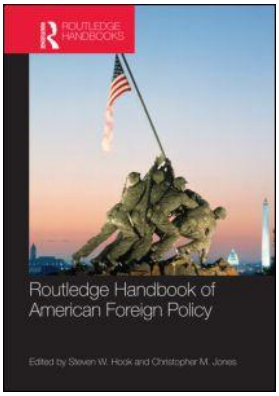

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Steven W. Hook, Christopher M. Jones

Law and Courts

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Gordon Silverstein
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Law and Courts

Gordon Silverstein

When it comes to the study of the courts and American foreign policy, September 11, 2001, changed everything—and it changed nothing.

It changed everything because the events that day and in the years since have brought a great deal of attention to constitutional debates over the separation of powers, the limits and authority of international law, and the role of courts and legal rulings in making and shaping American foreign policy in political science and in law, which, quite remarkably had until then been relatively lightly examined or remarked upon. It also changed everything because it forced the nation to consider the problems of applying America's eighteenth-century constitution—and the layers of law and interpretation that have been built upon that foundation—to a very different world from the classic Westphalian system of formal armies responding to hierarchical control.

But 9/11 also changed nothing, because what those who study political science and law suddenly discovered has always been there. Constitutional law and American foreign policy have been intimately related since Alexander Hamilton and James Madison (writing as *Pacificus* and *Helvidius*) battled over President George Washington's decision to proclaim neutrality in the conflict between England and France in 1793 (Hamilton and Madison 2007). The Supreme Court itself has played an important role in these debates, setting the parameters for the exercise of national power, as well as the allocation of that power among and between the branches of the national government. Indeed the Court's role dates back at least to 1804 when Chief Justice John Marshall ruled for the Court that orders given by the president during America's quasi-war with France (DeConde 1966; Alfange 1996) "cannot change the nature of the transaction, or legalize an act which without those instructions would have been a plain trespass" (*Little v. Barreme* 1804). Though Congress had written a statute that seemed unlikely to achieve the ends Congress itself likely intended, Marshall ruled that this was well within congressional power, and that the president had no constitutional authority to reinterpret the law.

To understand the dramatic ways in which 9/11 has and has not changed the landscape for those who study the role of courts and law in the making of American foreign policy, this chapter first reviews and tracks the evolution of the Court's doctrine in foreign affairs, arguing that judicial decisions themselves are vitally important not only as data points about who or what wins or loses, but in terms of how the underlying arguments, legal reasoning and default assumptions the Court has built over time shape and constrain American foreign

policy (Silverstein 1997, 2009a). The chapter then considers how those Court decisions shape and are shaped by the other key institutions of Congress and the executive, and then turns to examine framework legislation that has been proposed for adjusting our eighteenth-century constitution to deal with what some believe are the dramatically different challenges of our twenty-first-century world.

Constitutional Interpretation and American Foreign Policy

The Supreme Court has long played a significant and—at least through the start of the Second World War—a fairly consistent role in foreign policy cases. Though the degree of deference, delegation, and even abdication by Congress (Fisher 1999: 932) has varied through American history, the Court consistently has maintained that: (1) The national government (Congress *and* president, together) has broad, but *not* unlimited power in foreign affairs; (2) specific limits in the Constitution apply to foreign and domestic policy alike—including provisions assigning powers to the judicial branch itself—and these restrictions will be enforced by the Supreme Court even in war and emergencies; and (3) that Congress holds a great deal of constitutional authority (should it choose to exercise that authority) in foreign and domestic affairs alike.[1] These tenets have not changed. What has changed are the thresholds that must be met (or exceeded) before the Court will intervene and block or reverse government actions (Silverstein 2009b). While the Court has stood by this basic doctrine (adjusting the default thresholds along the way), there has been a profound change in how the other branches have interpreted and applied the Constitution's limits and allocation of power.

