

## ARTICLE

## Totemic Functionalism in Foreign Affairs Law

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## Abstract

In many Western democracies, and particularly in the United States, foreign affairs are primarily an executive enterprise. The travel ban, the exit from the Iran nuclear deal, and the airstrikes against the Bashar al-Assad regime in Syria are just a few recent illustrations of unilateral assertions of presidential power. A large part of the justification for treating foreign affairs differently than other areas of public policy, in which political and judicial checks on the executive are more robust, is functional. Owing to the executive's relative institutional advantages over the legislature and the judiciary—in expertise, knowledge, speed, unitary structure, and democratic accountability—courts afford the President considerable deference in cases relating to foreign affairs. But there is something deeply flawed in the way judges apply functionalist reasoning in this context. Instead of using functionalism for what it is—a contextual and adaptable paradigm for ascertaining whether and how much deference is desired in order to make the challenged policy or act work best—judges frequently simply rely on the executive's special competence to apply a de facto presumption of near-total deference. I term this practice “totemic functionalism.”

This Article traces the conceptual underpinnings of totemic functionalism and critically analyzes its pervasive effect in foreign affairs law. Using three case studies and other recent examples, it then shows how totemic functionalism undermines the system of checks and balances, first between the organs of government and then, indirectly, inside the executive branch. As a result, while judicial deference in foreign affairs is often excused with the assertion that other non-judicial checks provide adequate substitute, I show that the near-total deference arising from totemic functionalism insulates the President from any sort of accountability.

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## Introduction

In *Trump v. Hawaii*,<sup>1</sup> the Supreme Court reaffirmed what has become a major tenet of the American separation-of-powers doctrine: the overwhelming dominance of the executive branch in foreign affairs and national security. By a 5–4 vote, the Court upheld President Trump’s Proclamation No. 9645, restricting entry by nationals from seven—predominantly Muslim—countries into the United States.<sup>2</sup> This case is a paradigm of judicial deference on issues of national security. Courts traditionally give substantial deference to the President in cases that implicate national security because they accord to the executive superior expertise and knowledge in this field.<sup>3</sup> They also operate under a presumption that the President acts in good faith to fulfill his constitutional duty. In this case, both a record of religious animus and a flawed process behind the first two iterations of the travel ban cast doubt, as all Justices acknowledged in one way or another, on whether the Proclamation’s official objective was unalloyed.<sup>4</sup> And yet, the Court deferred to the President because national security was at issue.

The President’s primacy in national security and foreign affairs is firmly established in U.S. law and politics. Especially in the modern era, Presidents have asserted broad, often unilateral, authority in this area, with Congress and the courts rarely willing or able to assert their own authority to keep executive power in check.<sup>5</sup> One does not need to look further than the past two years to find countless

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<sup>1</sup> 138 S. Ct. 2392 (2018).

<sup>2</sup> *Id.* at 2405, 2423.

<sup>3</sup> See *infra* notes 43–48 and accompanying text.

<sup>4</sup> *Trump*, 138 S. Ct. at 2417 (“At the heart of plaintiffs’ case is a series of statements by the President and his advisers casting doubt on the official objective of the Proclamation.”); *id.* at 2433 (Sotomayor, J., dissenting) (“[A] reasonable observer would conclude that the Proclamation was motivated by anti-Muslim animus.”); see also Benjamin Wittes, *Reflections on the Travel Ban Case and the Constitutional Status of Pretext*, LAWFARE (July 6, 2018, 8:18 AM), <https://www.lawfareblog.com/reflections-travel-ban-case-and-constitutional-status-pretext> [<https://perma.cc/JNP6-PEAL>] (“In different ways, all of the justices acknowledge that they are evaluating how to respond to a pretext.”).

<sup>5</sup> See generally ERWIN CHERMERINSKY, *THE CASE AGAINST THE SUPREME COURT* 54–88 (2014) (contending that the Supreme Court has consistently failed to enforce the Constitution in times of exigency); CHARLIE SAVAGE, *TAKEOVER: THE RETURN OF THE IMPERIAL PRESIDENCY AND THE SUBVERSION OF AMERICAN DEMOCRACY* (2007) (arguing that the War on Terror enabled the presidency to undermine the constitutional system of checks and balances); ARTHUR M. SCHLESINGER, JR., *THE IMPERIAL PRESIDENCY* (2004) (describing the gradual expansion of presidential power and arguing that the imperial presidency is “as much a matter of congressional abdication as of presidential usurpation,” *id.* at xxvii); ERIC POSNER & ADRIAN VERMEULE, *THE EXECUTIVE UNBOUND: AFTER THE MADISONIAN REPUBLIC* (2008) (arguing that separation-of-powers principles do not constrain the modern presidency). For accounts on the accretion of executive power in specific foreign affairs contexts, see, for example, LOUIS FISHER, *PRESIDENTIAL WAR POWERS* 80–290 (3d ed., rev. 2013) (war powers); HAROLD H. KOH, *THE NATIONAL SECURITY CONSTITUTION* (1990) (national security); CLINTON ROSSITER, *THE SUPREME COURT AND THE COMMANDER IN CHIEF* 4–5 (expanded ed. 1976) (Commander-in-Chief power); Curtis A. Bradley & Jack L. Goldsmith, *Presidential Control over International Law*, 131 HARV. L. REV. 1201 (2018) (international law and foreign relations); John Yoo, *Politics as Law? The Anti-Ballistic Missile*

illustrations of the presidency's vast powers. In addition to the travel ban, President Trump unilaterally authorized the use of force in Syria;<sup>6</sup> has maintained U.S. military support for the Saudi campaign against Houthi rebels in Yemen, despite congressional disapproval;<sup>7</sup> withdrew from the Iran nuclear deal;<sup>8</sup> declared the U.S. intention to exit from the Paris climate agreement;<sup>9</sup> withdrew from the U.N. Human Rights Council;<sup>10</sup> and opened a dialogue with North Korea on their nuclear program.<sup>11</sup> The capacity to act unilaterally is a source of extraordinary power to the modern presidency—and is asserted in foreign affairs more often than in any other field of public policy.<sup>12</sup> This matters because, as political scientists Terry Moe and William Howell noted, unilateral actions are nearly equivalent to making one's own law.<sup>13</sup> Executive primacy in foreign relations has come close to meaning full executive autonomy.

Both proponents and critics of broad executive authority acknowledge that there is no explicit basis for it in the Constitution.<sup>14</sup> The text provides some guidance regarding the allocation of foreign relations and war powers between the political branches, and it limits the authority of courts to adjudicate only cases or controversies.<sup>15</sup> But, as Professor Jeff Powell writes, “no provision of the

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*Treaty, the Separation of Powers, and Treaty Interpretation*, 89 CALIF. L. REV. 851, 868–77 (2001) (treaty interpretation power).

<sup>6</sup> *Statement by President Trump on Syria*, WHITE HOUSE (Apr. 13, 2018), <https://www.whitehouse.gov/briefings-statements/statement-president-trump-syria/> [<https://perma.cc/D3RV-NW83>].

<sup>7</sup> See Allie Malloy, *Trump vetoes Yemen War Powers Resolution, his 2nd veto since taking office*, CNN (Apr 17, 2019), <https://www.cnn.com/2019/04/16/politics/trump-vetoes-yemen-war-powers-resolution/index.html> [<https://perma.cc/8RCG-FAGR>].

<sup>8</sup> *President Donald J. Trump Is Ending United States Participation in an Unacceptable Iran Deal*, WHITE HOUSE (May 8, 2018), <https://www.whitehouse.gov/briefings-statements/president-donald-j-trump-ending-united-states-participation-unacceptable-iran-deal/> [<https://perma.cc/6FNR-T26A>].

<sup>9</sup> *Communication Regarding Intent to Withdraw from Paris Agreement*, U.S. DEP'T OF STATE (Aug. 4, 2017), <https://www.state.gov/r/pa/prs/ps/2017/08/273050.htm> [<https://perma.cc/8ULA-7YPP>].

<sup>10</sup> *Remarks on the UN Human Rights Council*, U.S. DEP'T OF STATE (June 19, 2018), <https://www.state.gov/secretary/remarks/2018/06/283341.htm> [<https://perma.cc/37CL-7QXZ>].

<sup>11</sup> *Joint Statement of President Donald J. Trump of the United States of America and Chairman Kim Jong Un of the Democratic People's Republic of Korea at the Singapore Summit*, WHITE HOUSE (June 12, 2018), <https://www.whitehouse.gov/briefings-statements/joint-statement-president-donald-j-trump-united-states-america-chairman-kim-jong-un-democratic-peoples-republic-korea-singapore-summit/> [<https://perma.cc/3NZQ-XBAE>].

<sup>12</sup> See *infra* note 72 and accompanying text (introducing the concept of foreign affairs exceptionalism).

<sup>13</sup> Terry M. Moe & William G. Howell, *The Presidential Power of Unilateral Action*, 15 J.L. ECON. & ORG. 132, 133 (1999).

<sup>14</sup> See generally LOUIS HENKIN, *CONSTITUTIONALISM, DEMOCRACY, AND FOREIGN AFFAIRS* (1990) (referring to a “twilight zone” of foreign affairs powers in the Constitution); KOH, *supra* note 5, at 67; H. Jefferson Powell, *The President's Authority over Foreign Affairs: An Executive Branch Perspective*, 67 GEO. WASH. L. REV. 527, 545–546 (1999); Saikrishna B. Prakash & Michael D. Ramsey, *The Executive Power over Foreign Affairs*, 111 YALE L.J. 231, 238 (2001) (arguing that “the presidential primacy theory is fatally incomplete, for it lacks a textual basis”).

<sup>15</sup> See U.S. CONST. art. I, § 8; *id.* art. II, §§ 2–3; *id.* art. III, § 2.

Constitution vests either the President or Congress with a general power over foreign affairs or national security.”<sup>16</sup> Instead, theories of executive primacy in foreign affairs rest largely on functional grounds—specifically on empirical claims about the relative capacities of the three branches.<sup>17</sup> The core functionalist argument is that because the executive has institutional advantages in foreign affairs—including expertise, access to information, speed, unitary structure, and democratic accountability—its judgments should receive deference from Congress and the courts.<sup>18</sup>

In legal scholarship, this argument is hardly ever challenged on its own terms. That is, even when critics argue that Congress and the courts should oversee presidential action more closely, they tend to assume that functional considerations favor executive dominance, and have criticized it with this background assumption.<sup>19</sup> In practice, more importantly, functional considerations underlie

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<sup>16</sup> Powell, *supra* note 14, at 545.

<sup>17</sup> See, e.g., Eric A. Posner & Cass R. Sunstein, *Chevronizing Foreign Relations Law*, 116 YALE L.J. 1170, 1202 (2007) (noting that because “explicit grants of foreign relations power to the executive are rather sparse and ambiguous[,] . . . the underlying justifications [for executive primacy] are often less textual than functional”); Powell, *supra* note 14, at 547–48 (arguing that executive primacy in foreign and security affairs was “seldom if ever rested on any particular clause of Article II” in the Founding Era and noting that commentators instead “frequently put great weight on pragmatic considerations about the executive’s superior capacity for actually carrying out the tasks of foreign policy”). Note, however, that formal considerations, which are based on the text, structure, and historical practice, may also justify executive unilateralism in specific contexts. See, e.g., *Zivotofsky v. Kerry*, 135 S. Ct. 2076, 2083–94 (2015) (holding that the President’s constitutional authority to recognize foreign governments is exclusive).

<sup>18</sup> See ERIC A. POSNER & ADRIAN VERMEULE, *TERROR IN THE BALANCE: SECURITY, LIBERTY, AND THE COURTS* 29–31 (2007) (asserting that the executive has institutional advantages in making tradeoffs between security and liberty); Daniel Abebe & Eric A. Posner, *The Flaws of Foreign Affairs Legalism*, 51 VA. J. INT’L L. 507, 539–44 (2011) (comparing the capacities and incentives of the three branches in promoting international law); Julian Ku & John Yoo, *Beyond Formalism in Foreign Affairs: A Functional Approach to the Alien Tort Statute*, 2004 SUP. CT. REV. 153, 181–89 (noting the judiciary’s “significant institutional weaknesses in the implementation of foreign policy and [customary international law],” *id.* at 155); Jide Nzelibe, *The Uniqueness of Foreign Affairs*, 89 IOWA L. REV. 941 (2004) (arguing that institutional competence considerations warrant judicial abstention in foreign affairs cases); John Yoo & Jide Nzelibe, *Rational War and Constitutional Design*, 115 YALE L.J. 2512 (2006) (employing a functional approach to justify unilateral presidential authority over war-making).

