation of conflict—even in the absence of a declaration of war or other explicit legal authorization—but Congress may change its mind and direct such dispositions as it chooses.*

This doctrine has aspects that are both *ad bellum* (that is, under what conditions can the president undertake a belligerency?) and *in bello* (that is, to what extent can Congress determine the rules of conduct for the prosecution of war?) that evolved in the first seventy years of our constitutional life. The doctrine has not developed, as it might appear, in defiance of the text, but rather with a nuanced and subtler reading of that text guided by a greater appreciation of the intentions of the framers and ratifiers than we are inclined to observe today. To put it in historical terms, this was the doctrine of the American imperial state-nation—a nineteenth-century constitutional order that depended upon non-professional armies and citizen militias—that fought the Native American wars, the French Naval War, and the Barbary interventions, as well as declared wars in 1812 and 1846.

This doctrine was considerably modified by the events of the Civil War, which continued the earlier constitutional practices with respect to initiating belligerent action *ad bellum*—President Lincoln did not go to Congress for an authorization to attack the Confederacy—but which considerably enlarged the exclusive authority of the president to control the waging of armed conflict *in bello*. For example, Abraham Lincoln relied on his power as commander in chief as the basis for the Emancipation Proclamation. In terms of its constitutional order, the new doctrine laid the basis for the industrial nation-state with its notions of total war, mass conscription, and standing armies.

The new doctrine might be roughly stated as follows:

> *Providing the Congress has created the force structure, the president may dispose of the armed forces as he pleases—even in the absence of a declaration of war or other explicit legal authorization—and although Congress may by statute terminate the conflict, it cannot direct the disposition of armed forces contrary to the direction of the president as commander in chief.*

Despite this significant change in the doctrine, little controversy attached to the war powers doctrine as a whole and it was repeatedly confirmed in the practices of the Congress and the president and in various statements by the judiciary.

Although it is sometimes claimed that Congress departed from the *in bello*, regulatory elements of this doctrine in the run-up to World War II, I believe closer inspection casts doubt on this claim. It is true that the isolationist Seventy-sixth Congress prohibited the deployment of conscripted U.S. forces outside the Western hemisphere and that President Franklin Delano Roosevelt complied with this, at some strategic peril, by using Marines and regular Army elements to occupy Iceland prior to a declaration of war. But the clarity of even this extraordinarily minor example is marred by FDR's various subterfuges with respect to the Neutrality Act as he adroitly moved the United States toward war. Moreover, this tepid example stands in contrast to the great strategic decisions taken by the president, none of which were the subject of congressional action: the Europe First strategy, the timing of the second front, the alliance with the Soviet Union, and the use of the atomic bomb.

After Korea, however, this quietude abruptly ceased and a heated controversy over the *ad bellum*, initiational elements of the doctrine commenced.

Congressional partisans pointed to the apparently unqualified text of the declaration of war clause and, if they were inclined to go further, inferred from the various Article I

powers with respect to the creation, funding, and regulation of the armed forces, that Congress was the sole custodian of the war power much the way that it is of the Article I commerce power. The president is, on this view, the executor-in-chief.

Partisans of the executive, by contrast, pointed to the commander-in-chief clause which is similarly textually unqualified; to the requirement that the president faithfully execute the laws—which include treaties which are, of course, not passed by Congress but which often commit the United States to armed assistance—and to a series of precedents in which Congress has appeared to acquiesce in countless military interventions initiated by the president.

Although the protagonists in this debate portrayed the disputes as historic, even eternal, in fact this debate was mainly a post-World War II affair. It is my view that the timing and duration of the debate that began in the 1950s and continued up through the 1990s has its origin in a particular strategic context: the Cold War, and in particular the change in strategy brought about by the advent of nuclear weapons. This accounts for the paucity of debate on war powers prior to 1949 and the avalanche of articles since then. Further, I will suggest that as the strategic context changes, so the war powers debate will change. It will shift to new grounds for dispute. I believe that this is as it should be. Just as the law of contracts should shift with changing practices in the market, so constitutional law must take into account the evolving strategic environment.

That doesn't mean that historical argument—the efforts to enforce the intentions of the ratifiers of the constitutional provision to be construed—is irrelevant because these intentions were formed in the strategic environment of the late eighteenth century. On the contrary, historical argument, along with arguments from text and structure—that is, the modalities of strict construction—are perhaps the most important legitimating forms of argument. In fact, it is my view that commentators, heedless of the strategic context in which the framers found themselves, have often and perhaps unconsciously perverted the original intention animating the constitutional provisions they construe by viewing these, anachronistically, through the lens of the Cold War, Korea, and Vietnam. A *modal*[1] way of expressing this fact is to observe that historical argument is not doctrinal argument: that is, that the original intent of the ratifiers does not shift with changing strategic developments. For this very reason, we must be cautious when we use historical arguments so that we really do try to capture the intentions of the ratifiers and not simply their practices. It seems clear, for example, that it is consistent with the intentions of our founders that the United States should have an air force, even though manned and armed flight was unknown as a *practice* to the framers' generation.

II.

We must carefully distinguish between the different modal forms of argument. Although we teach these forms in our first-year constitutional law classes, and although every constitutional lawyer knows them as deeply as any Augustan poet knew his prosody, it is nevertheless the case that the most elementary mistakes can be made by confusing these archetypal forms or simply ignoring their significance.