Before the Second World War, presidents and members of Congress alike largely subscribed to the same traditional interpretation as did the Court. While there were a number of assertive presidents in this period, even the most aggressive among them continued to insist that Congress had a constitutional role to play in war and foreign policy should the legislators care to do so. Though some of these presidents—Thomas Jefferson in his military engagement with the Barbary pirates; James Polk in the Mexican War, Abraham Lincoln in the Civil War, and Theodore Roosevelt's naval expansion—would act without clear congressional authorization, none asserted any sort of independent constitutional authority to do so, and all made clear that ultimately they would bow to congressional preferences (Silverstein 1997: 43–65). When Lincoln went to Congress in July of 1861, it was not to argue that his actions at the start of the Civil War were above or beyond the Constitution, but rather to seek post-hoc approval or rejection from legislators in Congress, acknowledging that it was their constitutional prerogative to do so. "In full view of his great responsibility," Lincoln told Congress, the chief executive "has, so far, done what he has deemed his duty. You will now, according to your own judgment, perform yours" (Lincoln 1861). Even Roosevelt, who insisted that the president "was a steward of the people bound actively and affirmatively to do all he could for the people, and not to content himself with the negative merit of keeping his talents undamaged in a napkin," acknowledged that the executive power was limited "by specific restrictions and prohibitions appearing in the Constitution or imposed by the Congress under its Constitutional powers" (Roosevelt 1914: 371).

The development of nuclear weapons at the end of the Second World War and the Cold War that followed generated a significant shift of power and ushered in a second era. America's eighteenth-century system, of course, was predicated on deliberation with laws needing to pass through two different legislative bodies before being signed and implemented by the president. But nuclear weapons delivered by intercontinental ballistic missiles and bombers changed that, and the perceived need to be able to make credible threats as well as execute immediate retaliation shifted dramatic power to the executive. The Cold War gave rise to a wide range of

emergency statutes, and convinced Congress to delegate power (and responsibility) to the chief executive. But unlike prior emergencies, the Cold War continued for decades—as did the emergency powers it triggered. This reality meant that presidents and legislators alike came to see these powers not as temporary aberrations, but as part of the executive's proper arsenal. The Cold War, Scheppele (2003: 1015) writes, was a crisis that "promised an indefinite future of crises," an era of permanent emergency "in which the constitutional sacrifices to be made were not clearly temporary or reversible." This era was marked by the emergence of a new rhetoric, a prerogative powers rhetoric which began to develop in the Truman years, expanded under Presidents Kennedy and Johnson and came to full flower in the Nixon administration. This executive prerogative view held that in war and emergency powers, the president alone had final authority, and when the national security was imperiled (which was a decision left to the president to make), the president could legitimately ignore constitutional limits to protect U.S. security.

This prerogative interpretation surfaced in a number of instances, notably when Congress finally mustered the political will to repeal the Gulf of Tonkin Resolution in 1971, which had ostensibly provided statutory authority for the Vietnam War. Not only did President Richard Nixon sign the bill into law, he offered no opposition to the repeal, stating unequivocally that it was "without binding force or effect," and that his signing "will not change the policies I have pursued" (quoted in Schlesinger 1989: 194). This view would be even more starkly revealed by Nixon in a television interview with David Frost after he left office. Responding to questions from Frost, Nixon summarized the prerogative powers claim by asserting that if the president "approves something because of the national security or … because of a threat to internal peace and order of significant magnitude, then the president's decision in that instance is one that enables those who carry it out, to carry it out without violating a law." Later in the interview, Nixon added that "in wartime, a president does have certain extraordinary powers which would make acts that would otherwise be unlawful, lawful if undertaken for the purpose of preserving the nation and the Constitution" (Nixon 1977).

The wake of executive abuse left by the Watergate scandal, combined with congressional frustration over the prolonged war in Vietnam, led Congress to pass a number of major laws in the 1970s designed to bring Congress back into the foreign policy mix. These acts included reforms of the Central Intelligence Agency (Johnson 1987, 1991) as well as the War Powers Resolution of 1973 (50 U.S.C. 1541–1548). These reforms and others would be the subject of some great tension over the proper role of the elected branches in foreign policy which would flare into the open during and after the congressional investigation of the Iran-Contra affair in 1980s (Draper 1991). One of the members of the Special Joint Committee of Congress that investigated these matters, Richard Cheney, then a Republican lawmaker from Wyoming, would later remark that the years after Watergate and the Vietnam War were "the nadir of the modern presidency in terms of authority and legitimacy" a period in which the chief executive's ability to lead "in a complicated, dangerous era" was severely diminished (Baker and VandeHei 2005). When Cheney reached the White House as vice president in January 2001, he pressed hard to reassert the primacy of the chief executive, particularly in foreign policy, executing a strategy he had clearly articulated ten years earlier (Cheney 1990, 2009).