<sup>19</sup> Critics of presidential autonomy in foreign affairs have argued that balanced institutional participation, and in particular less deferential judicial review, is more faithful to the original constitutional structure, KOH, *supra* note 5, at 67–100; minimizes the risk of executive overreach, Derek Jinks & Neal Kumar Katyal, *Disregarding Foreign Relations Law*, 116 YALE L.J. 1230, 1234 (2007); Eyal Benvenisti, *Reclaiming Democracy: The Strategic Uses of Foreign and International Law by National Courts*, 102 AM. J. INT’L L. 241, 247 (2008); protects the rule of law, Jinks & Katyal, *supra*, at 1273; Aharon Barak, *Foreword: A Judge on Judging: The Role of a Supreme Court in a Democracy*, 116 HARV. L. REV. 16, 151–52 (2002); develops international law and advance a global constitutional order, Jenny S. Martinez, *Towards an International Judicial System*, 56 STAN. L. REV. 429, 476 (2003); and deflects international pressures from the national government, Benvenisti, *supra*, at 242. *But see* THOMAS M. FRANCK, *POLITICAL QUESTIONS/JUDICIAL ANSWERS: DOES THE RULE OF LAW APPLY TO FOREIGN AFFAIRS?* 45–60 (1992) (criticizing functional

judicial abstention and deference in foreign affairs cases. Courts invoke various doctrines such as “political question,” “act of state,” “standing,” and “international comity” to find their jurisdiction over questions that involve foreign affairs limited.<sup>20</sup> In situations where the courts do exercise jurisdiction, it is common for judges to give considerable deference to the views of the executive branch.<sup>21</sup> When courts defer or avoid deciding cases, it is in large part because judges perceive that executives are better equipped than they are to make sound judgments, irrespective of whether those judgments pertain to policy, facts, or even law.<sup>22</sup> As a result, in the realm of foreign affairs, the duty of the courts “to say what the law is”<sup>23</sup> is often overshadowed by various functional concerns, such as lack of expertise,<sup>24</sup> inadequate information,<sup>25</sup> secrecy,<sup>26</sup> fear of stepping into the thicket of foreign

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arguments for judicial deference in foreign affairs); Deborah N. Pearlstein, *Form and Function in the National Security Constitution*, 41 CONN. L. REV. 1549 (2009) (invoking functionalism to argue for multi-branch participation in national security decision-making).

<sup>20</sup> See generally CURTIS A. BRADLEY & JACK L. GOLDSMITH, *FOREIGN RELATIONS LAW: CASES & MATERIALS* (6th ed. 2017). Each of these doctrines is rooted, at least in part, in functional concerns. See, e.g., *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 423 (1964) (noting that the act of state doctrine—under which courts of one country will not sit in judgment on the acts of the government of another—“concerns the competency of dissimilar institutions to make and implement particular kinds of decisions in the area of international relations”); *Baker v. Carr*, 369 U.S. 186, 217 (1962) (listing six factors that may suggest that a case presents a nonjusticiable political question, five of which can be described as functional: (1) lack of judicially manageable standards for resolving the issue; (2) impossibility of deciding the issue without making a policy determination; (3) deciding the issue would be disrespectful to another branch; (4) a need to adhere to a political decision already made; and (5) need for the United States to speak with one voice on the issue).

<sup>21</sup> The extent to which judicial deference characterizes modern foreign relations law is debated, although most scholars agree that courts defer as a general practice but defer less in some contexts. Compare, e.g., Ganesh Sitaraman & Ingrid Wuerth, *The Normalization of Foreign Relations Law*, 128 HARV. L. REV. 1897, 1919–35 (2015) (arguing that for the past 25 years federal courts have been less deferential to the President in foreign affairs matters), with Curtis A. Bradley, *Foreign Relations Law and the Purported Shift Away from “Exceptionalism”*, 128 HARV. L. REV. F. 294 (2015) (contesting the scope of Sitaraman and Wuerth’s argument).

<sup>22</sup> See, e.g., *Chicago & S. Air Lines, Inc. v. Waterman S.S. Corp.*, 333 U.S. 103, 111 (1948) (“It would be intolerable that courts, without the relevant information, should review and perhaps nullify actions of the Executive taken on information properly held secret.”); *United States v. Curtiss-Wright Exp. Corp.*, 299 U.S. 304, 320 (1936) (noting the President’s greater expertise and resources on foreign policy issues); *El-Shifa Pharm. Indus. Co. v. United States*, 607 F.3d 836, 842 (D.C. Cir. 2010) (“The political question doctrine bars our review of claims that, regardless of how they are styled, call into question the prudence of the political branches in matters of foreign policy or national security . . .”).

<sup>23</sup> *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803).

<sup>24</sup> See, e.g., *Al-Aulaqi v. Obama*, 727 F. Supp. 2d 1, 50 (D.D.C. 2010) (dismissing a suit challenging the inclusion of a U.S. national on a government “kill list,” in part because the questions posed by the plaintiff require “expertise beyond the capacity of the Judiciary”).

<sup>25</sup> See, e.g., *Boumediene v. Bush*, 553 U.S. 723, 797 (2008) (“[N]either the Members of this Court nor most federal judges begin the day with briefings that may describe new and serious threats to our Nation and its people.”); *Schneider v. Kissinger*, 412 F.3d 190, 196 (D.C. Cir. 2005) (“Unlike the executive, the judiciary has no covert agents, no intelligence sources, and no policy advisors.”).

<sup>26</sup> One example is the frequent invocation of the state secret doctrine to bar review of alleged violations of individual rights in the conduct of national security policy. See Laura K. Donohue, *The*

relations,<sup>27</sup> and a recognition that the nation must speak with one voice in international affairs.<sup>28</sup>

However, there is something flawed in this so-called functionalist reasoning. Functionalism is an interpretive approach that asks what interpretation—here, of the Constitution’s separation-of-powers scheme—would make the challenged policy or act work best.<sup>29</sup> Judicial deference is thus functionally desired when in a given context it facilitates better results than judicial involvement. But what has played out in practice is that judges often cite the executive’s special competence in foreign affairs as a sort of heuristic for applying a de facto presumption of near-total deference. I term this practice “totemic functionalism.”

This Article describes, illustrates, and critiques the pervasive effect of totemic functionalism in foreign affairs law. To be sure, I do not suggest that deference in foreign affairs is always unwarranted. Executive judgments are entitled to respect, perhaps even conclusive weight, when the executive has exploited its unique advantages—special expertise, knowledge of substantive issues possessed exclusively by executives, or its unitary institutional structure.<sup>30</sup> Because executive officials who are subject to public accountability are more likely than judges to reflect public opinion, some judicial deference might also be appropriate for decisions that turn on value judgments.<sup>31</sup> But even though these rationales for deference are not equally implicated in all foreign affairs contexts,<sup>32</sup>

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*Shadow of State Secrets*, 159 U. PA. L. REV. 77, 85–88 (2010) (concluding that “the [state secrets] privilege played a significant role in the Executive Branch’s national security litigation strategy” between 2001 and 2009); Daniel R. Cassman, Note, *Keep It Secret, Keep It Safe: An Empirical Analysis of the State Secrets Doctrine*, 67 STAN. L. REV. 1173, 1192 (2015) (finding that since after 9/11 courts have upheld the privilege in 69% of the cases in which it has been invoked by the government). Judges often defer when government lawyers make secrecy claims because they acknowledge the executive’s superiority in evaluating the possible harms of disclosure. *See, e.g.*, *Edmonds v. U.S. Dep’t of Justice*, 405 F. Supp. 2d 23, 33 (D.D.C. 2005) (“[T]he court will not conduct a detailed inquiry to decide whether it agrees with the agency’s opinions; to do so would violate the principle of affording substantial weight to the expert opinions of the agency.”).

<sup>27</sup> *See, e.g.*, *Jesner v. Arab Bank, PLC*, 138 S. Ct. 1386, 1403 (2018) (“That the [Alien Tort Statute] implicates foreign relations ‘is itself a reason for a high bar to new private causes of action for violating international law.’” (citation omitted)).

<sup>28</sup> *See, e.g.*, *Munaf v. Geren*, 553 U.S. 674, 702 (2008) (dismissing habeas claims arising from the transfer of U.S. citizens held in Iraq to Iraqi custody in part because adjudication would “undermine the Government’s ability to speak with one voice”).

<sup>29</sup> *See infra* notes 33–39 and accompanying text.

<sup>30</sup> *See infra* Part I.A.

<sup>31</sup> *See infra* Part I.B.

<sup>32</sup> For example, treaty interpretation varies in the degree to which it requires the use of expertise and knowledge possessed by executive agencies, rendering the case for deference more compelling when the executive can show that it relied on its institutional advantages. *See, e.g.*, Robert M. Chesney, *Disaggregating Deference: The Judicial Power and Executive Treaty Interpretations*, 92 IOWA L. REV. 1723, 1773 (2007) (developing a model of calibrated deference, in which “the deference afforded to an executive treaty interpretation should vary from minimal to substantial depending on the origins and circumstances of the interpretation”); Michael P. Van Alstine, *The Death of Good Faith in Treaty Jurisprudence and a Call for Resurrection*, 93 GEO. L.J. 1885, 1942–43 (2005).

too often courts afford broad deference to the President in foreign affairs cases without properly assessing whether and to what extent doing so is functionally advantageous. Broadly speaking, they adopt a presumption of deference simply because a case involves foreign relations or national security matters.

My thesis is that deference arising from this practice undermines fundamental constitutional values. Totemic functionalism rests on the mistaken premise that judicial, political, and internal checks on executive power are “substitute goods”—namely, that one can be used in place of another, and that as long as one check can operate, the costs of giving up the others are tolerable. As I will show, these checking institutions are better viewed as “complementary goods.” When courts afford total deference to the President in foreign affairs, they do not merely foreclose one channel of accountability (i.e., judicial review). They also: (1) undercut the ability and motivation of Congress and other informal checks like the press and civil society organizations to hold the President to account; and (2) upset the delicate relationship between the legal gatekeepers and the political staff *inside* the executive branch in a way that increases the risk of politicizing its internal legal decision-making.

My argument unfolds in three parts. Part I traces the conceptual underpinnings of totemic functionalism. Most of, if not all, the functional reasons that judges give to explain why the judiciary should defer to the political branches or avoid deciding foreign affairs cases fall into one of the two rationales for judicial deference found in other areas of public law: (1) comparative institutional competence and (2) democratic accountability. But while in other contexts the deference doctrine is conditioned and restricted by functionalist legal tests, in foreign affairs judges frequently allow bromides about the executive’s special competence to short-circuit hard legal analysis.

Part II presents three case studies to illustrate the role and influence of totemic functionalism in different contexts. Each of these case studies—on targeted killings, *Bivens* litigation, and the War Powers Resolution—highlights a slightly different way in which totemic functionalism operates. I use these and other examples to demonstrate its significant impact on foreign affairs law. Part III elaborates on the consequences of totemic functionalism. It describes how its deployment, particularly in national security cases, undermines the entire constitutional system of checks and balances. It also demonstrates how the ensuing near-total judicial deference contributes to undercutting the constraining or cautionary role that the internal legal review mechanisms might otherwise play inside the executive branch. The Article concludes by considering how best to avoid the errors that totemic functionalism causes.

## I. Conceptualizing “Totemic Functionalism”

Functionalism is a widely accepted approach to legal interpretation.<sup>33</sup> Commonly contrasted to formalist theories (i.e., methods that rely on plain language, structure, or the drafters’ original intent to give meaning to legal instruments), functionalism asks what interpretation would make the legal provision at issue, or the legal instrument as a whole, work best.<sup>34</sup> For example, functionalists might consider which interpretation best serves the underlying purpose of the law or the practical effects of adopting a particular meaning. In general, functionalist reasoning provides greater room for balancing formulas and flexible standards; and relatedly, commentators tend to describe functionalism as a method that favors “adaptability, efficacy, and justice in law” over values like consistency and predictability, which are maximized by bright-line rules.<sup>35</sup>

In separation-of-powers disputes—that is, those over the division of authority within the federal government—one salient strand of functionalist thinking focuses on the structural capacities and limitations of each branch of government.<sup>36</sup> According to this strand, the proper way to ascertain how the Constitution allocates power among the branches of government is to ask which

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<sup>33</sup> For prominent examples of functionalist theories of interpretation, see, for example, AHARON BARAK, *PURPOSIVE INTERPRETATION IN LAW* (2005) (purposivism); RONALD DWORKIN, *FREEDOM’S LAW: THE MORAL READING OF THE AMERICAN CONSTITUTION* (1996) (the moral reading approach); JOHN H. ELY, *DEMOCRACY AND DISTRUST* (1983) (the democracy-reinforcement approach); DAVID STRAUSS, *THE LIVING CONSTITUTION* (2010) (the living constitutionalism approach); Richard A. Posner, *Pragmatic Adjudication*, 18 *CARDOZO L. REV.* 1 (1996) (pragmatism). It is worth noting that formalists might also invoke functional justifications in arguing for their theory. See, e.g., Antonin Scalia, *Originalism: The Lesser Evil*, 57 *U. CIN. L. REV.* 849, 855 (1989) (emphasizing functional disadvantages associated with non-originalist methods of interpretation).