Perhaps the first mistake is to assume that in matters of life or death to the State, meticulous adherence to the forms of argument is an absurd luxury. The Constitution, we are often told, is not a suicide pact. But neither is it a shopping list. For one thing, the public presentation of the great policies of the American state necessarily involve, even when they are not "wholly dependent upon, traditional modes of constitutional interpretation . . ."[2] Moreover, even the most cursory review of our past exercises of the war power reveals that they are grounded in constitutional argumentation. Both within the government and outside the government, the extent of the war powers of the American state has been governed by conventional constitutional analysis. If, as the former legal advisor to the National Security Council concluded, "as a practical matter that the majority of [war powers] disputes are ultimately settled (or left unresolved) by the give and take between the political branches and by the non-judicial precedent that such negotiated resolution establishes,"[3] this too is a matter of a classic modal form, specifically doctrinal argument. Although we are trained—I almost said "deformed"—by constitutional law classes that focus exclusively on the case law of the judiciary as the generative agency of doctrine, in fact the practices of the president and the Congress also create constitutional doctrine.

The risqué observation that "whatever the political process produces is what the Constitution requires . . ."[4] disguises the fact that the actions of our political process are themselves structured and informed by the Constitution and are incorporated into its forms of argument. Worse, it suggests that either government can act unconstitutionally so long as it confines its actions to the non-justiciable or that, whatever the Constitution provides, the branches of government can flout its provisions so long as they are in temporary accord.

So it is worth our while to pay attention to the rigors of these forms. They are not mere niceties. Historical argument is quite distinct from textual argument—that is, argument from our contemporary understanding of the unvarnished words of the Constitution. This is something partisans on both sides tend to blur. And both these forms or modalities are quite different from doctrinal argument. Just as judges must create

doctrine to enable them to decide cases, so must the president and the Congress craft precedents with the future in mind. Finally, we will want to distinguish between doctrinal argument—which can hugely shift as precedents are overruled—and ethical arguments, or arguments from tradition, which emerge in much longer and more consistent patterns that reflect an embedded constitutional ethos. With these distinctions in mind, let us return to the *ad bellum* debate of the post-war era and then to the *in bello* questions raised by the war on terror.

III.

Although the war powers debate is closely associated with the controversy surrounding the war in Vietnam and Southeast Asia, it really goes back to Korea and North Asia when President Harry S. Truman ordered U.S. forces to lead a United Nations coalition without seeking a declaration of war from Congress. There was some considerable objection to this in Congress at the time; I know Lyndon Johnson thought President Truman had made a mistake. But Secretary of State Dean Acheson took the position that action by the U.N. Security Council obviated the need for a joint resolution from Congress. Treaties are, after all, the law of the land and the president is constitutionally committed to enforcing the U.N. Charter, pursuant to which the U.N. Security Council had acted.

Partisans of both sides of this debate had a hard time of it, though not necessarily for the reasons pressed by their adversaries. For example, some in Congress elided the distinction between textual argument and historical argument. This was captured by a cartoon in *The Washington Post* that first appeared in the 1960s in which a parchment scroll displays the words, "Congress shall have the power to declare war" before two frock-coated framers, one of whom observes, "Well, that should be clear enough." But this move depends upon a kind of sleight of hand, taking the current meaning of words (the mode of textual argument) and inferring an entirely erroneous original meaning (the province of historical argument). As we know from *Bas* v. *Tingy*, to say nothing of *The Federalist Papers*, the original understanding of a declaration of war had to do with perfecting the war under international law, thus permitting the lawful interdiction of neutral shipping, internment of civilians, etc. It was the farthest thing possible from a condition precedent that must be satisfied before war can be constitutionally commenced, which is, I believe, the way the phrase "declaration of war" is widely understood by the public today.

Not dissimilarly, though equally erroneously, advocates for the executive pointed to early precedents like the French Naval War, the United States' first war, which was

fought without the benefit of a declaration of war, mistakenly inferring that this war had been prosecuted on the initiative of the executive acting alone when in fact the war was fought on the basis of a series of congressional appropriations statutes. This is important not only for the doctrine that emerged; it is also indicative of the intentions of the ratifiers who peopled the Congress and the executive at the time.

These sorts of arguments dominated the debate up through the second Gulf War (another so-called "undeclared war") and then the debate rather ended with a whimper—or, perhaps I should say, with a sigh. Although peace campaigners could still speak angrily of "unauthorized wars," now they meant that the U.N. Security Council *hadn't* authorized action against Iraq, the very opposite of their objections about the Korean intervention. And while members of the executive asserted—as had President George H. W. Bush with respect to the first Gulf War—that the president didn't really need congressional authorization, in that case because he had a U.N. resolution, it was pretty obvious that George W. Bush could not take the country to war in the absence of both a congressional authorization of military action and a U.N. resolution, whatever bravado issued from the White House Press Office.