September 11, then, ushered in what the Bush administration certainly expected would be a third era, one that would be marked by the reality and not simply the rhetoric of executive prerogative. To do this, the Bush administration put great weight and emphasis on constitutional law, clearly aimed at embedding and enhancing its claims to power through judicial rulings and precedent (Goldsmith 2007; Savage 2008; Bruff 2009).[2] Through public rhetoric and formal signing statements attached to legislation (Pfiffner 2008), through frequent formal legal opinions issued by administration lawyers, and in briefs and oral arguments before the Supreme Court and in lower federal courts, the Bush administration consistently asserted independent

and unfettered constitutional powers which, it asserted, could not constitutionally be interfered with by Congress or even by the Federal Courts (Yoo and Delahunty 2001, 2002; Yoo 2005; Yoo 2006; Goldsmith 2007). All of these powers and more, they said, were constitutionally left to the executive and the executive alone (Yoo 2005; 2006). The administration was determined not only to achieve its immediate policy goals, but also to assert (and they hoped, have the Court embed) a prerogative view of the powers of the Executive. And, in September 2001, they had every reason to believe this was likely to happen. But it did not. To understand why we need more than a simple box score of presidential victories and defeats before the Supreme Court requires a careful study of the opinions and arguments in those cases, placed within their historical context.

The Supreme Court and Foreign Policy: Constitutional Limits and National Power

Before the First World War, the Court's focus in foreign and domestic policy was primarily on the *vertical* separation of powers—the relative power of the national government (Congress *together with* the executive branch) versus the states—rather than on the horizontal separation of powers among and between the executive, legislative, and judicial branches.

America's commitment to maintaining a weak central government without a significant, professional, standing army made it difficult to mobilize for the First World War. This left a dilemma for conservatives such as Utah's Republican Senator George Sutherland, who served on the Senate Foreign Relations Committee. Recognizing that the United States could no longer manage international affairs with a weak and decentralized national government, and yet equally committed to maintaining state autonomy and a limited national role in social policy questions, Sutherland developed a constitutional interpretation that attempted to bifurcate the Constitution, finding a way to read the document quite differently when it came to the limits on government in domestic as contrasted with foreign policy (Sutherland 1909, 1919). When President Warren Harding nominated Sutherland to the U.S. Supreme Court, he was presented with a unique opportunity to put his theory into practice in a case called *United States v. Curtiss-Wright Export Corporation* (1936). This case concerned the delegation of power, asking what the *national government,* Congress *together with* the executive branch, could and could not do.

Foreign affairs, Sutherland argued, were governed by sovereign power, and sovereign power, he insisted, passes unbroken and in whole from one sovereign (in this case the king and parliament in England) to another (the Continental Congress and then the U.S. national government, the president *together with* Congress). All other power—domestic policy and police powers, for example—passed from the sovereign to the people and the states. From there, the people and states chose which powers to delegate and which to retain. While Sutherland did note that the executive had important powers in foreign affairs, this was not a case challenging executive power, but rather a case concerning the power of Congress to delegate discretionary power to the president. And while Sutherland ruled that Congress could, indeed, do so, he also made clear that even this sovereign power "like every other governmental power, must be exercised in subordination to the applicable provisions of the Constitution" (*United States v. Curtiss-Wright Export Corp.,* 1936: 320).

Sutherland's valiant effort to maintain a constitutional commitment to severely limited national intrusion on state autonomy in domestic affairs seemed at the time to have crumbled in the onslaught of demands for strong central government in the midst of the Great Depression and the emergence of the administrative state in the Second World War (Skowronek 1982). From that point forward, the primary constitutional debates concerning foreign affairs would

swing from the vertical to the horizontal separation of powers, focusing not on the divide between the federal government and the states, but instead on the divide between and among the branches of the national government itself.

The modern parameters of the horizontal separation of powers in foreign policy were outlined most clearly in a concurrence by Justice Robert Jackson in the steel seizure case in 1952 (*Youngstown Sheet & Tube v. Sawyer*). In deciding that President Harry Truman did not have the constitutional authority to order the seizure of privately owned steel mills, Justice Jackson argued that separation of powers cases could be divided into three groups. At one end of the scale, Jackson argued, are those cases where the president "acts pursuant to an express or implied authorization of Congress." Here, the president would have the greatest latitude, for here he or she would be exercising all the power of the national government, limited only by explicit constitutional provisions. At the other end of the scale were cases where the president "takes measures incompatible with the expressed or implied will of Congress." Here, Jackson wrote, executive power is tightly limited—a president could only exercise those powers explicitly and exclusively allocated to the executive. Between these two positions, however, there was a third category, what Jackson called the "zone of twilight." This was an arena in which the president had to act with great caution, for this was an area in which Congress and the president might have concurrent or overlapping powers, and would be skating on thin constitutional ice. The critical issue was to determine just what would constitute congressional acquiescence or approval and just what would constitute congressional opposition (moving the case from the first to the third category). Did Congress have to explicitly say yes—or no? And how should the Court interpret congressional silence? The *Youngstown* case, and Jackson's concurrence in particular, suggested that presidents were on shaky ground without explicit congressional support—silence certainly would not be read as tacit or implicit consent.