<sup>34</sup> For a description and critique of the functionalism-formalism dichotomy, see William N. Eskridge Jr., *Relationships Between Formalism and Functionalism in Separation of Powers Cases*, 22 *HARV. J.L. & PUB. POL’Y* 21 (1998); Peter L. Strauss, *Formal and Functional Approaches to Separation-of-Powers Questions—A Foolish Inconsistency?*, 72 *CORNELL L. REV.* 488 (1987).

<sup>35</sup> Eskridge, *supra* note 34, at 22; see also Suzanne Prieur Clair, Note, *Separation of Powers: A New Look at the Functionalist Approach*, 40 *CASE W. RES. L. REV.* 331, 334 (1989) (“[T]he functionalist test emphasizes flexibility and balancing by examining the entire framework of relationships between the branches.”).

<sup>36</sup> A forerunner of this approach was the Legal Process School, which maintained as a key tenet that, implicit in the procedural arrangements that legal systems invoke to allocate powers, is “an idea which can be described as the principle of institutional settlement.” HENRY M. HART JR. & ALBERT M. SACKS, *THE LEGAL PROCESS: BASIC PROBLEMS IN THE MAKING AND APPLICATION OF LAW* 4 (William N. Eskridge, Jr. & Philip P. Frickey eds., 1994) (emphasis deleted). According to this principle, decision-making authority should be assigned to the institutional actor most competent to make it, and that once duly decided, decisions should be generally treated as settled and therefore binding on the other actors. *Id.* at 3–5; see also Daniel B. Rodriguez, *The Substance of the New Legal Process*, 77 *CALIF. L. REV.* 919, 949–50 (1989) (“The allocation of decisionmaking power and responsibility in government is built upon a principle of comparative advantage, a principle built in turn on the assumption that certain institutions are better suited than others to perform particular tasks.”).

branch is best structured to carry out a particular function.<sup>37</sup> For example, under a functionalist reading of *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, judicial deference to executive agencies' statutory interpretations is appropriate because they have more expertise in ascertaining the meaning of laws they are charged with administering and are better situated to reflect democratic preferences.<sup>38</sup> This strand of functionalism plays a significant role in separation-of-powers disputes relating to foreign affairs.<sup>39</sup> Functionalist reasoning in this field is usually associated with pro-executive views: since the days of Alexander Hamilton,<sup>40</sup> functionalists have put a premium on the unique competences of the presidency, arguing that given "the unity of the office, its capacity for secrecy and dispatch, and its superior sources of information," executive judgments in the conduct of foreign affairs should receive considerable deference from courts and Congress.<sup>41</sup> Prominent contemporary scholars specifically offer *Chevron* as a useful framework for conceptualizing foreign affairs deference. This analogy to *Chevron* bases the functional justification for foreign affairs deference on one of two rationales: (1) expertise or, more broadly conceived, institutional competence; and (2) democratic accountability.<sup>42</sup>

Analyzing how these two rationales are applied in foreign affairs law, I show that—notwithstanding its characterization as a flexible and adaptable paradigm—functionalism in separation-of-powers disputes relating to foreign affairs has taken a "formalistic" shape. Instead of using functionalism as a framework for contextually analyzing deference claims, courts simply rely on the Hamiltonian articulation of the executive's special competence as a kind of heuristic for assessing the scope of presidential power and the propriety of judicial deference. Put simply, this heuristic operates as follows: the executive branch is best structured to produce sound foreign policy choices; ergo, in cases touching on foreign affairs matters, judges should defer to the executive or withhold judgment

<sup>37</sup> For the prominent role of comparative institutional competence claims in American law, see Adam S. Chilton & Christopher A. Whytock, *Foreign Sovereign Immunity and Comparative Institutional Competence*, 163 U. PA. L. REV. 411, 414–15 (2015).

<sup>38</sup> 467 U.S. 837, 865 (1984); see also William N. Eskridge Jr., *Expanding Chevron's Domain: A Comparative Institutional Analysis of the Relative Competence of Courts and Agencies to Interpret Statutes*, 2013 WIS. L. REV. 411, 414 (2013) ("[C]omparative institutional analysis lends normative support to the strong deference to agency interpretations . . .").

<sup>39</sup> For examples, see *infra* Part II. For a general account of the role of functionalism in foreign affairs, see Curtis A. Bradley, *The Irrepressible Functionalism in U.S. Foreign Relations Law*, in 1 FOREIGN RELATIONS LAW (Curtis A. Bradley ed., forthcoming 2019) (manuscript at 7–8), <https://ssrn.com/abstract=3228497> [<https://perma.cc/82TA-ZG86>].

<sup>40</sup> See THE FEDERALIST NO. 70, at 356 (Alexander Hamilton) (Clinton Rossiter ed., 1961) ("Decision, activity, secrecy, and dispatch will generally characterise the proceedings of one man, in a much more eminent degree, than the proceedings of any greater number; and in proportion as the number is increased, these qualities will be diminished.")

<sup>41</sup> EDWARD S. CORWIN, THE PRESIDENT: OFFICE AND POWERS 171 (4th rev. ed. 1957); see also *supra* works cited in note 18. For a summary of the functionalist pro-executive argument in the national security context, see Pearlstein, *supra* note 19, at 1562–63.

<sup>42</sup> See Curtis A. Bradley, *Chevron Deference and Foreign Affairs*, 86 VA. L. REV. 649, 669–70 (2000) [hereinafter Brady, *Chevron Deference*]; Posner & Sunstein, *supra* note 17, at 1202.

altogether. It is in these circumstances that functional analysis turns “totemic” and can no longer properly distinguish between situations where judicial deference is functionally advantageous and situations when robust judicial review is required.

### A. Institutional Competence

#### 1. The Limits of the Functional Case for Executive Primacy

The starting point of the pro-executive functionalist argument is that:

Only a limited set of institutional structures can lead to the most effective exercise of power in achieving foreign policy goals. Nation-states require a form of organization that permits them to recognize which values and objectives are to be maximized; to identify and compare the costs and benefits of different policy options; to collect and evaluate information; to communicate policy decisions to arms of the state; to communicate with other nations; and to evaluate results and receive feedback.<sup>43</sup>

It follows that foreign affairs ought to be (mainly) a presidential prerogative. First, the unity of office provides presidents with greater capacity to produce and adjust foreign policy decisions definitively and quickly. Whereas courts are decentralized and slow and Congress is a plural body with limited days in session, presidents are “always on hand and ready for action.”<sup>44</sup> In the age of cyberthreats and digital communications, the ability to act decisively and with dispatch is more functionally advantageous than ever.<sup>45</sup> Second, the executive both possesses expertise in foreign affairs and has greater access to information than do other branches of government.<sup>46</sup> Presidents have at their disposal an enormous bureaucratic apparatus filled with experienced personnel and resources dedicated to monitoring the world order. Several executive agencies and departments collect and process foreign relations information that often cannot be shared with the other branches without compromising sensitive national interests.<sup>47</sup>

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<sup>43</sup> Yoo, *supra* note 5, at 871.

<sup>44</sup> CORWIN, *supra* note 41, at 171; *see also* Ku & Yoo, *supra* note 18, at 199–201 (discussing the institutional shortcomings of the judiciary); Aziz Z. Huq, *Structural Constitutionalism as Counterterrorism*, 100 CALIF. L. REV. 887, 929–31 (2012) (discussing the institutional shortcomings of Congress).

<sup>45</sup> For different views, compare Posner & Sunstein, *supra* note 17, at 1217 (asserting that speed and flexibility are “general characteristic[s] of foreign relations”), with Sitaraman & Wuerth, *supra* note 21, at 1938 (challenging that assertion).

<sup>46</sup> *See generally* Cass R. Sunstein, *The Most Knowledgeable Branch*, 164 U. PA. L. REV. 1607 (2016) (analyzing the sources of the executive’s informational advantage and its implications).

<sup>47</sup> *See* Yoo & Nzelibe, *supra* note 18, at 2523. In addition, interagency collaborations promise that when executives lack relevant information for assessing the foreign relations implications of their decisions, they have access to those who do. *See* Sunstein, *supra* note 46, at 1620.

These arguments are, in brief, the institutional competence grounds for foreign affairs deference. They also rest on the assumption that even if collective deliberation and reasoned judgment—two forms of decision-making that characterize the legislature and the judiciary—were to have some advantages, executive primacy is desired because it is especially important that the nation speaks with one voice in its external relations.<sup>48</sup>

For their part, scholars have largely embraced those premises.<sup>49</sup> However, most would agree that for deference to be appropriate, there must be a rational connection between the function of the deference doctrine—that is, ensuring optimal decision-making processes in matters relating to foreign affairs—and the executive’s special competence and epistemic advantages. In other words, institutional-competence-based deference is normatively attractive only when “the outcomes produced by the executive acting alone [are better than] the outcomes produced by the executive operating under judicial review.”<sup>50</sup>

The practice of totemic functionalism, in contrast, describes situations where courts accord the executive functional deference without investigating whether a rational connection between the executive’s advantages and the issue at hand in fact exists. Below, I identify two similar but distinct forms of this practice. I call the first “blanket deference” and the second “reflexive deference.”

## 2. “Blanket” Deference and “Reflexive” Deference

*Blanket Deference.* Judicial deference can relate to three categories of decision-making: policy-making/implementation, assessment of facts, and interpretation of legal materials, both domestic and international. The degree to which the executive’s institutional advantages are relevant and actually employed may vary. Accordingly, it is well established that courts must conduct a “discriminating analysis of the particular question posed . . . in the specific case [before them].”<sup>51</sup> This analysis ought to include both a distinction *between* categories (law, fact, and policy) and also *within* categories. For example, interpretation of different legal materials requires different resources and expertise,

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<sup>48</sup> See, e.g., *United States v. Curtiss-Wright Exp. Corp.*, 299 U.S. 304, 319 (1936) (“In this vast external realm, with its important, complicated, delicate and manifold problems, the President alone has the power to speak or listen as a representative of the nation.”); *Baker v. Carr*, 369 U.S. 186, 211 (1962) (noting that foreign relations communications “demand single-voiced statement of the Government’s views”). For a comprehensive analysis of the one-voice doctrine, see David H. Moore, *Beyond One Voice*, 98 MINN L. REV. 953 (2014).

<sup>49</sup> See *supra* notes 18–19 and accompanying text.

<sup>50</sup> Aziz Z. Huq, *Article II and Antidiscrimination Norms*, 117 MICH. L. REV. (forthcoming 2019) (manuscript at 48), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3239976](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3239976) [<https://perma.cc/798Q-SMGL>].

<sup>51</sup> *Baker*, 369 U.S. at 211.

and consequently, it might be appropriate to adjust the weight given to the executive's position based on the specific legal source at issue.<sup>52</sup>

Blanket deference describes the practice of referencing comparative institutional competence arguments that are relevant to one decision-making category—typically policy-making or fact-finding—to accord the executive absolute deference, which applies to all categories. Courts employing this practice usually assume, explicitly or implicitly, that probing the legal issue presented in a case is akin to second-guessing the wisdom of the challenged policy or displacing factual determinations made by the executive branch. They announce the lack of judicial competency in *those* efforts, articulate it on a general level, and then “extend” it to conclude that deference is warranted *in toto*. What follows from blanket deference is almost always invocation of non-justiciability doctrines and, consequently, assertion that the case, as presented, falls outside the ambit of judicial power.

To see how this works in practice, consider the court's analysis in *Al-Aulaqi v. Obama*.<sup>53</sup> This case arose from the government's decision to kill Anwar Al-Aulaqi, a U.S. citizen and alleged leader of an Al-Qaeda affiliate group in Yemen.<sup>54</sup> In early 2010 the media reported that the government added Al-Aulaqi to a secret list of individuals pre-approved to kill.<sup>55</sup> His father brought an action seeking declaratory and injunctive relief, asserting that targeted killing of U.S. citizens outside of the armed conflict context violates the Constitution and international law unless carried out to prevent a concrete, specific, and imminent threat to life or physical safety.<sup>56</sup> The complaint was dismissed at the outset on standing and political question grounds, a result that amounts as a practical matter to absolute

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<sup>52</sup> Consider, for example, the differences between constitutional law and customary international law (CIL). In considering the existence and meaning of a CIL rule, the executive is likely to frequently rely on its superior knowledge and expertise, so the claim for deference might be more strongly grounded. As explained by Professors Curt Bradley and Jack Goldsmith, “[d]etermining whether there is sufficient state practice to support a CIL rule, the appropriate level of generality at which to describe the practice, and whether the practice is being followed out of a sense of legal obligation all present difficult interpretive challenges that leave substantial room for presidential discretion.” Bradley & Goldsmith, *supra* note 5, at 1230. In contrast, constitutional interpretation does not implicate those resources and is usually understood to be at the core of judicial competency. For this reason, when legal positions advanced by executive agencies raise constitutional problems, deference claims are usually received with more skepticism. See William N. Eskridge, Jr. & Lauren E. Baer, *The Continuum of Deference: Supreme Court Treatment of Agency Statutory Interpretations from Chevron to Hamdan*, 96 GEO. L.J. 1083, 1115–16 (2008) (arguing that the Supreme Court has invoked an “anti-deference” approach when agency interpretations raised serious constitutional difficulties).