Conferences are still held on this issue—the necessary conditions precedent for intervention *ad bellum*—but that isn't where the action is. That's because, like most debates, the world moved on while the debaters continued and it eventually became obvious that new problems loomed even if the old ones were not solved to the satisfaction of all parties. The rest of us became bored and distracted, and were then agitated by new challenges, even as the conferences kept droning on. Today, among scholars and public officials, there is something of a consensus that there are four legitimate ways by which the United States can be taken to war: one is by declaration of war or other joint resolution of Congress; another is by statute; another route is by treaty or with the endorsement of an international organization established by a treaty to which the United States is a party; and a final option occurs in the context of an emergency—an imminent threat to American forces or nationals abroad, to our civil order, or to the society as a whole.[5]

The war powers debate of the fifties through the nineties had been an artifact of the Cold War and particularly of the doctrine of nuclear deterrence and its twin pillar, containment. It was absurd to think that nuclear deterrence could function on the basis of a declaration of war as a precondition to the initiation of hostilities. That's not because the president didn't have the authority to respond to a nuclear attack; even the most ardent of the congressional partisans conceded that the president

had the authority to retaliate in the face of an attack, or the threat of an imminent attack, on the American homeland. [6] It was more complex and far more serious than that. Rather it was because *extended deterrence* depended upon the president's ability to initiate nuclear strikes if our allies in Europe or Korea were overwhelmed by a conventional attack. Indeed, the whole calculus of containment depended upon executive authority, pursuant to which presidents had promulgated various strategic doctrines—massive retaliation, controlled response, assured destruction, essential equivalence—that were analogous to judicial doctrines embodied in case law.

Truly awful nuclear scenarios animated many of those hostile to executive power. It wasn't simply the president they distrusted—any president—it was the terrible prospect of mutual annihilation and, too, of officious executive intervention abroad that might always degenerate into a nuclear holocaust. These concerns sometimes inspired anxious efforts to remove such powers from representative government itself. When Congress in fact authorized intervention in Vietnam through the Gulf of Tonkin Resolution—a joint resolution signed into law by the president—opponents of the war simply ignored this and began to claim that a different joint resolution, a declaration of war, was necessary. Some simply concocted the myth now widely and shamefully repeated that the facts of the Tonkin incident had been deceitfully arranged—or willfully misconstrued—by the executive, thus vitiating any subsequent authorization by Congress.[7]

A contemporary descendant of this maneuver is the claim that President George W. Bush lied to Congress about the presence of weapons of mass destruction (WMD) in Iraq, thus erasing any constitutional authority otherwise conveyed by the joint resolution endorsing the invasion of Iraq in 2003.

If the war powers debate of the late twentieth century was an artifact of the Cold War, its successor in the twenty-first century will be an artifact of the Wars on Terror. If the former was necessary for doctrines of nuclear deterrence and containment to function, the latter must serve doctrines of preclusive warfare, which includes armed intervention abroad, aggressive intelligence collection, non-criminal detention abroad and at home, and a host of measures designed to address our ever-growing vulnerability to disruption and de-territorialized attacks.

IV.

At least deterrence and containment were well understood, even if they had some counter-intuitive aspects. Preclusive warfare, however, is an emerging doctrine and its

contours have yet to be thoroughly described. All we know for certain is that it will depend as no doctrine has depended before upon the rapid analysis of guesses about the future because the consequences of waiting for an undeterrable attack are fatal to the war aim of protecting civilians and maintaining a democratic state. As I observed in *The Shield of Achilles*,

> It is a cliché that generals always prepare to fight the last war rather than the next one. But if it is such a cliché, why haven't the generals heard it—that is, why do we persist in modeling the future on the past?
>
> The past, it turns out, is all we know about the future. Things are usually pretty much the same as they have been. About modern warfare we can say three things based on the past: that it pits one country against another; that it is waged by governments, not private parties; that the victorious party defeats—or at least indefinitely deters—its adversary.
>
> Now it happens that we are living in one of those relatively rare periods in which the future is very much unlike the past. Indeed the three certainties I just mentioned about the national security—that it is national (not international), that it is public (not private) and that it seeks victory (and not stalemate)—these three lessons of the past are all about to be turned upside down by the new Age into which we are plunging.[8]

Therefore, the ground of the war powers debate will also shift, away from disputes over the *ad bellum* and toward the subjects of the *in bello*.

The novelty of our strategic context is sometimes expressed as a war on terror. I prefer to say that this is a period of wars on terror, which will include arenas of conflict against twenty-first century, global, networked terrorists; efforts to prevent the proliferation of WMD for the purposes of compellance rather than deterrence; and the prevention and mitigation of civilian catastrophes. These are controversial ideas. Indeed, most of my friends doubt that a "war" on terror even makes sense. But this, too, counts against reviving the *ad bellum* debate. After all, if opponents of the wars on terror don't even think we are at war, it will be hard for them to demand a declaration of that state of affairs.

As we move away from a fixation on the commencement of hostilities, we will move toward an obsession with the regulatory debate, that is, the extent to which Congress can control the waging of war. In place of a focus on the declaration of war clause, attention will focus on Article I writ large; and rather than the "faithfully executed

provision," the president will rely as never before on the commander-in-chief clause, something he was loath to do when the war was of his own initiation.

Because preclusive war relies so heavily on the collection and analysis of intelligence, the executive's efforts to wage such a war will necessarily come up against the various pre-existing statutory regulations that Congress has imposed on intelligence activities. As two distinguished law professors—the authors of the *Harvard Law Review* piece—now serving in senior roles at the Office of Legal Counsel in the Department of Justice, aptly noted,

Well before the war on terrorism began, both intelligence collection and the treatment of interrogation of detained persons have become subject to a thicket of statutory regulation, through laws enacted to implement human rights treaties and the laws of war and to respond to the public's outrage at the abuse of national security powers exposed in the aftermath of Watergate. . . . [thus] Executive actions central to the current military conflict are in fact subject to a substantial body of legislative and treaty-based regulation . . . [for[much of the primary action for engagement to the enemy is more likely to occur in interrogation rooms and detention facilities, and across wires and in vast computer reservoirs of stored data than in bunkers and on traditional battlefields.[9]

So it's not that there is a general executive trend toward self-aggrandizement—the physics of the "imperial presidency" so beloved of some critics—but rather that a change in warfare is creating the conditions of constitutional conflict between the executive and the Congress and judiciary over the appropriate application of statutory and treaty-based limitations that purportedly apply to a president attempting to wage preclusive warfare. It's not that constitutional struggles are attractive in and of themselves; it's that developments in warfare now implicate statutory regulation that did not originally contemplate these developments.