By the mid-1980s, the Court seemed to have shifted the default assumptions in the case. In foreign policy, the shift was signaled in a case challenging the executive's authority to shift litigation over Iranian assets that had been seized in the aftermath of the taking of American hostages in Teheran (*Dames & Moore v. Regan* 1981) while in domestic affairs, the Court significantly expanded executive discretion in the interpretation of statutes (*Chevron v. Natural Resources Defense Council* 1984).

Dames & Moore challenged the constitutionality of executive orders signed by President Jimmy Carter which enabled the president to negotiate the release of American hostages who had been held in Iran for more than a year. Having ordered all Iranian assets (and all claims against those assets) frozen immediately after the hostage seizure, Carter then negotiated a resolution in which those assets, and the claims against them, would be shifted out of U.S. courts and assigned to an international tribunal in Algeria for resolution. But could the president do this without explicit congressional authorization? Justice William Rehnquist's opinion for the Court argued that though one of the statutes in question (the International Economic Emergency Powers Act) was explicitly designed to *reduce* executive discretion and trim back on delegated power, the fact that it neither provided for, nor failed to preclude the sort of agreement Carter had signed meant that it posed no barrier to the president's authority in this matter. Rehnquist concluded that since Congress had not formally foreclosed or forbidden these options, these statutes actually indicated that "Congress has *implicitly* approved the practice of claim settlement by [e]xecutive agreement" (*Dames & Moore v Regan*, 680, emphasis added).[3]

Three years later in *Chevron v. Natural Resources Defense Council* (1984), the Supreme Court held that agencies could exercise broad discretion in implementing statutes unless the actions they took had been explicitly prohibited by legislation itself (Silverstein 2009a: 143–146). Where before ambiguity (or congressional silence) would allow Congress the upper hand, now the only way for congressional preferences to prevail would be if Congress could muster

the needed votes to pass unambiguous legislation—a difficult task under any circumstances and even more difficult if there is the possibility of an executive veto. As Justice Antonin Scalia would later write about *Chevron* (a case decided before he joined the Court), Congress was put on notice, and "now knows that the ambiguities it creates, whether intentionally or unintentionally, will be resolved, within the bounds of permissible interpretation, not by the courts but by a particular agency, whose policy biases will ordinarily be known" (Scalia 1989: 517). And, while *Chevron* was a domestic statutory interpretation case, it would quickly become the focus of much foreign affairs attention from conservative academics (Bradley 2000) as well as liberals. The logic of *Chevron*, Cass Sunstein argued, "applies to the exercise of executive authority in the midst of war" (Sunstein 2005: 2664; also see Posner and Sunstein 2007).

The Court's shifting default assumption lined up quite nicely with a major effort initiated by then Attorney General Edwin Meese, which was directed at fundamentally reorienting legal thought and judicial doctrine to counter what many in the Reagan administration believed to be a deep liberal bias among the judiciary and particularly within legal academe. Working with committed and skilled legal advocates (including then Deputy Assistant Attorney General Samuel Alito[4]), Meese inspired and supported a generation of conservative lawyers and legal academics who would build the Federalist Society into a significant intellectual, legal, and political force (Teles 2008; Hollis-Brusky 2010). Through legal briefs, academic writing, and government filings, these lawyers, students, and academics would develop the doctrine of original intent (Bork 1997; Calabresi 2007); and upon that foundation develop claims for the independent power of what they insisted was the "unitary executive" who exercised broad and undefined powers limited *only* by explicit provisions in the Constitution itself—in contrast with the legislative branch which exercised only the explicit, limited authority assigned by Article I, Section 8 of the Constitution (Calabresi and Yoo 2008; Spitzer 2008: 90–109).