<sup>53</sup> 727 F. Supp. 2d 1 (D.D.C. 2010).

<sup>54</sup> *Id.* at 9–10; see also CHARLIE SAVAGE, *POWER WARS: INSIDE OBAMA'S POST-9/11 PRESIDENCY* 231–32 (2015).

<sup>55</sup> Al-Aulaqi, 727 F. Supp. 2d at 11.

<sup>56</sup> *Id.* at 12.

deference.<sup>57</sup> The court reasoned that the issues requiring resolution in this case—including “the nature and magnitude of the national security threat posed” by Al-Aulaqi, his capabilities “to carry out a threatened attack,” and the U.S. interests that “call for military action”—were beyond its institutional competency and thus warranted abstention.<sup>58</sup> But a closer look into the court’s reasoning reveals that those and other issues cited as grounds for dismissal referenced various factual and policy judgments that had very little to do with the legal issue presented in the case.<sup>59</sup> Put differently, the court acknowledged its lack of competence to evaluate a series of empirical findings and predictive foreign policy judgments relating to the decision to target Al-Aulaqi, but then invoked its limited competence in those areas as justification to give the President absolute deference on the constitutional and international law questions stated in the complaint.<sup>60</sup> There is no concrete analysis in the opinion as to why the legal aspect of the plaintiff’s claim is inappropriate.

Blanket deference raises both doctrinal and analytical problems. As a matter of legal doctrine, the principle that courts must avoid resolving a purely legal issue if it is intimately related to national security or foreign policy is inconsistent with Supreme Court jurisprudence. In *Japan Whaling Ass’n v. American Cetacean Society*, the Court refused to invoke the political question doctrine in a statutory-based challenge to a decision by the Secretary of Commerce concerning enforcement of international whaling quotas.<sup>61</sup> The Court explained, “We are cognizant of the interplay between [the statute at issue] and the conduct of this Nation’s foreign relations . . . [B]ut under the Constitution, one of the Judiciary’s characteristic roles is to interpret statutes, and we cannot shirk this responsibility merely because our decision may have significant political overtones.”<sup>62</sup> To take another example, the Court’s jurisprudence on the habeas rights of aliens detained at Guantanamo also distinguished between jurisdictional issues and operational ones, affording the President deference only with respect to the latter.<sup>63</sup>

Analytically, blanket deference cannot be defended on comparative institutional competence grounds. In the application of blanket deference, the analytical error does not necessarily occur when the court defers on a policy or factual issue the case presents. Rather, it occurs when the court defers on the logical

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<sup>57</sup> See Bradley, *Chevron Deference*, *supra* note 42, at 659–60 (equating the invocation of the political question doctrine with giving the President “absolute deference”).

<sup>58</sup> Al-Aulaqi, 727 F. Supp. 2d at 46–48.

<sup>59</sup> See Phillip Alston, *The CIA and Targeted Killings Beyond Borders*, 2 HARV. NAT’L SEC. J. 283, 393–96 (2011).

<sup>60</sup> See Al-Aulaqi, 727 F. Supp. 2d at 47.

<sup>61</sup> 478 U.S. 221, 230 (1986).

<sup>62</sup> *Id.*

<sup>63</sup> See *Hamdi v. Rumsfeld*, 542 U.S. 507, 527–35 (2004) (rejecting the government’s assertion that extending the statutory right of habeas to detainees interferes with the executive’s conduct of the military campaign against Al-Qaeda); *Boumediene v. Bush*, 553 U.S. 723, 769–71, 797 (2008) (rejecting claims that adjudicating a habeas petition interferes with military matters).

leap it makes in concluding that lack of judicial tools to evaluate that issue warrants absolute deference, even on the legal issues the case presents. The “extension” of deference from the specific issue over which the executive possesses special competence to other issues over which it might not, is neither tenable nor inevitable. In *Al-Aulaqi*, for example, the court did not have to resolve the many policy questions it cited in order to decide the case on the merits.<sup>64</sup> Instead, it should have restricted deference on these grounds to the policy domain and considered the propriety of deference regarding legal interpretation and factual analysis separately. Indeed, in that situation and many others even deference restricted to specific issues—such as certain executive fact-finding or empirical inferences made by the government in shaping its policy—will result in the government prevailing on the merits. But as shown in Part III, it matters how judges explain and structure deference. A more discriminating approach to deference claims enables courts to more closely scrutinize legal questions, which rightly remain within the judiciary’s domain.

*Reflexive Deference.* A second form of totemic functionalism arises when courts give conclusive weight to the executive’s views on foreign affairs matters without inquiring whether, in developing its position, the executive actually applied its special expertise and epistemic advantages. Instead, they accord deference to executive officials based solely on their superior institutional *status* in foreign affairs. This practice typically takes place when the court assesses the merits of the case and not when it considers threshold issues (as when blanket deference is employed). In addition, while in blanket deference the crux of the error is the scope of the deference given (i.e., its application *in toto*), in reflexive deference the problem arises because the court defers even though the rationales underlying functional deference have not been met. Consider the following two examples.

In *Abbott v. Abbott*, the Supreme Court deferred to the State Department’s interpretation of the Hague Convention on International Child Abduction, emphasizing the executive’s unique position to assess “the diplomatic consequences resulting from this Court’s interpretation” and “the impact on the State Department’s ability to reclaim children abducted from this country.”<sup>65</sup> Justice Stevens, in dissent, lamented that “[w]ithout discussing precisely why, we have afforded great weight to the meaning given treaties by the departments of government particularly charged with their negotiation and enforcement.”<sup>66</sup> Stevens found the State Department’s position “newly memorialized” and “possibly inconsistent with [its] earlier position,” and thus concluded that there was no reason “to replace our understanding of the Convention’s text with that of the Executive Branch.”<sup>67</sup> Notice how his opinion breaks from the opinion of the Court: instead of looking at the superior *potential* of executive officials to assess the foreign relations implications of any particular reading of the treaty, Justice Stevens

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<sup>64</sup> See *Al-Aulaqi*, 727 F. Supp. 2d at 46–48.

<sup>65</sup> 560 U.S. 1, 15 (2010).

<sup>66</sup> *Id.* at 40–41 (Stevens, J., dissenting).

<sup>67</sup> *Id.* at 41–43.

examined whether the position was in fact *informed* by the executive's unique institutional advantages. Answering the question in the negative, he refused to accord conclusive weight to the State Department's suggested reading of the treaty.

The vulnerability of the "reflexive deference" approach that Justice Stevens flagged in *Abbott* can also be illustrated by a contrasting example. In *Hamdan v. Rumsfeld*, the Court (in an opinion written by Justice Stevens) rejected the government's interpretation of the Geneva Conventions and held that military commissions established by a presidential order to try members of Al-Qaeda for war crimes violated the treaties.<sup>68</sup> The issue in *Hamdan* was the applicability of Common Article 3, which secures minimum protection and humanitarian treatment for individuals involved in non-international armed conflicts—to the war with Al-Qaeda.<sup>69</sup> The government denied that the petitioner, an alleged Al-Qaeda operative, was entitled to Article 3 protections. But despite the tradition of affording "great weight" to the executive's interpretation of treaties—which, as emphasized in Justice Thomas's dissent, has been understood as "a duty to defer"<sup>70</sup>—the Court ruled against the government.

The Court's refusal to defer to the government's reading of Common Article 3 was analytically sound: the government's position rested on a memorandum by the Office of Legal Counsel (OLC) from 2002 that argued that the provision is applicable "only to internal conflicts between a state party and an insurgent group, rather than to all forms of armed conflict not covered by Common Art. 2."<sup>71</sup> In developing that position, OLC lawyers, who are generalists like judges, had no apparent special expertise or information that might warrant the Court's deference. Further, the Court was perhaps aware that it was a more reliable treaty interpreter in this context. The Court received twenty amicus briefs filed by various legal experts and interest groups, which afforded it a broader range of legal perspectives and expert opinions than did the government.

Scholars attribute the practice of granting deference based solely on the potential of executive officials to exercise professional, specialized knowledge-based judgment to "foreign affairs exceptionalism," defined as "the view that the federal government's foreign affairs powers are subject to a different, and generally more relaxed, set of constitutional restraints than those that govern its domestic powers."<sup>72</sup> Indeed, in contrast, it is an established practice in administrative law

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<sup>68</sup> 548 U.S. 557, 613 (2006).

<sup>69</sup> *Id.* at 628–31.

<sup>70</sup> *Id.* at 718 (Thomas, J., dissenting).

<sup>71</sup> Memorandum from Jay Bybee, Assistant Attorney Gen., Dep't of Justice, to Alberto R. Gonzales, Counsel to the President & William J. Haynes, Gen. Counsel, Dep't of Def., Re: Application of Treaties and Laws to al Qaeda and Taliban Detainees (Jan. 22, 2002), <https://www.justice.gov/sites/default/files/olc/legacy/2009/08/24/memo-laws-taliban-detainees.pdf> [<https://perma.cc/UZ8M-JXPB>].

<sup>72</sup> Curtis A. Bradley, *A New American Foreign Affairs Law?*, 70 U. COLO. L. REV. 1089, 1096 (1999). Critics of exceptionalism have pointed out that at least from a functional standpoint,

that courts condition (and adjust) deference based on whether the agency in charge of interpreting the statute in question used its special expertise in the specific case.<sup>73</sup> In that sense, the practice of reflexive deference is unique to foreign affairs cases. But whatever one thinks of exceptionalist reasoning as a general concept in foreign affairs law, an effort to ground reflexive deference in institutional competence considerations is not tenable: if the executive's special competence did not bear on the challenged policy or action (or some aspects of it), then affording deference to executive judgments does nothing to promote an optimal decisional process in foreign affairs. Accordingly, such instances of foreign affairs deference fall squarely within totemic functionalism.

*B. Incentive Structure: Between Accountability and Impartiality*

Another functional justification for foreign affairs deference stems from the idea that consequential foreign policy judgments should be made by politically accountable institutions. This rationale can be, and has been, the basis for varying degrees of judicial deference. In *Chicago & Southern Air Lines, Inc. v. Waterman Steamship Corp.*, Justice Jackson articulated a more radical version of this rationale, asserting that “the very nature of executive decisions as to foreign policy is political, not judicial.”<sup>74</sup> In this view, decisions implicating foreign affairs and national security are unsuitable to judicial review “and should be undertaken only by those directly responsible to the people whose welfare they advance or imperil.”<sup>75</sup> Jackson's reasoning might explain well-known decisions such as *United States v. Curtiss-Wright Export Corp.*,<sup>76</sup> but in recent years this reasoning is found more frequently in dissenting Supreme Court opinions. The majority of Justices have seemed to move away from it.<sup>77</sup> A more moderate articulation of the

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deference claims in foreign affairs cases should be considered under normal deference canons. See Sitaraman & Wuerth, *supra* note 21, at 1959–70 (calling for normalization of deference regimes in statutory construction, fact-finding analysis, and treaty interpretation); Robert M. Chesney, *National Security Fact Deference*, 95 VA. L. REV. 1361, 1403–34 (2009) (making a similar claim with respect to fact deference in national security law); Chesney, *supra* note 32, at 1771–74 (developing a functional framework for assessing deference claims in treaty interpretation).

<sup>73</sup> See, e.g., *Gonzales v. Oregon*, 546 U.S. 243, 263 (2006) (holding that the Attorney General's interpretation of the Controlled Substances Act is not entitled to binding deference and then rejecting his opinion due to “lack of expertise in this area and the apparent absence of any consultation with anyone outside the Department of Justice who might aid in a reasoned judgment”).

<sup>74</sup> 333 U.S. 103, 111 (1948).

<sup>75</sup> *Id.* For articulation of similar views in the literature, see Yoo & Nzelibe, *supra* note 18, at 2536–38; Nzelibe, *supra* note 18, at 987–92; Margaret A. Niles, *Judicial Balancing of Foreign Policy Considerations: Comity and Errors under the Act of State Doctrine*, 35 STAN. L. REV. 327, 361 (1983) (“[T]he structure of the United States government puts fully informed evaluations of foreign relations beyond the practical competence of judicial institutions . . .”).

<sup>76</sup> 299 U.S. 304, 319–21 (1936) (acknowledging the “very delicate, plenary and exclusive power of the President as the sole organ of the federal government in the field of international relations”).