V.

In this upcoming debate, Congressional partisans will point to the mass of Article I legislation governing intelligence collection and surveillance—we already have had a foretaste of this in the Foreign Intelligence Surveillance Act (FISA) reform debate—and other areas, including torture and coercive interrogation, adherence to the laws of war including the Uniform Code of Military Justice, the Federal Criminal Torture statute, War Crimes Act, the Geneva Conventions, the Convention against Torture, and laws regulating critical infrastructure protection, as well as many other statutes. Presidents—of either party, by the way—will assert the power to use the armed forces in novel ways

both domestically (as we have seen with the assignment of cyber-protection to the Department of Defense) and abroad (e.g., where Americans are serving in Afghanistan under NATO commanders). The executive will claim that the power to command the armed forces preempts congressional action insofar as the latter is contrary to, or incompatible with, executive action. The George W. Bush administration made something of a fetish of this claim, but it has an important role.

The opening shot in this new debate within the academy has already been fired by David Barron and Marty Lederman in two extraordinarily impressive essays that appeared in the *Harvard Law Review*.[10] Barron and Lederman argue that, contrary to common expectations, the commander in chief has only "superintendence" powers.[11] That is, the virtually universal assumption that Congress may not regulate the president's tactical oversight of wartime operations—an assumption that is so problematic with the breakdown of spatial barriers in warfare between zones of peace and zones of war, between international and domestic theaters—is founded on an egregious oversight. According to Barron and Lederman, there really is no problem, other than that imposed by prudential arguments, because there are no exclusive powers conferred by the commander-in-chief clause beyond the procedures enshrined in the chain of command.

This, they claim, was reflected in our common governmental tradition until Korea. "The notion, supposedly deeply embedded in the Constitutional plan, that the Commander-in-Chief Clause prevents the Congress from interfering with the President's operational discretion in wartime by 'directing the conduct of campaigns' " is belied by a careful review of the actual practices of the president and Congress from the founding up to 1950. Thus, despite its reaffirmation in the 2006 *Hamdan* v. *Rumsfeld* case, "the argument for a substantive preclusive power must proceed, if at all, by defending a reversal of our [historic practices]."[12]

This line of attack might be phrased: despite what everyone up to now has assumed to be the case, we have discovered that presidents and Congresses—at least until the War on Terror and quite possibly until Korea—acted as if this general understanding did not bind them, and was not dispositive.

But if we carefully attend to the modal distinctions between the forms of argument, rather than lumping them all together in the portmanteau phrases "historical practice" and "constitutional tradition," we can better assess this conclusion.

Barron and Lederman want to expose the fact that we have all, for a very long time, been deceived into thinking there was a reserve power in the president for tactical

command. They concede, however, that there is little evidence of the ratifiers' intention to compel this conclusion. Their historical *discoveries* are not generally the substance of historical *arguments* because they concern the behavior of a century and a half of presidents, few of whom were ratifiers of the original constitutional charter.

Rather, they say that the historical "practice," at least until the early 1950s, supports their claim. This could be construed as the assertion of either an ethical argument—that is, an argument based upon our historic constitutional traditions—or a doctrinal argument based upon the practices of the various branches of government as these have developed over time.[13]

Barron and Lederman are happy to concede that for a very long time practically everyone assumed that the president, by virtue of the Constitution's delegation of authority to him as commander-in-chief, did enjoy some reserved powers of tactical control over his forces. "There is a venerable scholarly consensus," they write, "that Congress is constitutionally disabled from using its Article I war powers to limit the President's 'tactical' options in war time." Expressing the conventional view, William Howard Taft wrote in a 1916 article in the *Yale Law Journal* that "when we come to the power of a President as Commander-in-Chief, it seems perfectly clear that Congress could not order battles to be fought on a certain plan and could not direct parts of the army to be moved from one part of the country to another."[14] Indeed, they also gleefully admit this has been a common judicial assumption since after the Civil War, when Chief Justice Salmon P. Chase stated that while Congress has an extensive war-making authority; it may not enact legislation that "interferes with the command of the forces and the conduct of campaigns."[15]

They are not troubled by the many expressions of this conventional wisdom because that is what allows them to bring about such a *frisson* in the reader when he comes upon their conclusion that "the view embraced by most contemporary war powers scholars—namely, that our constitutional tradition has long established that the Commander-in-Chief enjoys some substantive powers that are preclusive of Congressional control with respect to the command of forces and the conduct of campaigns—is unwarranted. "[16] This exciting scholarly claim relies on an exhaustive reconnaissance over the terrain of governmental practices preceding the post-war period. Whatever we may have thought they were doing, in actuality, we are told, the presidents of this period were remarkably acquiescent on those rare occasions when Congress asserted its authority over tactical control of the armed forces.

Even acknowledging the difficulty of determining when a president is acquiescing as a matter of political tactics and when he is truly asserting a constitutional claim against interest, Barron and Lederman have indeed made a valuable discovery. But is it a constitutional argument?