The Courts, the Executive, and the Constitution after September 11

Seeing the trend from *Youngstown* to *Dames & Moore* and fortified by *Chevron,* the George W. Bush administration—heavily staffed with Federalist Society lawyers, and supported by a vice president deeply committed to building constitutional claims for power—could hardly be blamed for imagining that the time was ripe to develop and embed their theories of executive power. It would take a few years for the first important case testing the Bush administration's arguments for exclusive executive power in war and foreign affairs, but staring in 2004 the Court became increasingly unwilling to accept the Bush administration's constitutional claims.

In *Hamdi v. Rumsfeld* (2004) the Court was asked if the administration could, on its own authority, seize, hold and, and even try those captured as enemy combatants. While the Court was quite willing to find constitutional authority for these policies, the justices were unwilling to say that the executive alone could make these choices. This outcome is not dissimilar from the Court's ruling in *Youngstown*: That the *national government* could seize private property for public use was without question, but whether the executive could do this independently was an entirely different matter. In *Hamdi,* however, the Court argued that there was sufficient, formal delegation of power available in the 2001 Authorization for the Use of Military Force (AUMF). This position enabled the Court to argue that the president was exercising delegated power, and not acting on his own Article II authority alone. The administration could do precisely what it wanted to do, but far from embedding the president's more aggressive theories of executive power, the *Hamdi* case actually looked more like *Youngstown* and less like *Dames & Moore*.

The Bush administration was handed another constitutional defeat in *Rasul v. Bush* (2004) and a policy victory, tied to a constitutional defeat, in *Padilla v. Hanft* (2005). In Rasul the administration asserted that federal courts lacked constitutional authority to hear habeas corpus pleas from non-American citizens being held in Guantanamo, the Supreme Court rejected that claim. The administration insisted that it could indefinitely hold Jose Padilla, a U.S. citizen accused of attempting to blow up an airliner that was inbound to Chicago's O'Hare airport, and deny him access to civilian courts. Fourth Circuit Court of Appeals Judge Michael Luttig ruled that the administration could indeed hold Padilla without charges—precisely what the administration sought to do—but not because of any inherent Article II power. Padilla could be held, Luttig ruled, because the president possessed this authority "pursuant to the Authorization for Use of Military Force Joint Resolution enacted by Congress…" (*Padilla v. Hanft*, 423 F.3d 386, 2005).

In 2006 Salim Ahmed Hamdan, a driver for Osama bin Laden who had been captured in Afghanistan, petitioned the U.S. District Court, arguing that the administration had no constitutional authority to try him before a military commission (*Hamdan v. Rumsfeld*), arguing that to do so would violate the Geneva Accords, an international treaty to which the United States was a signatory.[5] This time, the Court would reject the administration's policy as well as the constitutional foundation on which it was built. In a 5–3 decision the Court ruled that the Geneva Accords were law and could be enforced in the federal courts, and that the military commissions, as they had been constructed by the administration, violated the Uniform Code of Military Justice—over which the Congress has constitutional control. The Court insisted that these commissions could be properly constructed, but to do so would require an explicit act of Congress. The legislature quickly complied, promptly passing the Military Commissions Act of 2006.

The Military Commissions Act included a provision that purported to strip the federal courts of the authority to review *habeas* petitions from the Guantanamo detainees, setting the stage for a dramatic opportunity to not only ask what the executive or Congress could do independently—but what they could, and could *not* do even when acting together. Unlike *Rasul, Hamdi,* and *Hamdan,* now the question would be does the national government as a whole possess the constitutional authority to take this action? And the answer from the Court was no.

Speaking for a 5–4 Court, Justice Anthony Kennedy ruled in *Boumediene v. Bush* (2008) that the government could only suspend the right to petition for a writ of *habeas corpus* by doing so explicitly, as required by Article I, Section 9, clause 2 of the Constitution—something the Military Commissions Act did not do. But the Court was not quite done. The administration had asserted that because Guantanamo was neither U.S. Federal Territory, nor under the control of a foreign country with which the United States had diplomatic relations, they had effectively a constitutional free hand there. The Court rejected this argument, insisting that the political branches do not have the power "to switch the Constitution on or off at will."[6]

As much as *Rasul, Hamdi, Padilla,* and *Hamdan* had set back the broader project of embedding executive prerogative, *Boumediene* pushed the Court's default even further away from *Dames* and *Chevron* by reminding the administration that process is not the only limitation in foreign policy but, as Justice Sutherland himself had written in *Curtiss-Wright*, stating that that "every governmental power must be exercised in subordination to the applicable provisions of the Constitution" (*Curtiss-Wright* 1936: 320).