<sup>77</sup> See, e.g., *Zivotofsky v. Clinton*, 566 U.S. 189, 213 (2012) (Breyer, J., dissenting) (invoking Jackson's reasoning to conclude that a lawsuit seeking to enforce a statutory right to list “Jerusalem, Israel” as a place of birth on passports presents nonjusticiable political question); *Hamdan v. Rumsfeld*, 548 U.S. 557, 683 (2006) (Thomas, J., dissenting) (“Military and foreign policy

democratic accountability rationale draws its logic from the *Chevron* doctrine, which, as noted, scholars have offered as a useful analogy to foreign affairs deference.<sup>78</sup> In *Chevron*, the Supreme Court acknowledged that interpretation of ambiguous statutes necessarily implicates value judgments.<sup>79</sup> Courts should defer to reasonable executive interpretations because the executive, as a politically accountable institutional actor, is better incentivized to reflect public beliefs than the judiciary.<sup>80</sup>

Lower courts have appeared to follow the more radical version of this rationale in several foreign affairs cases, justifying absolute judicial deference on the grounds that legal issues implicating national security and foreign policy should be resolved by those who bear “electoral accountability.”<sup>81</sup> This Section argues that this position is conceptually flawed and that, even under its more moderate guise, the contention that executives are in a better position to resolve legal ambiguities in foreign affairs law raises difficulties. Moreover, this Section shows that judges and scholars who use the democratic accountability rationale as an excuse for broad foreign affairs deference are prone to practice totemic functionalism.

### 1. Accountability Should be Optimized, not Maximized

Proponents of executive power assert that unelected judges, “who have no constituency,”<sup>82</sup> lack proper incentives to serve the public interest.<sup>83</sup> In the realm of foreign affairs, these critics claim, constitutional and statutory guidance is at best ambiguous, and the danger is that, in balancing between competing values, judges will be influenced by their own ideological preferences.<sup>84</sup> Presidents, on the other hand, “face elections so that their incentives will be aligned with the public interest.”<sup>85</sup> Their electoral accountability warrants trust in their discretion.

Electoral accountability, however, has its disadvantages. For some issues, particularly those that turn more on expertise and facts than on values, politicized judgments must be balanced with sober, knowledge-based decision-making

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judgments ‘are and should be undertaken only by those directly responsible to the people whose welfare they advance or imperil.’” (quoting *Hamdi v. Rumsfeld*, 542 U.S. at 582 (Thomas, J., dissenting) (quoting *Chicago S. Air Lines*, 333 U.S. at 111)); *Hamdi*, 542 U.S. at 582 (Thomas, J., dissenting) (“Congress, to be sure, has a substantial and essential role in both foreign affairs and national security. But it is crucial to recognize that *judicial* interference in these domains destroys the purpose of vesting primary responsibility in a unitary Executive.”).

<sup>78</sup> See generally Bradley, *Chevron Deference*, *supra* note 42; Posner & Sunstein, *supra* note 17.

<sup>79</sup> See *Chevron*, U.S.A., Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837, 865–66 (1984).

<sup>80</sup> See *id.*

<sup>81</sup> *Jaber v. United States (Jaber II)*, 861 F.3d 241, 247 (D.C. Cir. 2017), *cert. denied*, 138 S. Ct. 480 (2017). For more examples, see *infra* Part II.

<sup>82</sup> *Chevron*, 468 U.S. at 866.

<sup>83</sup> See, e.g., Abebe & Posner, *supra* note 18, at 542–43.

<sup>84</sup> See generally Eric Posner & Adrian Vermeule, *Inside or Outside the System?*, 80 U. CHI. L. REV. 1743, 1757–58 (2013) (noting the risk of ideological and partisan influences on judicial decision-making).

<sup>85</sup> Abebe & Posner, *supra* note 18 at 543. See also Posner & Sunstein, *supra* note 17, at 1202.

processes. Take answering legal questions as an example. The ideal incentive structure for institutions that engage in legal decision-making often favors detachment over accountability. As Professor Herbert Wechsler famously put it, purely legal decisions “transcend any immediate result that is involved”—they are detached from political, ideological, and other value judgments.<sup>86</sup> In real life, of course, legal questions often do implicate indeterminate values, but legal reasoning should at least aspire to neutrality.

One way to manage concerns about politicization has been through institutional design: a division of labor inside the executive branch between the political echelon and the bureaucracy, which consists of a vast array of offices and administrative agencies with experienced career civil servants.<sup>87</sup> The idea is that political appointees “will be staffed and guided by people without any evident political affiliation; they are specialists and technocrats.”<sup>88</sup> In the legal context, career and political appointee lawyers in various offices and agencies are charged with curbing political influence on legal decisions. Whether and to what extent the legal institutions of the executive branch are resistant to political pressures is a controversial issue in legal scholarship.<sup>89</sup> The point, in any case, is that an optimal incentive structure for interpreting legal materials, articulating legal limits to presidential authority, and clarifying legal ambiguities strikes a different balance between democratic accountability and impartiality than foreign affairs matters that turn on policy trade-offs and value judgments. If interpretive deference is to be justified, it must be shown that unilateral executive decision-making is the best structure to strike the optimal balance. Otherwise, one risks practicing “blanket deference” by using an executive virtue that applies to a limited set of decisions (value judgments) as a rationale for deference in another category of decisions (legal judgments).

The following portion of this Section compares executive lawyers and judges in this context. First, it demonstrates that foreign affairs disputes frequently

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<sup>86</sup> Herbert Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1, 19 (1959).

<sup>87</sup> There is a vast literature on how presidents have upset this equilibrium by politicizing the bureaucratic sphere. *See, e.g.*, Elena Kagan, *Presidential Administration*, 114 HARV. L. REV. 2245, 2338 (2001).

<sup>88</sup> Sunstein, *supra* note 46, at 1621. For an argument for bureaucratic checking, see Neal K. Katyal, *Internal Separation of Powers: Checking Today’s Most Dangerous Branch from Within*, 115 YALE L.J. 2314 (2006).

<sup>89</sup> *See, e.g.*, BRUCE ACKERMAN, *THE DECLINE AND FALL OF THE AMERICAN REPUBLIC* 67–74, 87–104 (2010) (discussing the risk of politicization within the OLC and White House Counsel); Trevor W. Morrison, *Constitutional Alarmism*, 124 HARV. L. REV. 1688 (2011) (reviewing ACKERMAN, *id.*) (criticizing Ackerman’s thesis); Dawn E. Johnsen, *Faithfully Executing the Laws: Internal Legal Constraints on Executive Power*, 54 UCLA L. REV. 1559 (2007) (analyzing failures of executive branch legal review during the Bush presidency); Neomi Rao, *Public Choice and International Law Compliance: The Executive Branch Is a “They,” Not an “It”*, 96 MINN. L. REV. 194 (2011) (conducting public-choice analysis of various executive offices of legal review that advise the President on international law matters).

display two factors—legal indeterminacy and limited external oversight—that make legal advice within the executive branch more susceptible to political influence. These factors are especially pervasive in national security cases. Second, it demonstrates that judges, who may also be subject to political and ideological biases, are nevertheless in a better position to engage in impartial legal analysis. As a result, an executive operating under judicial supervision is more likely to strike an optimal balance between democratic accountability and impartiality. Overall, the analysis demonstrates that rigorous foreign affairs deference in the legal domain severely inhibits true functionalism, as it actively prevents optimal outcomes.

## 2. Structural Biases in Executive Branch Legalism

Under the standard separation-of-powers paradigm, the branches of government are designed to check and balance one another. Legal advice within the executive branch serves, at least in part, to predict how other actors in the political system will react to presidential action and advise how the President can avoid crossing legal lines and triggering a judicial or Congressional response.<sup>90</sup>

This dynamic between internal and external checks bears significantly on government lawyers' institutional incentives. On the one hand, it empowers them. As actors who compete to influence decisions within the executive branch, government lawyers capitalize on their predictive function. When a lawyer states that a contemplated course of action is unlikely to survive judicial review, her opinion is relatively resilient to political pressures. In theory, should government lawyers prove reluctant to sign off on a particular action, the President might try to pressure them into changing their view or, alternatively, to marginalize them.<sup>91</sup> But the incentive to do so is not high when the legal advice provided is not itself a constraint on the President's actions, but simply a reasoned prediction of how courts or Congress might constrain him. From the lawyers' perspective, the result of this dynamic is a relatively high level of functional independence and greater power to facilitate acceptance of their views.

On the other hand, external checks constrain the lawyers' discretion. External oversight not only constrains the President, it also cabins the scope of discretion of the legal institutions within the executive branch. Consider the legal positions advocated in the series of OLC memoranda known as the "torture

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<sup>90</sup> See Eric Posner, *Deference to the Executive in the United States after September 11: Congress, the Courts, and the Office of Legal Counsel*, 35 HARV. J. L. & PUB. POL'Y 213, 230 (2012).

<sup>91</sup> For example, reporting on the deliberations over a contemplated attack against senior Al-Qaeda leaders, Daniel Klaidman attributes to the military the power to create "an atmosphere of do-or-die urgency" which puts enormous pressure on the legal advisers. Klaidman quotes the State Department Legal Adviser Harold Koh's confession to a friend following that meeting, saying that "trying to stop a targeted killing 'would be like pulling a lever to stop a massive freight train barreling down the tracks.'" DANIEL KLAIDMAN, *KILL OR CAPTURE: THE WAR ON TERROR AND THE SOUL OF THE OBAMA PRESIDENCY 199–202* (2012).

memos.”<sup>92</sup> It is hard to imagine that such a radical expression of presidential prerogatives would have been propagated (or, for that matter, relied upon) had the drafters expected a court to review them. Further, even if the torture memos can be dismissed as an abnormal episode in the history of executive branch legal decision-making, the disciplining effect of external scrutiny is wide-ranging. Professor Jack Goldsmith famously noted that legal advice to the President “is neither like advice from a private attorney nor like a politically neutral ruling from a court. It is something, inevitably and uncomfortably, in between.”<sup>93</sup> The delicate balance between the executive branch lawyer’s functions is maintained, at least in part, by external checks. As the pressures from within an administration push its lawyers to think like private attorneys, the operation of courts and Congress, as well as other informal checks, push the pendulum back.

Thanks to the dictates of secrecy and Congress’s institutional limitations, the President is far less constrained in the realm of foreign affairs.<sup>94</sup> Judicial review may be the only effective way to impose external limits on executive action. When this route is foreclosed, the role of government lawyering changes significantly. Lawyers might technically be asked to perform the same function: give legal advice. But in these circumstances, their advice serves as the final authoritative opinion on the legality of presidential action. And once contemplated actions skirt legality, the President’s control over the structure of executive branch legal decision-making could adversely impact the lawyers’ ability and will to draw clear redlines.<sup>95</sup>

A recent study by Professor Daphna Renan fleshes out this point.<sup>96</sup> Renan diagnoses a relatively steady shift inside the executive branch from a centralized OLC-led model of legal decision-making that thrived in the late 1970s to an informal one, in which power is diffused among several institutional actors.<sup>97</sup> She attributes this shift, in part, to the President’s control over institutional design, explaining that structural changes have reflected changing presidential needs.<sup>98</sup>

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<sup>92</sup> The “torture memos” are a series of OLC memoranda drafted under the George W. Bush administration, which took a radical view of the President’s power to sanction coercive interrogations that, by a majority view, amount to torture and a direct violation of U.S. law. *See generally* JACK GOLDSMITH, *THE TERROR PRESIDENCY* 141–72 (2007); H. JEFFERSON POWELL, *THE PRESIDENT AS COMMANDER IN CHIEF: AN ESSAY IN CONSTITUTIONAL VISION* 27–48 (2014).

<sup>93</sup> GOLDSMITH, *supra* note 92, at 35.

<sup>94</sup> There is a vast literature on the structural problems that undercut Congressional oversight of presidential national security powers. *See infra* notes 198–211 and accompanying text.

<sup>95</sup> Notably, there is no fixed structure for resolving legal questions inside the executive branch. Presidents retain final authority and substantial latitude in deciding whose advice to seek and how to approach legal problems. For example, they can seek the advice of one office and marginalize others or form ad hoc mechanisms.

<sup>96</sup> Daphna Renan, *The Law Presidents Make*, 103 VA. L. REV. 805 (2017).

<sup>97</sup> *Id.*, at 814–45.

<sup>98</sup> *Id.*, at 850–66. *See also* ACKERMAN, *supra* note 89, at 99–102 (asserting that the rising institutional power of the White House Counsel affects the incentive structure of the OLC); POSNER

According to Renan, when deciding how to approach legal problems and whose advice to seek, presidents face a tradeoff between credibility, control, and competent advice. To gain credibility, presidents need to receive competent legal advice, which they do not control; however, having control over policy requires some control over legal decision-making, which then compromises credibility.<sup>99</sup>

This trend, of diffusing power between different legal offices and institutions, enables advice shopping and has benefitted presidents when control over a specific legal outcome has been critical. The U.S. involvement in NATO's campaign in Libya provides an example. In 2011, drawing on the consensus of his legal team that Congressional authorization was not required, President Obama authorized airstrikes against the Libyan regime.<sup>100</sup> As time passed and the operation continued, another legal question surfaced—only this time there was no internal consensus.<sup>101</sup> Obama's legal team seemed to disagree whether, under the War Powers Resolution's sixty-day limit on unauthorized involvement of U.S. armed forces in hostilities,<sup>102</sup> the U.S. should cease airstrikes in the absence of a Congressional resolution.<sup>103</sup> The widely held view among most advisors, including the acting head of OLC, was that maintaining the U.S.'s role in the campaign was at odds with the Resolution.<sup>104</sup> Determined to continue the mission, President Obama relied on another legal approach, one advanced by the State Department Legal Adviser and the White House Counsel, both of whom opined that the limited military campaign did not meet the threshold of "hostilities" under the War Powers Resolution and therefore was not controlled by the statutory time limit.<sup>105</sup> President Obama valued control, which he exercised through advice shopping, over credibility.