Well, it's not an ethical argument. Arguments from the American constitutional ethos—arguments from tradition—cannot be established by a discovery. If we have commonly held a view that is inconsistent with actuality—if we have believed that Pluto was a planet and it turns out only to be an asteroid—then that confirms that it was our tradition to believe that Pluto was a planet. A "tradition"—unlike the facts that it may assert—cannot be exposed as false. A tradition is a widely shared assumption and if that assumption is wrong, it has been no less widely shared for that discovery.

Nor can this argument be maintained in a doctrinal modality. If it is true that, until relatively recently, our practice—which is to say our doctrinal understanding—was otherwise than it has recently been, this does not count against more recent doctrine. Doctrine provides for its own overruling; modification is allowed.

Barron and Lederman pose this choice to the executive branch: presidents "can build upon a practice rooted in a fundamental acceptance of a legitimacy of congressional control over the conduct of campaigns that prevailed without substantial challenge through World War II. Or they can cast their lot with the more recent view, espoused to some extent by most—but not all—modern Presidents, that the principle of exclusive control over the conduct of war provides the baseline for which to begin thinking about the Commander-in-Chief's proper place in the constitutional structure."[17]

To see how ambitious this argument is, imagine its authors had written: "Courts can build upon a practice—segregation—rooted in the fundamental acceptance of the state's role in federalism that prevailed without substantial challenge into the late 1950s; or they can cast their lot with the more recent view that racial discrimination is unconstitutional." But in fact, we do not deny the doctrinal validity of *Brown* v. *Board of Education* by saying that *Plessy* v. *Ferguson* had a longer run.

Common understandings about the intentions of the ratifiers can be overturned by better research, more careful inferences, etc. But doctrinal argument—that is, the record of congressional and presidential practice that parallels the decision of cases and controversies by courts—is dispositive precisely to the extent of the most recent authoritative "holdings." If Presidents Washington and Lincoln did in fact act

as Barron and Lederman assert, this is of far less significance than how Congress and the president acted in 1949 and thereafter.[18]

Nor do Barron and Lederman take up prudential arguments and therefore they have no occasion to address the issue of the extent to which doctrine should be sensitive to the changes under way in the strategic environment.

Let me make two diffident suggestions: that we frame the question by looking at the original intention of the ratifiers and the important silences in their text; and that we answer it by deploying prudential and structural arguments. These two steps will lead us to a doctrinal resolution that is every bit as startling, I am afraid, as Barron and Lederman's discoveries.

VI.

I have long thought the most interesting aspect of the power to make war is that it is constitutionally committed to neither branch. This is a less surprising claim if one is merely asserting that the power to make war is divided between the legislative and executive branches, but that is not what I mean. I mean that the enumerated power to make war was carefully and deliberately removed from the text entirely. This was done at the Constitutional Convention of 1787 when the delegates declined to accept proposals to give the power to make war to either the executive or the legislative branches. The delegates removed the language by which the war power had been lodged in Congress—where it had been under the Articles of Confederation—and replaced the text with the more limited power to declare war; they then rejected proposals to give the power to "make war" to the executive, striking the entire phrase from the text. As Pierce Butler, who was an important participant in this decision, explained it at the South Carolina ratifying convention,

> It was at first proposed to vest the sole power of making peace or war in the Senate; but this was objected to as inimical to the genius of a republic, by destroying the necessary balance they were anxious to preserve. Some gentlemen were inclined to give this power to the President; but it was objected to, as throwing into his hands the influence of a monarch, having an opportunity of involving his country in a war whenever he wished to promote her destruction. The House of Representatives was then named; but an insurmountable objection was made to this proposition—which was, that negotiation always required the greatest secrecy, which could not be expected in a large body.[19]

Like other implied powers, the war power—like the power to create a national bank—must be inferred from more fundamental powers. Because war is not an end in itself, it need not be an enumerated power; because it is a means, it can be inferred from allocation to the executive—like the responsibility to enforce treaties—or from express powers given to Congress, like the declaration of war clause. But such a *means* cannot be inferred from either the power to create an army and navy or the commander-in-chief clause: we do not wage war so that the president can have something to do or the Congress to fund. By contrast, Congress's power to "define and punish . . . Offences against the law of nations" is sufficient to support such means as the Torture Act and the War Crimes Act and to regulate "targeted killing"; Congress's commerce power is sufficient to imply the means of regulating electronic interception and measures to protect the infrastructure. Its enumerated power to "make rules for the Government and Regulation of the land and naval forces" gives it "plenary control over . . . procedures and remedies related to military discipline" and thus the power to make rules for coercive interrogations. All these measures are relevant to a war on terror.

Thus the history and text of the Constitution take us a long way toward framing the issue. Now we must consider how our constitutional structure can best be deployed to solve the insistent and perilous prudential problems of wars on terror. In doing so, I begin with the legitimating function of constitutional argument.

VII.

To fight the wars of the twentieth century—the long struggle among fascism, communism, and parliamentarianism for the soul of the nation-state—we studiedly separated law and strategy.

The arch-Legal Realist Dean Acheson was every bit as committed to this separation as was General George Marshall. On the one hand, we did not wish to militarize the domestic environment; Marshall refused even to vote in elections and insisted that his subordinates wear civilian clothes when they were not on duty. On the other hand, we didn't wish to restrain warfare through the imposition of laws. We're inclined to forget that it was Francis Lieber who did as much as anyone to legitimate total war, a way of warfare that goes back to Lincoln, Secretary of War Edwin Stanton, and Generals Ulysses S. Grant and William T. Sherman, but was shocking to contemporaries in the U.S. and Europe.