Research Challenges and Opportunities

The Bush era's efforts and the Court's response set up three avenues for research. First, was the turn toward executive deference in *Dames* and in *Chevron* an aberration, thereby returning

the Court and country to a more Madisonian balance of the separated institutions that share foreign policy power? Second, will the trends exemplified in *Dames* and *Chevron* ultimately be revived and extended by a president willing to forego the more dramatic constitutional claims made by his predecessor and return to the pre-Bush era practice of building executive power on the traditional sources of statutory support and favorable judicial interpretation? Third, what are we to make of a Congress that has, at least since the 1980s, been increasingly willing to abdicate its constitutional role in foreign policy? Does this practice suggest a profound institutional failure, or, even more dramatically, does it suggest that our eighteenth century Constitution is simply incapable of dealing with twenty-first century foreign policy and emergency powers challenges?

While it is tempting to see the Court's rejection of the Bush administration's constitutional claims as evidence that the American system's self-correction mechanisms are functioning as designed, early evidence from the Obama administration suggests that strong executive dominance in foreign policy is still quite viable within the contours and structures of the traditional interpretation. Unlike Bush, the Obama administration has pursued aggressive executive power in foreign policy, but has done so by building its claims solidly on existing statutes and judicial interpretations, rather than pressing for a radically different vision of the separation of powers. Though they have not yet reached the U.S. Supreme Court, the Obama administration has aggressively asserted and defended claims for a central and powerful executive in cases ranging from those concerning warrantless wiretapping (*Al-Haramain v. Obama; Jewel v. NSA*) and extraordinary rendition (*Mohamed v. Jeppesen Dataplan*) to those concerning lawsuits over detention and treatment in Guantanamo (*Bostan v. Obama*) and the reach of the right to petition for *habeas corpus* to Bagram Air Force Base in Afghanistan (*Al Maqaleh v. Gates*).

Emergencies, the Constitution and Framework Statutes

If the Bush era cases turn out to be the aberration, and Obama revives the Court's trend away from insisting on congressional prerogatives, then the question becomes how and why Congress has failed to play its constitutional role in what has been called a system of "separate institutions sharing power" (Neustadt 1990: 29)—and what, if anything, can be done about it. James Madison wrote that the American constitutional system was predicated on an assumption that safety would depend on human nature, and that human nature would guarantee that each branch would defend its constitutional prerogatives. To do that, of course, the "interest of the man, must be connected with the constitutional rights of the place" (Madison, Federalist 51). But what happens if those become disconnected in some significant way?

Congress has changed dramatically in the past fifty years (Polsby 1983, 2005; Aldrich 1995). The dimensions of the modern separation of powers are defined far less by institution and far more by party. If the parties in Congress are ideologically unified and if the legislature and executive are controlled by members of the same party, then we can expect little in the way of Madisonian checks and balances (Tushnet 2007: 78).

Despite the changes in the party system, members of Congress continue to play something more like their Madisonian role in domestic policy, but this far from true in foreign policy (Silverstein 1997: 191–210). Examinations of presidential speeches (Lewis 1997), executive orders (Marshall and Pacelle 2005), and even in budget negotiations (Canes-Wrone, Howell, and Lewis 2008) suggest that presidents recognize the need to secure congressional support in domestic policy, but largely ignore the legislature when it comes to foreign policy. Indeed, Wildavsky's (1966) "two presidencies" thesis—asserts that there is a distinct difference between the president who presides over foreign policy, and the presidency that deals with domestic

affairs (Shull 1991). In fact, the executive not only retains the advantages Wildavsky identified in 1966, but has added a number of others as both institutions—Congress and the executive—have changed and their incentives have evolved in the ensuing decades (Moe and Howell 1999).

Has Congress simply abdicated in foreign policy? Many scholars who study Congress insist that the legislature continues to play an important role in foreign policy, but one that is built on influence rather than formal control (Burgin 1993; Lindsay 1993; Howell and Pevehouse 2007).[7] Their evidence is compelling, at least in those areas where the policy in question has a tight connection to members' own electoral concerns—members from Texas and Arizona continue to care deeply about immigration policy, whereas those from New York remain sensitive to U.S. policy in Ireland and Israel. However, influence on particular issues is not the same as an aggressive effort to defend broader institutional prerogatives in the control and direction of foreign policy more generally. And while influence may be enough to satisfy constituents, one place where this distinction matters is in Court. The Court's default treatments of congressional silence and informal deals can matter a great deal. Congress certainly has powerful tools with which to influence policy—procedural requirements, public pressure, and the influence of anticipated reactions, consultations, hearings, oversight, floor statements and, of course, the power of the purse. In Court, however, influence does not carry the same weight as do formal statutes.