Advice shopping and other forms of presidential influence on legal decision-making are more likely to occur when two factors are present. The first is legal indeterminacy, which widens the zone of reasonably acceptable interpretations. When, for example, the lawfulness of detention and targeting

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& VERMEULE, *supra* note 5, at 140 (arguing that the President's power to marginalize the OLC has negatively affected the Office's checking power).

<sup>99</sup> Renan, *supra* note 96, at 854.

<sup>100</sup> See Authority to Use Military Force in Libya, 35 Op. O.L.C. 1 (2011) [hereinafter OLC Libya Memo].

<sup>101</sup> See SAVAGE, *supra* note 54, at 638–42. See also Trevor W. Morrison, *Libya, "Hostilities," the Office of Legal Counsel, and the Process of Executive Branch Legal Interpretation*, 124 HARV. L. REV. F. 62, 64–67 (2011).

<sup>102</sup> See 50 U.S.C. §§ 1541–1548 (2012).

<sup>103</sup> See SAVAGE, *supra* note 54, at 635–45.

<sup>104</sup> *Id.*

<sup>105</sup> Testimony by Legal Adviser Harold H. Koh, U.S. Department of State, on Libya and War Powers, Before Senate Foreign Relations Committee, at \*7 (June 28, 2011) [hereinafter *Koh's testimony on Libya*], <http://www.law.uh.edu/faculty/eberman/NSL/HaroldKohTestimony-Libya-and-War-Powers-June-28-2011.pdf> [https://perma.cc/Y4RG-HR3Z].

policies depends on novel and unsettled concepts like “associated forces”<sup>106</sup> and inherently open-ended standards like “proportionality,”<sup>107</sup> there will be a wide range of plausible opinions as to how the law applies to a particular set of facts. The redlines that, once crossed, diminish the President’s credibility will be less clear. The second factor is the limited operation of external checks. Public scrutiny, whether facilitated by formal institutions like courts and Congress or informal institutions like mass media and civil society organizations, increases the political costs of legally dubious decisions. Concerned with losing credibility by relying on shaky legal bases for their actions, presidents are incentivized to adopt mechanisms that generate competent legal advice. But when those checks are less likely to curtail presidential abuses, presidents may favor control (e.g., advice shopping) over the advice that gives them the best view of the law while keeping the political costs relatively low.

The President’s power to engage in advice shopping—and more generally to shape the institutional structures under which legal questions are addressed within the executive branch—might result (and has resulted) in the marginalization of offices and individual lawyers who tend to impose more constraints on executive power.<sup>108</sup> **The dangerous potential consequence of this trend is a race to the bottom between legal institutions: the more expansive the view of executive power adopted, the more central an agency’s role will become to the decision-making process.** While lawyers at both the personal and institutional levels are equipped to resist such perverse incentives, the risk of this result is more serious in the area of foreign affairs, in which legal indeterminacy makes it more difficult to identify errors or abuses.

In sum, the President, though technically not a participating actor in producing legal opinions, can exercise political influence over legal decision-making by opportunistically shaping the structures used for resolving legal questions inside the executive branch. This risk increases in areas where the law is unsettled or ambiguous and when external oversight mechanisms, especially judicial review, are absent. Yet this account weakens the functional case for judicial deference only if judges are in a better position to resolve the relevant legal issues impartially. The next subsection considers this question.

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<sup>106</sup> National Defense Authorization Act for Fiscal Year 2012, Pub. L. No. 112-81, sec. 1021, 125 Stat. 1298, 1562 (2011).

<sup>107</sup> The principle of proportionality in IHL prohibits attacks “which may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated.” Articles 51(5)(b), 35(2), and 57(2)(a)(ii–iii) of Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts, opened for signature 12 December 1977, 1125 U.N.T.S. 3 (entered into force 7 December 1979) (Additional Protocol 1). The norms incorporating the principle of proportionality in the context of rules of targeting are generally accepted as customary law applicable in both international and non-international armed conflict.

<sup>108</sup> See GOLDSMITH, *supra* note 92, at 166–67 (discussing examples).

### 3. Judicial Behavior in Comparative Perspective

There are many ways to characterize judges, ranging from ideal accounts of courts as politically insulated and independent institutions,<sup>109</sup> to the Legal Realist school's portrayal of judges as "politicians in robes."<sup>110</sup> Subscribing to any one particular theory is beyond the scope of this Article. My goal is, instead, to narrowly examine what, if anything, separates judges' capacity to impartially consider legal questions from that of government lawyers.

Scholars of judicial behavior categorize judges' motivations according to three primary groups: (1) ideological/political, (2) personal/self-interested, and (3) legal motivations, described as the aspiration simply "to interpret the law accurately."<sup>111</sup> Any judge is influenced by a mix of motivations and attaches different weights to particular preferences. But the question here is: are judges likely to balance conflicts between legal and non-legal preferences differently than lawyers in the executive branch and, if so, how? To answer this question, Professors Sidney Shapiro and Richard Levy's craft/outcome approach proves helpful.<sup>112</sup> Legal decision-making features a tradeoff between "craft" and "outcome": a craft-oriented decisional process values "consistency with constitutional and statutory provisions and continuity with prior case-law, but permits interstitial evolution and, in exceptional cases, overruling precedent."<sup>113</sup> Put differently, in its pure form, craft means the impartial application of authoritative legal materials informed by logic and legal reasoning. An outcome-oriented decision "focuses on the result in a given case and its implications for the parties and society as a whole; it reflects the values of justice and social utility as filtered through a judge's worldview."<sup>114</sup> The

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<sup>109</sup> See, e.g., WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND VOL. I, 69 (1779) (1765) (describing the common law judges as "depository of the laws" and "living oracles"); RONALD DWORKIN, A MATTER OF PRINCIPLE, 71 (1985) (describing the judiciary as an institution that "calls some issues from the battleground of power politics to the forum of principle").

<sup>110</sup> See, e.g., Posner & Vermeule, *supra* note 84, at 1757–58 (theorizing that because parties control judicial appointments, judges will be subject to strong partisan influence); Richard A. Posner, *What Do Judges and Justices Maximize? (The Same Things Everyone Else Does)*, 3 SUP. CT. ECON. REV. 1, 3 (1993) (asserting that judges, much like other political actors, are rational players who respond to the influences of a range of personal, institutional, and ideological motivations and constraints).

<sup>111</sup> LAWRENCE BAUM, JUDGES AND THEIR AUDIENCES: A PERSPECTIVE ON JUDICIAL BEHAVIOR, 8 (2006); see also JEFFREY A. SEGAL & HAROLD J. SPAETH, THE SUPREME COURT AND THE ATTITUDINAL MODEL REVISITED (2002) (advocating the attitudinal model, by which judicial behavior is best explained by the judge's political and ideological preferences); RICHARD A. POSNER, HOW JUDGES THINK 19–56 (2008) (discussing realist conceptions of judicial behavior and criticizing the legalist model); LEE EPSTEIN, WILLIAM M. LANDES, & RICHARD A. POSNER, THE BEHAVIOR OF FEDERAL JUDGES: A THEORETICAL AND EMPIRICAL STUDY OF RATIONAL CHOICE 25–53 (2013) (same). Not all incentives fall neatly into one category. For example, a judge's motivation to enhance the institutional power of the judiciary could be legally or politically driven, or to serve self-interest for power and influence.

<sup>112</sup> Sidney A. Shapiro & Richard E. Levy, *Judicial Incentives and Indeterminacy in Substantive Review of Administrative Decisions*, 44 DUKE L. J. 1051 (1995).

<sup>113</sup> *Id.*, at 1053.

<sup>114</sup> *Id.*

balancing between countervailing motivations determines which orientation will dominate. A decision maker who accords substantial weight to promoting ideology is likely to be outcome-oriented, while those who value legalism will be craft-oriented.

Judges, at least those who are appointed for life, are relatively more craft-oriented than other legal and political actors. This is not because a judge is more immune to political, partisan, or ideological biases than executive branch lawyers—that proposition is not empirically grounded. Rather, the relative advantage of judges lies in their institutional and personal incentive structure: scholars have found that the reputation and self-esteem of judges are strongly correlated to behavior that facilitates craft.<sup>115</sup> In some circles, judges might be appreciated based on outcome, but within their profession, prestige and respect are gained through good craft. While craft is also valuable for executive lawyers, their institutional role and dependency makes their situation somewhat different. For a government lawyer, “doing a good job” also means helping the administration find ways to advance its policy preferences—a motivation that facilitates outcome-orientation. Moreover, the correlation between craft and personal motivations is weaker for government lawyers, because providing legal advice informally, orally, or secretly—common forms of advice-giving within the executive branch—minimizes the personal benefits associated with craft.

Even under realistic conceptions of judicial behavior that reject the model of judges as neutral arbitrators who only seek to follow the law, judges appear to be best positioned to approach legal issues impartially. This does not mean that any degree of foreign affairs deference is unwarranted. It does mean, however, that using democratic accountability as an excuse for broad deference in the legal domain is, from a functionalist perspective, untenable.

## II. Case Studies

It is hard to pin down how pervasive totemic functionalism is in practice. Courts often defer to the executive in foreign affairs without acknowledging they are doing so, let alone specifying why. Thus, for example, while one can plausibly argue that in blindly adopting the President’s broad interpretation of the scope of his detention authority in the war on terror the courts practiced reflexive deference, there is no hard evidence to support it.<sup>116</sup> Moreover, because functionalist

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<sup>115</sup> See Lee Epstein & Jack Knight, *Reconsidering Judicial Preferences*, 16 ANNU. REV. POLIT. SCI. 11, 18-21 (2013) (“the value of working within the existing body of law can be an important feature of a craft orientation to judging, an orientation with significant implications for a judge’s personal satisfaction with her job”); Shapiro & Levy, *supra* note 112, at 1053; EPSTEIN ET AL., *supra* note 111, at 48 (arguing that animosities from judicial colleagues over disagreements subtract from the judge’s self-satisfaction).

<sup>116</sup> See, e.g., *Al-Bihani v. Obama*, 590 F.3d 866, 872 (D.C. Cir. 2010) (endorsing the government’s definition of “associated forces” to Al-Qaeda in articulating the scope of the President’s detention authority).

arguments are sometimes invoked in tandem with other forms of argumentation, it is not always clear what role functionalism, totemic or not, has played in the court's conclusion.<sup>117</sup> And even with respect to Supreme Court cases that invoke functional analysis, a mixed record of opinions makes it impossible to find a decisive predictive factor for when totemic functionalism is more or less likely.<sup>118</sup>

Notwithstanding these difficulties, three case studies illustrate the significant role totemic functionalism plays in U.S. foreign affairs law. Each case study highlights a slightly different way that totemic functionalism operates. The first case study on targeted killings is a paradigm for how it brings courts to gloss over hard separation-of-powers questions and find an issue exclusively within the executive's purview. The second case study focuses on the "special factors" test in *Bivens* litigation to show how totemic functionalism helps to limit the availability of constitutional remedies in the foreign affairs context. And the third case study illustrates how totemic functionalism contributes to turning an important foreign affairs statute—the War Powers Resolution—into a dead letter. In none of the case studies do I claim that the decisions I survey should have been decided differently on the merits. Instead, my point is that when courts invoke totemic functionalist reasoning, functionalism ceases to be a useful framework for resolving separation-of-powers disputes or justifying judicial deference.

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<sup>117</sup> See, e.g., *Clapper v. Amnesty Int'l USA*, 568 U.S. 398 (2013) (invoking functional and formal considerations to find that plaintiffs lacked Article III standing to challenge the constitutionality of the government's electronic surveillance policy).