By means of the separation, we defeated deadly foes who had chosen to tightly integrate strategy and law. Perhaps the most important aspect of the political struggle

surrounding *Youngstown Sheet & Tube Co.* v. *Sawyer* was not Justice Robert Jackson's celebrated concurrence so much as Truman's message that he would abide by any act passed by Congress that disclaimed the power to seize the steel mills (and also that he would not veto such an act). He chose not to trump statutory action with his commander-in-chief powers.

To fight the wars of the twenty-first century, however, we shall have to reintegrate law and strategy, for they are that sort of wars.

From those who are unconvinced that we are witnessing the emergence of a new constitutional order, we can expect to hear charges that this integration smacks of fascism or communism (depending on who's making the charge). But the failure to achieve this integration of law and strategy will deliver us defeats[20] like Abu Ghraib and Guantanamo—when strategy neglected law—and fiascos like "the Wall"[21] and the campaign for lawsuits against those telecommunication companies who gave assistance to government surveillance after 9/11 when our law had not kept pace with the strategic challenges we face.

So I conclude that while congressional partisans had the worst of it, constitutionally, in the period just passed—a declaration of war was *not* necessary for the United States to use armed force, a treaty commitment *would* suffice, Congress could *not* direct troops to enter or leave any particular theater of battle, a pattern of appropriations *was* sufficient to legitimate nuclear deterrence and riders to those appropriations *insufficient* to exercise command functions—despite all this which cut in favor of executive initiative, we are now entering a very different period.

In this new world, it's the partisans of the executive who will be in for rough sledding. There is no inherent prudential power, absent revolution or invasion that would preempt Congress from regulating U.S. forces at home or abroad so long as Congress acts within its Article I authorities. And, as I have suggested, these authorities are precisely those that will be relevant to prosecuting a war on terror.

This evolution is as it should be. We needed imaginative executive authority to win the Cold War; we will need explicit congressional endorsements to win the wars against terror. The war aim of the Long War from 1914 to 1990 was to preserve the ideology of an industrial democracy from aggressive and heavily armed ideological opponents. The war aim we confront in the twenty-first century will be to protect civilians from avoidable or mitigable catastrophes; this demands that we act strategically through

law, and the other way around, lest desperate civilians become the engine of damage to themselves and their institutions.

The George W. Bush administration attempted to meet the menacing threats it faced by circumventing the need for statutory authorization; no matter how tempting a route this is, it must be avoided because the struggle we are embarked on is one to preserve consent. Evading the consent of Congress is ultimately self-defeating and, by the way, even more enervating for Congress itself.

By kicking the props of statutory and congressional authority away, the presidency will only weaken itself and undermine the legitimacy it requires to prosecute wars against terror. It remains to be seen whether Congress is capable of being an enlightened and foresightful partner. If it is not, the absence of legitimacy is bound to result in the very losses our enemies wish to bring about, enhanced by the way, by the creation by the courts, *faute de mieux*, of a legal framework for such wars on the basis of litigation.

We must recognize that we cannot complacently rely on law that is insensitive to changes in the strategic context. To do so, as James Madison recognized in *Federalist Paper* No. 41, "will breed contempt for the law and for constraints on government generally." This gives even greater urgency to the need for Congressional action.

I am by no means sanguine about this prospect. Norman J. Ornstein and Thomas E. Mann's excellent book, *The Broken Branch*, aptly describes Congress and its current degraded and feckless condition. Indeed, as Barron and Lederman observe,

> The most glaring institutional fact about the war on terror so far is how little Congress has participated in it. The President has resolved most of the novel policy and institutional challenges terrorism poses with virtually no input or oversight from the legislative branch.

And yet we have a recent example of how Congress might successfully function as the principal constitutional regulator of the wars on terror: that is the import of the legislative action that resulted in FISA reform.

The Foreign Intelligence Surveillance Act was enacted in 1978 as a reaction to congressional investigations following the Watergate affair. These revealed that the National Security Agency (NSA) had collected millions of telegrams sent from the

United States, originally a program initiated by FDR at the outset of WW II without any further statutory authority.

FISA, which provides standards and procedures for electronic collection of foreign intelligence, is to be distinguished from the Electronic Communications Privacy Act that governs traditional criminal investigations. FISA has been amended many times, as our intelligence targets changed from Soviet agents to terrorists and to so-called lone wolves.

In December 2005 the *New York Times* disclosed that, following 9/11, the NSA had been tasked by the White House with intercepting communications without first seeking a warrant, as provided by the statute, where one party to a conversation was outside the United States. The full extent of this program remains unknown, but it appears to have been a version of data mining. Under FISA, NSA was required to demonstrate probable cause that a target was a foreign agent or terrorist. NSA requests for "basket warrants" within so-called umbrella surveillance were rejected. Included in such surveillance would inevitably be conversations where one end was undetermined to be foreign.