Emergency Powers, Constitutional Theory, and Framework Statutes

Influence may be adequate for the immediate electoral concerns of members of Congress, but is a Congress that no longer guards its institutional prerogatives capable of managing to deal with fundamental threats to national security? Indeed, is our eighteenth-century system, built on contest and assumptions about deliberation and checks and counterweights, capable of dealing with twenty-first-century threats that include weapons of mass destruction, suicide attacks, and technological infrastructure that no eighteenth-century constitution writer could possibly have imagined?

September 11, 2001, certainly raised these questions. An optimist would note that it has been over ten years since those attacks of September 11, and there has not been another comparable attack in the United States. These facts might suggest that the eighteenth-century system was up to this challenge. That is, we can and should rely upon what some might call a business-as-usual model (Campbell 2008), arguing that the American political structure and the institutions constructed by the Constitution are flexible and adaptable and quite adequate for dealing with unanticipated, even unimagined emergencies (Tribe and Gudridge 2004). Pessimists, by contrast, would insist that we have been very lucky, and that the system survived despite its constitutional structures and not because of them. They would insist that 9/11 was a clarion call for fundamentally new structures that would insure security, even at the cost of dramatic sacrifices of individual liberty (Posner 2006).

And then there are the liberal realists who fear that security concerns will inevitably trump liberty, and thus are eager to offer a clear, preemptive structure before one is imposed upon them. Here one might find arguments such as that offered by Bruce Ackerman (2004) who insists that the American liberal constitutional system simply cannot stand up to security demands and expectations that would follow another major attack and that therefore, if we hope to preserve any liberty, we need to preemptively construct some sort of emergency powers regime, or fundamental framework for balancing rights and security, and allocating power among and between the branches. Lazar (2009), for example, argues justice and order are inextricably bound, and that the survival of the state is absolutely required if we are to have any

hope of actualizing liberal ethics. Indeed, she says, liberal ethics are actualized in order. If we recognize this, we might build institutions better able to provide and assure us the good life we seek rather than sacrificing the very purpose of these institutions to preserve a particular institutional arrangement and set of procedures which serve no real purpose if they cannot function. Ackerman is among those who argue that September 11 represents the future, and not an exception or aberration. They should urge that we take advantage of the lull we are currently enjoying to develop broad framework statutes that can structure and manage emergency powers in the future. Ackerman suggests in effect that we bifurcate the Constitution, recognizing that we need a fundamentally different regime structure to deal with emergencies. "To avoid a repeated cycle of repression, defenders of freedom must consider a more hard-headed doctrine," Ackerman writes, "one that allows short-term emergency measures but draws the line against permanent restrictions" (Ackerman 2004: 1030).

Oren Gross (2003) represents a very different sort of realist, one far closer to the approach taken by American presidents such as Jefferson or Lincoln. Much like Cicero, leaders have an obligation to do what they must to save the nation, but must not assert that they have the legal or constitutional right to do so. Their choices will ultimately be certified or rejected by the constitutional process, by the Congress or even through a round of post-hoc elections that will ratify or reject their actions. One model they cite is Lincoln who took many constitutionally questionable actions in the first months of the Civil War but never claimed prerogative emergency powers. Instead, he ultimately laid his actions before Congress, noting that it was "with the deepest regret that the [e]xecutive found the duty of employing the war-power, in defense of the government, forced upon him." In full view "of his great responsibility, he has, so far, done what he has deemed his duty. You [Congress] will now, according to your own judgment, perform yours" (Lincoln 1861). Gross argues that this approach maintains a commitment to the underlying American system is, and yet allows us to grapple with problems that system never anticipated.