<sup>118</sup> Some of the Court's recent high-profile foreign affairs cases feature totemic functionalist reasoning. One example is *Trump v. Hawaii*, 138 S. Ct. 2392 (2018), in which a divided Court rejected constitutional and statutory challenges to President Trump's travel ban. Writing for a 5-4 majority, Chief Justice Roberts hesitated to scrutinize the objective of the presidential proclamation and the sincerity of the process leading to it, noting the "deference traditionally accorded the President in this sphere." But it is hard to see why the executive's superior position in national security matters should have had any bearing on the capacity of the Court to weigh the existence and role of religious animus in the issuance of the travel ban. Moreover, if the point of deference is to give preference to judgments based on expertise and knowledge, then surely decisions motivated by bias warrant no deference. Another example is *Munaf v. Geren*, 553 U.S. 674 (2008). In *Munaf*, the Court dismissed a habeas petition by U.S. citizens held in Iraq who challenged the decision to transfer them to the local authorities. Central to the Court's holding was the functionalist argument that the executive is best positioned to assess the petitioners' risk of torture, once transferred to Iraqi hands. The Court gave deference to the State Department on that question based on the Solicitor General's claim, with no further inquiry into the basis or the process leading to that claim. In contrast, the Court relied on functional considerations in other important foreign affairs cases in which its reasoning did not exhibit totemic functionalism. See, e.g., *Boumediene v. Bush*, 553 U.S. 723 (2008) (invoking functional analysis to consider the sovereign status of the U.S. concerning Guantanamo Bay for jurisdictional purposes); *Zivotofsky v. Kerry*, 135 S. Ct. 2076 (2015) (invoking functional analysis to conclude that the President has exclusive power to recognize foreign nations).

### A. Targeted Killing

The President's power to authorize targeted killing as part of U.S. counterterrorism efforts has been challenged in several lawsuits.<sup>119</sup> Only one count in one lawsuit (pending appeal) survived summary judgment.<sup>120</sup> In each case, functional considerations were invoked by the courts to conclude that targeting is invariably an executive-only decision and that courts have no role to play in this area. For instance, the frequent use of the political question doctrine was based on the premises that “judicially discoverable and manageable standards” for adjudication are lacking and that deciding claims arising from targeting decisions compels the court to make “an initial policy determination of a kind clearly for nonjudicial discretion.”<sup>121</sup> Moreover, several opinions emphasized that reaching the merits requires assessments of “the merits of the President’s decision to launch an attack,”<sup>122</sup> “the capabilities of the [alleged] terrorist operative to carry out a threatened attack,”<sup>123</sup> and the imminence of the threat posed.<sup>124</sup> Those judgments, said the courts, are inappropriate for the judiciary because “judges lack the knowledge and expertise necessary to make decisions regarding national security.”<sup>125</sup> In addition, it was stressed that military decisions should be “in the hands of those who are best positioned and most politically accountable for making them.”<sup>126</sup>

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<sup>119</sup> *El-Shifa Pharm. Indus. Co. v. United States*, 55 Fed. Cl. 751 (Fed. Cl. 2003), *aff'd*, 378 F.3d 1346 (Fed. Cir. 2004); *El-Shifa Pharm. Indus. Co. v. United States*, 402 F. Supp. 2d 267 (D.D.C. 2005), *aff'd*, 559 F.3d 578 (D.C. Cir. 2009), *aff'd on reh'g en banc*, 607 F.3d 836 (D.C. Cir. 2010); *Al-Aulaqi v. Obama*, 727 F. Supp. 2d 1 (D.D.C. 2010); *Al-Aulaqi v. Panetta*, 35 F. Supp. 3d 56 (D.D.C. 2014); *Jaber v. United States (Jaber I)*, 155 F. Supp. 3d 70 (D.D.C. 2016), *aff'd*, 861 F.3d 241 (D.C. Cir. 2017), *cert. denied*, 138 S. Ct. 480 (2017); *Zaidan v. Trump*, 317 F. Supp. 3d 8 (D.D.C. 2018).

<sup>120</sup> The outlier in this series of cases is the recent D.C. District Court ruling in *Zaidan*. In that case, Ahmed Zaidan and Bilal Kareem, two journalists who regularly report from conflict zones in the Middle East, challenged under the Administrative Procedure Act (APA) and the Constitution the alleged decision to include them on a government “kill list.” The government moved to dismiss on grounds of standing, political question, and failure to state a plausible claim for relief. The court granted the government motion in part but allowed the constitutional claim of Kareem, who is a U.S. citizen, to proceed.

<sup>121</sup> *Jaber II*, 861 F.3d at 245 (quoting *Baker v. Carr*, 369 U.S. 186, 217 (1986)).

<sup>122</sup> *El-Shifa Pharm. Indus. Co. v. United States*, 607 F.3d at 844.

<sup>123</sup> *Al-Aulaqi v. Obama*, 727 F. Supp. 2d at 46 (alteration in original) (citation omitted).

<sup>124</sup> *Jaber I*, 155 F. Supp. 3d at 79.

<sup>125</sup> *Al-Aulaqi v. Panetta*, 35 F. Supp. 3d at 77 (citing *Vance v. Rumsfeld*, 701 F.3d 193, 200 (2012)).

<sup>126</sup> *Al-Aulaqi v. Obama*, 727 F. Supp. 2d, at 52 (quoting *Hamdi v. Rumsfeld*, 524 U.S. at 531); *see also Jaber II*, 861 F.3d at 247 (noting that military judgments are subject to “civilian control of the Legislative and Executive Branches,” and that “[t]he ultimate responsibility for these decisions is appropriately vested in branches of the government which are periodically subject to electoral accountability” (quoting *Gilligan v. Morgan*, 413 U.S. 1, 10 (1973))); *El-Shifa Pharm. Indus. Co. v. United States*, 378 F.3d 1346, 1365–67 (Fed. Cir. 2004) (noting that the power to designate a target should lie exclusively “in the hands of those who are best positioned and most politically accountable for making [it]” (quoting *Hamdi*, 524 U.S. at 531)).

There are a number of analytical mistakes that make the courts' functionalist reasoning in those cases "totemic," but they all originate from one conceptual error: the idea that authorizing counterterrorism targeting is factually and legally the same as a field commander telling his subordinate to "shoot that enemy over the hill." In fact, as I explain below at some length, counterterrorism targeting is significantly different, calling for different institutional capacities and rendering impartiality more functionally valuable than in traditional military targeting.

Historically, war was viewed as an event with identifiable features.<sup>127</sup> Hostilities were conducted in a defined war-zone and had an identifiable termination point; soldiers fought wars, and, in most cases, they were easily identifiable by their uniforms or other distinctive signs. These features marked geographical and temporal borders of war and distinguished between active participants who constituted legitimate targets and those who were to be spared and protected. Notably, the party with legal and moral responsibility was the enemy state. Enemy soldiers were targeted as agents of the enemy state, on the basis that removing them from the battlefield would weaken the state's military strength. In these circumstances, scrutinizing each and every attack on a particular enemy soldier was not required—the law focused on state responsibility, not individual responsibility.<sup>128</sup>

Counterterrorism lacks those traditional markers, even when employed under the war paradigm. Hostilities frequently occur outside of traditional battlefields, including in neutral countries. As the prolonged wars in Afghanistan and Iraq demonstrate, it is often impossible to foresee when and under what circumstances hostilities will end.<sup>129</sup> In most cases, members of armed groups are not identifiable by uniforms or other distinctive signs. And most importantly, decisions to kill or capture are made *de facto* on the basis of individual conduct.<sup>130</sup>

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<sup>127</sup> See, e.g., Rosa Ehrenreich Brooks, *War Everywhere: Rights, National Security Law, and the Law of Armed Conflict in the Age of Terror*, 153 U. PA. L. REV. 675, 688–91 (2005); see also MARY L. DUDZIAK, *WAR TIME: AN IDEA, ITS HISTORY, ITS CONSEQUENCES* 3–4 (2012) ("Wartime becomes a justification for a rule of law that bends in favor of the security of the state. Traditionally, this distortion has been tolerated because wars end."); Jennifer C. Daskal, *The Geography of the Battlefield: A Framework for Detention and Targeting Outside the "Hot" Conflict Zone*, 161 U. PA. L. REV. 1165, 1193–97 (2013) (discussing the rationales for the war zone/peace zone distinction).

<sup>128</sup> There are no specific international humanitarian law (IHL) rules that condition the use of lethal force against enemy combatants on *ex ante* assessment of risk or anticipated military advantage save in cases where incidental civilian damage is foreseeable. See generally YORAM DINSTEN, *THE CONDUCT OF HOSTILITIES UNDER THE LAW OF INTERNATIONAL ARMED CONFLICT* (3d ed. 2016).

<sup>129</sup> The hostilities between Israel and Hamas, the *de facto* sovereign in the Gaza strip, are another example. In 2000, Israel launched a massive military campaign against Hamas and other armed militant groups. Even though the intensity of hostilities has decreased significantly, especially since 2014, the Supreme Court of Israel has recently held that the state of armed conflict has not ceased. See HCJ 3003/18 *Yesh Din—Volunteers for Human Rights v. The IDF Chief of Staff* ¶ 38 (2018) (Isr.).

<sup>130</sup> See, e.g., PRESIDENTIAL POLICY GUIDANCE ON PROCEDURES FOR APPROVING DIRECT ACTION AGAINST TERRORIST TARGETS LOCATED OUTSIDE THE UNITED STATES AND AREAS OF ACTIVE HOSTILITIES (May 22, 2013) [hereinafter PPG], <https://www.justice.gov/oip/foia->

The evolving practice among nations that use targeted killing suggests that operations are authorized based on evidence linking the targeted individual with a recognized enemy organization or with specific unlawful actions he committed, and on an evaluation of the threat posed by him.<sup>131</sup> The shift from “categorical, group-based judgments that turned on *status*” to “a world that implicitly or explicitly requires *the individuation of enemy responsibility*,” means that the procedures through which persons are identified and the evidence against them is assessed are more consequential than ever before.<sup>132</sup> Put differently, before every targeted killing there will be a group of people assessing evidence and deciding whether that evidence is sufficient to permit killing. In that sense, counterterrorism targeting looks more like a criminal process rather than traditional battlefield targeting.

Despite the quasi-adjudicative nature of the targeting process, it is quite different from criminal proceedings: it is held *ex parte* and is fully administered by executive actors who are judged by their success in countering terrorism, even though a neutral decision maker might have maximized reliable and accurate decision-making. In addition, the traditional constraint on the use of force embedded in the identifiability of war (in space, time, and the clear distinction between combatants and civilians), as well as in concepts like reciprocity and reprisal that limited state power in the past, are not applicable in counterterrorism. In these circumstances, the risk of error or abuse increases significantly.

As the risks of error or abuse grow, so does the importance of *impartiality* and *legal expertise*. Legal rules and procedures facilitate accurate and reliable decision-making. Ad hoc judgments tend to be short-sighted and more susceptible to bias.<sup>133</sup> By contrast, legal constraints compel decision makers to go through a structured process before they authorize the use of force. In this process, attention to substantive and procedural requirements, and the array of competing values reflected in them, fosters more deliberative, analytical and rational decision-making. In theory at least, robust process increases the likelihood of executing good policy.<sup>134</sup> Legal constraints also help safeguard values associated with the

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library/procedures\_for\_approving\_direct\_action\_against\_terrorist\_targets/download [https://perma.cc/3757-CXQ] (describing the Obama administration’s procedures for counterterrorism targeting).

<sup>131</sup> See, e.g., JOINT COMMITTEE ON HUMAN RIGHTS, THE GOVERNMENT’S POLICY ON THE USE OF DRONES FOR TARGETED KILLING: GOVERNMENT RESPONSE TO THE COMMITTEE’S SECOND REPORT OF SESSION 2015–16, 2016–17, HL 49, HC 747 (UK) (laying out the targeting standards of the U.K. government); HCJ 769/02 Public Committee Against Torture in Israel v. Government of Israel 57(6) PD 285 (2006) (Isr.) (articulating the targeting standards under Israeli law).

<sup>132</sup> Samuel Issacharoff & Richard H. Pildes, *Targeted Warfare: Individuating Enemy Responsibility*, 88 N.Y.U. L. REV. 1521, 1522–23 (2013). See generally Gabriella Blum, *The Individualization of War: From War to Policing in the Regulation of Armed Conflicts*, in LAW AND WAR 48 (Austin Sarat et. al. eds., 2014).

<sup>133</sup> See generally Jonathan Renshon & Stanley A. Renshon, *The Theory and Practice of Foreign Policy Decision Making*, 29 POL. PSYCHOL. 509 (2008).

<sup>134</sup> See JACK GOLDSMITH, POWER AND CONSTRAINT: THE ACCOUNTABLE PRESIDENCY AFTER 9/11, 137–38 (2012) [hereinafter GOLDSMITH, POWER AND CONSTRAINT].

separation of powers and the rule of law. Clear legal standards cabin presidential discretion and provide the other branches (and informal institutions) with tools to check abuses and hold the President to account. For example, if the law prohibits strikes that cause excessive civilian losses in relation to the anticipated military gain, observers can use the legal standard to better assess presidential behavior. This result is socially desirable because an accountable agent is more likely to be attuned to the wishes of her principals (as promulgated by laws).