The statutory mechanism had not kept up with technologies that allowed, for example, wholly foreign conversations to be routed through the United States, among other anomalies. Some kind of reform was urgently needed. The FISA Amendments Act (FAA) of 2008 provides a salient example of bipartisan congressional action in a complex and urgent context. As Professor Paul Schwartz observes the new statute:

> . . . expands the government's surveillance abilities, [while] it also adds some new privacy protections. Its most important expansion of surveillance authority is to allow government collection of information from U.S. telecommunications facilities where it is not possible to know in advance whether a communication is purely international (where all parties are located outside of the United States) or whether the communication involves a foreign power or its agents. . . . The person targeted must not be a United States person. The critical substantive requirements are (1) the "target" of the surveillance is located overseas, and (2) a "significant purpose" of the surveillance must be to acquire foreign intelligence information. . . . The acquisition must also involve new minimization procedures, which the attorney general is to adopt. . . . Until this new enactment, FISA had not regulated surveillance of targets, whether U.S. citizens or not, when they were located *outside* the United States. The FAA now

> requires that a [special court] approve surveillance of a U.S. citizen abroad based on a finding that the person is "an agent of a foreign power, or an officer or employee of a foreign power." The statute also contains a prohibition on "reverse targeting" [which involves] the government using this link as a pretext to gather intelligence about the domestic party to the communication. . . . As a final privacy safeguard, the FAA also contains new mechanisms for congressional oversight.[22]

This is a very impressive piece of legislation, passed during a presidential campaign in which the members of Congress were subjected to the crassest kind of bullying by the media, notably the *New York Times* editorial page.

VIII.

This history, even more than the recent congressional action on health care, suggests that the branch may not be quite as dysfunctional as it often appears. Moreover if there are prudential reasons why we want Congress to act—to gain legitimacy for acts that necessarily are taken on the basis of mere guesses about the future based on intelligence that will sometimes be wrong—are there not also structural reasons why Congress is an indispensable partner?

I suggest this structural argument:[23]

1. The commander-in-chief clause provides a hierarchical command with the president at its apex.

2. As a co-equal branch of government, Congress cannot be under the president's command.

3. Therefore, the president cannot imply statutory authorities on the basis of the commander-in-chief clause that empower the executive to do what he wants in the absence of congressional authorization.

From these considerations—historical, textual, ethical, structural, doctrinal, and prudential—I propose this rule:

> *Statutory regulations adopted prior to the Authorization for the Use of Military Force, adopted in 2001, bear the presumption that they have been modified by that joint resolution. Congress, however, has the final word on these matters and*

explicit statutory action after an authorization for the use of military force will govern executive conduct in the war on terror.

Thus, President Bush may well have been within his rights to go beyond the authorities granted by FISA when he acted in 2001 and the telecommunication firms that relied upon his representations that their cooperation was lawful were on reasonable ground. By contrast, the current administration could not go beyond the authorities granted by the FISA reform statute in 2008.

It remains the case, as it has been since 1949 that, as the Office of Legal Counsel found, Congress may not enact statutes restricting troop levels in combat theaters, or define their mission, or determine the amount of military force to be used in response to an attack on U.S. forces, citizens, or territory. But this doctrine must be modified—perhaps in the way I have suggested—to cope with the looming threat of a conjunction among global, networked terror groups, a market in weapons of mass destruction, and the increasing vulnerability of civilians in ways that come within Congress's traditional Article I powers.

A common law method has served us well in the past with respect to these questions, even if we didn't always recognize it as such because it was being practiced by the legislative and executive branches. It can serve us well again.

Conclusion

Barron and Lederman appreciate that one reason for the shift of focus from issues of initiation to issues of regulation is "the peculiar nature of the war on terrorism. Its unusual entwinement with the home front, its heavy focus on preemptive action and intelligence collection, and its targeting of a diffuse, non-state enemy, all guarantee that presidential uses of force are likely to be conducted for years to come in a context that is thick with statutory restrictions."[24] My proposed doctrinal rule is an effort to cope with this "unusual entwinement."

The allocation of the commander-in-chief's power to the president, to say nothing of the consensus doctrine that this power contains some substantive authorities that Congress may not regulate, makes the resolution of this inter-branch confrontation highly fraught. It could even be the source of a crisis of de-legitimation. Or, it just might lay the foundation for the mature acceptance of the complexities of preclusive warfare and thus arm us more effectively to protect ourselves and our institutions. My aim in this paper is to offer an analysis of just how these apparently opposing

constitutional authorities might be satisfactorily reconciled, and thus how this difficult but crucial task might be accomplished.

I have assessed two surprising discoveries, rejected one and exalted the other. I have done this on the basis of a strict adherence to, and reliance on, the modalities of constitutional argument as these are applied in light of our changing strategic environment (as indeed they always have been). I recognize that this only a beginning. But it is the best place to begin.

Notes

1 The six modalities of constitutional argument are: historical (applying the intentions of the ratifiers of the provision to be construed); textual (applying the contemporary understanding of the terms of the provision); structural (inferring a rule from the relationships that obtain among constitutional structures); doctrinal (applying rules derived from case law and precedent); prudential (deriving rules from a cost/benefit analysis of alternatives); and ethical (implying rules from the American constitutional tradition).

2 David J. Barron and Martin S. Lederman, "The Commander-in-Chief at the Lowest Ebb—Framing the Problem, Doctrine, and Original Understanding," 121 *Harvard Law Review* (2008) 689, 725.

3 James E. Baker, *In the Common Defense: National Security Law for Perilous Times* (New York: Cambridge University Press, 2007).

4 Mark Tushnet, "The Political Constitution of Emergency Powers: Some Lessons from *Hamdan*," 91 *Minnesota Law Review* (2007), 1451, 1468.