The idea of framework legislation is in some sense a way around the fact that the U.S. Constitution is so hard to amend. But the problem with framework legislation is that, much like wars, we are always designing solutions for the most recent crisis, since we cannot imagine the contours and dimensions of the next challenge. This situation would be a mere annoyance if framework legislation did not have potentially profound effects in the event that it is flawed, and those flaws are exploited. Consider the War Powers Resolution of 1973. Few would argue that it has achieved the objectives of those who initially pressed for this legislation. Senator Thomas Eagleton (D-Missouri), an original sponsor, voted against the law when it finally reached the Senate floor, arguing that the final, compromised version actually ended up giving the president more power, rather than less (Eagleton 1974). Before the War Powers Resolution, any use of force by the president was constitutionally suspect without formal and explicit congressional authorization. This state of affairs did not stop presidents from using force, but it certainly left them constitutionally (and politically) vulnerable. The War Powers Resolution, however, was meant to remove ambiguity and relieve the high political cost of challenging a president when the nation's security was at risk. The chief executive was formally authorized to use force for a limited time at the end of which, their authority would lapse unless Congress took affirmative action to reauthorize the military exercise. This not only changed the political equation, but in the event there ever might be a constitutional or legal challenge in Court, this sort of formal authorization clearly shifts the debate from one about a president acting, at best, in Jackson's zone of twilight, into a debate about the limits (or lack thereof) facing a president who has explicit authorization from Congress ahead of time.

When it became increasingly apparent that the War Powers Resolution was clearly failing in its objectives, the response from most was not to repeal the law, or rethink the whole con-

cept of regulating the separation of powers in foreign policy through framework statutes, the response was that we needed more law, better law. Unsurprisingly, that call came primarily from academic lawyers including Koh (1990) and Ely (1995). This tendency to think that more law, or better law, is the solution for a perceived lack of law, or flawed or failed laws may be a particularly American trait (Silverstein 2009a). As Llewellyn has reminded generations of law students, in America there is "no cure for law but more law" (1960: 102).

In thinking about the law, the Constitution, and American foreign policy, we would do well to consider the complex ways in which ideas and institutions interact in the American system. The United States, courts, along with those who study law and politics, play an important role in developing and reinforcing these values. Tushnet rightly attributes a great deal of importance to what he calls "bureaucratic constraints," by which he means that the government ultimately depends on professionals and elected officials who have internalized a set of values (Tushnet 2008: 155) and are constrained by those values (or at least we hope they are). The courts and judicial doctrine are an extremely important source of those values and the arguments that explain and extrapolate those values. To understand American foreign policy, one must understand the institutional as well as the intellectual role the courts and the law have and continue to play in the making of that policy. And about each of these elements there is still a great deal to be learned.

Notes

1 Many insist that the 1936 case of *U.S. v. Curtiss-Wright Export Corporation*, undercuts this assertion. This badly misunderstood and often misquoted case does no such thing. (For a full discussion, see Silverstein 1997: 37–41; Fisher 2007, 2008.)

2 In a signing statement attached to a defense appropriations bill in 2005 that contained a provision banning torture, President George W. Bush wrote: "The executive branch shall construe Title X in Division A of the Act, relating to detainees, in a manner consistent with the constitutional authority of the President to supervise the unitary Executive branch and as Commander in Chief and *consistent with the constitutional limitations on the judicial power,* which will assist in achieving the shared objective of the Congress and the President, evidenced in Title X, of protecting the American people from further terrorist attacks" (White House document, December 30, 2005, emphasis added).

3 The International Economic Emergency Powers Act (IEEPA, 1977) was designed to reduce and limit previously authorized executive emergency powers, though it did assign and delegate various emergency powers to the president (Silverstein 1997: 178–180; and 2009a: 224–228).

4 Three current U.S. Supreme Court Justices—Chief Justice John Roberts, Justice Clarence Thomas, and Justice Samuel Alito—served as legal advisors in the Reagan administration. Roberts worked in the Office of White House Counsel Fred Fielding. Thomas was assistant secretary for civil rights in the Department of Education and later served as chairman of the Equal Employment Opportunity Commission. Alito served in the Department of Justice, where he worked as a Deputy Assistant to Attorney General Edwin Meese. In addition, President Ronald Reagan nominated Justice Antonin Scalia to the Circuit Court of Appeals for the D.C. Circuit and later to the U.S. Supreme Court. Earlier, Scalia had served in the Nixon administration and subsequently under President Gerald Ford, as assistant attorney general for the Office of Legal Counsel in the Department of Justice.

5 Common Article 3 of the Third Geneva Convention precludes the use of evidence to convict a prisoner unless the prisoner has had a chance to see or hear that evidence and to present a defense.

6 *Boumediene v. Bush*, 533 U.S. ___ (2008).

7 Others have strenuously and compelling refuted these claims (e.g., Hinckley 1994; Schoenbrod 1995; and Fisher 1999).

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