5 Philip Bobbitt, "War Powers: An Essay on John Hart Ely's 'War and Responsibility'," 92 *Michigan Law Review* (1994), 1364, 1393–94."By the conclusion of the Clinton administration . . . it appeared that something of a practical settlement between the political branches regarding this long-contested constitutional question had been reached. By that time presidents were in rough agreement that, whatever the founding-era understandings might have been, extensive historical practice had established that the Commander-in-Chief was, to some not fully specified extent, authorized to commit American forces in such a way as to seriously risk hostilities . . . without prior congressional approval." See, Memorandum from William H. Rehnquist, Assistant Attorney General, Office of Legal Counsel, to Charles W. Colson, Special Counsel to the President 20 (May 22, 1970), 17; see also "Proposed Deployment of United States Armed Forces into Bosnia," 19 Op. Off. Legal Counsel (1995), 327, 336; "Deployment of United States Armed Forces into Haiti," 18 Op. Off. Legal Counsel (1994), 173; "Presidential Power to Use Armed Forces Abroad Without Statutory Authorization," 4A Op. Off. Legal Counsel (1980), 185, 186–88.

6 The threat to retaliate against such an attack maintained *central deterrence*.

7 This despicable canard has been too often repeated, in too many quarters, to require citation.

8 Philip Bobbitt, *The Shield of Achilles: War, Peace and the Course of History,* (New York: Alfred A. Knopf, 2002), 815–816.

9 Barron and Lederman, "The Commander-in-Chief at the Lowest Ebb," 714–715.

10 Ibid., 689.

11 "The President must to some considerable extent retain control over the vast reservoirs of military discretion that exist in every armed conflict, even when bounded by important statutory limitations and thus Congress may not assign such ultimate decision-making discretion to anyone else (including subordinate military officials)" id. 696–697. On this view, there is no "substantive" commander-in-chief power that is exclusive to the executive.

12 Ibid., 696.

13 Barron and Lederman also offer what they term a "structural argument" in support of their conclusion that the president's reserved powers are confined to the "superintendence" of the chain of command: the text of the commander-in-chief clause, they argue, is fairly read to instruct that no statute could place a general or other officer in charge of the authorized armed conflict against al-Qaeda, or the war in Iraq, and insulate that officer from presidential direction or removal. But this is not a structural argument. The Constitution does not create the force structure *per se*, and structural arguments are based on structures created by the Constitution, not by Congress; compare Barron and Lederman, 769–770.

14 25 *Yale Law Journal* (1916), 599, 610.

15 *Ex parte Milligan*, 71 US (4 Wall.) 2, 139 (1866) (Chase, C.J. concurring in the judgment); see also *Hamdan* v. *Rumsfeld*, 126 S. Ct. 2749, 2773 (2006) ("[N]either can the President, in war more than in peace, intrude upon the proper authority of Congress, nor Congress upon the proper authority of the President . . . Congress cannot direct the conduct of campaigns . . ."); see also Powell, 67 *George Washington Law Review* (1999), 527, 564–76; and H. Jefferson Powell, "The President's Authority Over Foreign Affairs," 113–26 (2002); See, e.g., William C. Banks and Peter Raven-Hansen, *The Power of the Purse* (New York: Oxford University Press USA, 1994); Michael Glennon, *Constitutional Diplomacy* (Princeton, NJ: Princeton University Press, 1990) 84; David M. Golove, "Against Free-Form Formalism," 73 *New York University Law Review*, (1998) 1791, 1855; Philip Bobbitt, see note 5, 1389–92: "although Congress may forbid the use of forces in pursuit of a particular policy at any time, it may not act as a commander directing where troops will go or direct the force it has created and the President may act within his Constitutional authority to send troops into hostile action without specific authorization even if Congressional statutes purported to interfere with his command of these forces." But see that fine contrarian Henry P. Monaghan, "The Protective Power of the Presidency," 93 *Columbia Law Review* (1993), 28.

16 Barron and Lederman, 944.

17 Barron and Lederman , 950.

18 "Washington, Lincoln, and both Roosevelts, among others—never invoked the sort of preclusive claims of authority that some modern Presidents appear to embrace without pause. In fact, no Chief Executive did so in any clear way until the onset of the Korean War." Barron and Lederman, 948.

19 Bobbitt, see note 5, 1381.

20 For these were defeats in the wars on terror just as surely as defeats in battle occurred in previous wars.

21 "The Wall" was a DOJ policy that prohibited the sharing of information between prosecutors and intelligence officials. One egregious example of its impact was the barring of FBI investigators from gaining access to the computer of Zacarias Moussaoui.

22 Paul M. Schwartz, "Warrantless Wiretapping, FISA Reform, and the Lessons of Public Liberty: A Comment on Holmes's Jorde Lecture," UC Berkeley Center for Law and Technology (2009). Retrieved from: http://escholarship.org/uc/item/7ws504gs

23 Not for the first time, I have worked on an essay only to discover that Charles L. Black Jr. got there first and wrote it better. Recognizing the crucial role of the president's veto, Professor Black wrote, the substantive law of presidential war powers is "secreted in the interstices of procedure" that dramatically alters the relative powers of the political departments, "Reflections on Teaching and Working on Constitutional Law," 66 *Oregon Law Review* (1987), 1, 12.

24 Barron and Lederman, 945.

The preferred citation for this publication is
Philip Bobbitt, "The Power to Make War in an Age of Global Terror (May 2010)," in *Future Challenges in National Security and Law*, edited by Peter Berkowitz, http://www.futurechallengesessays.com.

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