Against this backdrop, it is hard to argue that the functional role of a neutral judge in counterterrorism targeting is quite the same as in traditional military targeting. It is also clear that while targeted killing involves policy and fact assessments that executives might be in a better position to grapple with, the issue also raises hard legal questions and would benefit from judicial involvement in resolving them.<sup>135</sup> The targeting opinions overlooked these special features of counterterrorism targeting and, as a result, **invoked functionalist reasoning that poorly supports deference.**

The trial court decision in *Jaber v. United States*<sup>136</sup> provides an example. At issue in *Jaber* were claims under the Torture Victim Protection Act (TVPA), a federal law that establishes a civil cause of action against individuals who collude in extrajudicial killing or torture under authority of a foreign nation.<sup>137</sup> The complaint was filed on behalf of victims of a drone attack who appear to have been killed incidentally in a strike that targeted three other individuals based on a suspicious behavior pattern (known as a “signature strike”).<sup>138</sup> The plaintiffs sought a declaratory judgment that the victims were killed in violation of the TVPA and international law.<sup>139</sup> To answer the legal question, the court was required to tackle different aspects of customary and treaty-based international law and flesh out the conditions required by that body of law to permit the use of force. This was essentially what the Israeli Supreme Court had earlier done in its landmark decision in *Public Committee Against Torture in Israel v. Government of Israel*.<sup>140</sup> In *Jaber*, however, the court characterized the claim as a “complex policy question[,]” which “courts are ill-equipped to answer.”<sup>141</sup> It reasoned that the plaintiffs’ claims, “regardless of how they are styled, call into question the prudence of the political

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<sup>135</sup> Counterterrorism targeting is genuinely ambiguous and raises complex legal questions on both the domestic and international levels. *See generally*, H. JEFFERSON POWELL, TARGETING AMERICANS: THE CONSTITUTIONALITY OF THE U.S. DRONE WAR (2016) (conducting constitutional analysis of the U.S. targeted killing policy); NILS MELZER, TARGETED KILLINGS IN INTERNATIONAL LAW (2008) (examining the legality of targeted killing under international law).

<sup>136</sup> *Jaber I*, 155 F. Supp. 3d 70 (D.D.C. 2016).

<sup>137</sup> Torture Victim Protection Act of 1991, Pub. L. No. 102-256, 106 Stat. 73 (1992) (codified at 28 U.S.C. § 1350 note (2012)).

<sup>138</sup> Complaint, *Jaber I*, 155 F. Supp. 3d 70 (D.D.C. 2016) (No. 15-0840 (ESH)).

<sup>139</sup> *Id.* at 40.

<sup>140</sup> *See generally* 57(6) PD 285 (2006) (Isr.).

<sup>141</sup> *Jaber I*, 155 F. Supp. 3d at 79.

branches in matters of foreign policy or national security.”<sup>142</sup> To illustrate this point, the court focused on one obstacle that it found dispositive, wondering “[w]hat conceivable basis would the Court have for delineating the point at which the three young men presented an ‘imminent’ threat to the U.S., such that it could confidently second-guess the Executive?”<sup>143</sup>

But while the court viewed the imminence issue as a matter of professional judgment (for which it had no tools to evaluate presidential discretion), what was in fact required was a resolution of three questions: what “imminent threat” means; whether considering the imminence of the threat was required under governing international law; and whether the plaintiffs’ relatives posed such a threat. The first two are questions of law; the third is a question of fact. It is true that fact-finding in this kind of litigation may raise unique difficulties and that, after careful consideration, fact deference may have been warranted in the circumstances of the case. It is unclear, however, why the court assumed a priori that addressing these questions was beyond judicial competency. To be sure, there might be reasons for giving some, even great, weight to the executive’s interpretive position on international law, but what the court did was instead to accord blanket deference to the President: it acknowledged that executives are better positioned to decide the *policy* component of the decision to strike, and blindly “extended” the deference to the legal and factual domains. The application of blanket deference led the court to find the claims stated in the complaint nonjusticiable.<sup>144</sup> As a result, important questions about presidential power in the realm of national security remained unanswered outside the executive branch.

### B. The “Special Factors” Test in *Bivens* Litigation

In *Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics*, the Supreme Court announced for the first time that, under certain conditions, individuals whose Fourth Amendment rights were allegedly infringed may bring suits for damages against federal officials, even in the absence of a statutory cause of action.<sup>145</sup> In the wake of *Bivens*, lower courts expanded its scope to encompass violations of additional constitutional provisions,<sup>146</sup> and the Supreme Court itself further extended it to injuries inflicted in violation of the Fifth and

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<sup>142</sup> *Id.*, at 78 (quoting *El-Shifa Pharm. Indus. Co. v. United States*, 607 F.3d at 842) (emphasis omitted).

<sup>143</sup> *Id.*, at 79.

<sup>144</sup> *Id.* at 77.

<sup>145</sup> See generally 403 U.S. 388 (1971).

<sup>146</sup> See, e.g., *United States ex rel. Moore v. Koelzer*, 457 F.2d 892, 894 (3d Cir. 1972) (opining that *Bivens* “recognizes a cause of action for damages for violation of constitutionally protected interests, and is not limited to Fourth Amendment violations”); see also Alexander A. Reinert, *Measuring the Success of Bivens Litigation and Its Consequences for the Individual Liability Model*, 62 STAN. L. REV. 809, 821–22 (2010) (noting that *Bivens* was understood by lower courts to permit suits “for violations of additional constitutional provisions, including the First, Fifth, Eighth, Ninth, and Fourteenth Amendments”).

Eighth Amendments.<sup>147</sup> At that time, a majority of the Justices seemed to embrace the idea of using a judge-made right of action for damages as a tool for vindicating constitutional rights; accordingly, the Court carefully carved out and narrowly construed two limiting principles on the availability of *Bivens* remedies: a plaintiff was able to proceed with a *Bivens* action unless (1) “Congress has provided an alternative remedy which it explicitly declared to be a *substitute* for recovery directly under the Constitution”;<sup>148</sup> or (2) “special factors” counseled against judicial recognition of a damages remedy under the Constitution.<sup>149</sup>

*Bivens*’s “heady days,” as later portrayed by Justice Scalia, did not last long.<sup>150</sup> A series of decisions over the next decades reflected the Court’s reluctance to apply *Bivens* to new contexts or new categories of defendants and, more broadly, a growing skepticism about its merits.<sup>151</sup> Notwithstanding the trend to limit its reach, the Court recently made clear that *Bivens* is a “fixed principle in the law,” one that serves a significant role in enforcing the Constitution when no other forms of redress are available.<sup>152</sup>

A “special factors” analysis under *Bivens* is inherently functionalist. The factors taken into account and the level of generality at which the test is applied involve assessment of the costs and benefits of judicial inquiry into particular governmental conduct.<sup>153</sup> In most cases, the analysis will focus on separation-of-powers concerns, namely, whether courts are institutionally capable, absent Congressional guidance, to weigh the competing interests in deciding whether damages are a proper remedy for constitutional wrongs.<sup>154</sup> As such, the test helps

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<sup>147</sup> See *Davis v. Passman*, 442 U.S. 228, 234 (1979) (recognizing an implied cause of action under the Due Process Clause for employment discrimination); *Carlson v. Green*, 446 U.S. 14, 20 (1980) (inferring a *Bivens* cause of action for violations of the Eighth Amendment’s ban on cruel and unusual punishments).

<sup>148</sup> *Carlson*, 446 U.S. at 18–19.

<sup>149</sup> *Id.*, at 18 (quoting *Bivens*, 403 U.S. at 396).

<sup>150</sup> *Corr. Servs. Corp. v. Malesko*, 534 U.S. 61, 75 (2001) (Scalia, J., concurring).

<sup>151</sup> See *Ziglar v. Abbasi*, 137 S. Ct. 1843, 1856–57 (2017) (surveying cases limiting the reach of *Bivens*; noting that given “the changes to the Court’s general approach to recognizing implied damages remedies, it is possible that the analysis in the Court’s three *Bivens* cases might have been different if they were decided today”).

<sup>152</sup> *Id.*, at 1857; see also Stephen Vladeck, *The New National Security Canon*, 61 AM. U. L. REV. 1295, 1304 (2012) (“the Court had never rejected *Bivens* relief when such a claim was the only means by which the plaintiff could vindicate a constitutional claim against a federal officer”).

<sup>153</sup> See, e.g., *U.S. v. Stanley*, 483 U.S. 669, 681–83 (1987) (illustrating the spectrum at which one can discern the special factors inquiry concerning suits arising from military service; noting that finding the desired point along this spectrum is “essentially a policy question”).

<sup>154</sup> *Abbasi*, 137 S. Ct., at 1857–58 (arguing that “separation-of-powers principles are or should be central to the analysis;” and that the test should concentrate on “whether the Judiciary is well suited, absent congressional action or instruction, to consider and weigh the costs and benefits of allowing a damages action to proceed”); see also *Hernandez v. Mesa*, 885 F.3d 811, 818 (5th Cir. 2018) (applying the *Abbasi*’s functionalist separation-of-powers framework to a *Bivens* suit arising from a lethal border shooting incident); *Meshal v. Higgenbotham*, 804 F.3d 417, 430 (D.C. Cir. 2015) (Kavanaugh J., concurring) (arguing that the question underlying the special factors analysis is “who

filter out suits that, despite the potential unconstitutional conduct they raise, are inappropriate for judicial resolution. And yet its functionalist nature is meant to ensure that this filtering role will be contextual and narrowly tailored. It is difficult to conclude how contextual the test is in practice, but a comprehensive empirical study from 2010 provides a plausible indication, reporting that the general success rate for *Bivens* claims ranges between 16-40%.<sup>155</sup>

In sharp contrast, the courts categorically refused to apply *Bivens* to cases arising out of foreign policy and national security activities. This anomaly (compared to the general success rate of *Bivens* suits) is even more puzzling given the unique obstacles that plaintiffs face in pursuing other effective remedies in this area.<sup>156</sup> What accounts for it? One explanation is the deployment of totemic functionalism in *Bivens* suits involving foreign affairs, which is most evident by the frequent use of national security as a “special factor” in cases arising from post-9/11 national security activities.<sup>157</sup> The categorical bar on *Bivens* suits in this context initially emerged at the Circuit level in the years following 9/11, with no less than five Courts of Appeals rejecting extension of *Bivens* into the national security context,<sup>158</sup> followed by the Supreme Court in *Ziglar v. Abbasi*.<sup>159</sup> To be sure, it may be that national security concerns should be considered special factors under *Bivens*. But while a sincere and in-depth analysis of these factors would have resulted, in all likelihood, in a nuanced articulation of the test in the foreign affairs context, many decisions simply adopted a presumption of national security deference as, in and of itself, a special factor.

Consider the following examples. In *Rasul v. Myers*, which concerned allegations of unlawful detention and mistreatment of detainees at Guantanamo, the Court of Appeals for the D.C. Circuit acknowledged “the danger of obstructing U.S. national security policy” as a special factor.<sup>160</sup> The court did not pause to consider the nature or likelihood of such “obstruction” or how it played out against other factors supporting monetary relief, but simply relied on a 1985 decision, *Sanchez-Espinoza v. Reagan*, which dealt with allegations concerning U.S. support of the Nicaraguan Contras.<sup>161</sup> One might question whether in the context of constitutional torts an unacknowledged foreign policy decision concerning American interests

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decides”—either Congress or the judiciary—whether it is appropriate to allow a damages action against U.S. officials for constitutional torts).

<sup>155</sup> See Reinert, *supra* note 146, at 835–45.

<sup>156</sup> To recall, the availability of an alternative remedy has been recognized by the Supreme Court as one of the limiting principles of *Bivens*. See *Carlson v. Green*, 446 U.S. 14, 18–19 (1980); see also Stephen I. Vladeck, *National Security and Bivens after Iqbal*, 14 LEWIS & CLARK L. REV., 255, 276–77 (2010) (arguing that in most 9/11-related *Bivens* lawsuits, plaintiffs generally lacked access to alternative political or legal remedies).

<sup>157</sup> For an elaborate analysis of the post-9/11 *Bivens* litigation, see JAMES E. PFANDER, *CONSTITUTIONAL TORTS AND THE WAR ON TERROR* 42–56 (2016).

<sup>158</sup> See *id.*, at 45–56.

<sup>159</sup> 137 S. Ct. 1843 (2017).

<sup>160</sup> 563 F.3d 527, 532 n.5 (D.C. Cir. 2009) (per curiam), *cert. denied*, 558 U.S. 1091 (2009).

<sup>161</sup> *Id.*, citing *Sanchez-Espinoza v. Reagan*, 770 F.2d 202, 209 (D.C. Cir. 1985).

abroad is analogous to the treatment of detainees under the direct control of the U.S. government, but in the practice of totemic functionalism such questions are not addressed. Another example is the Second Circuit decision in *Arar v. Ashcroft*, declining to adjudicate claims under the Fifth Amendment for harms caused in detention and subsequent extraordinary rendition to Syria.<sup>162</sup> The *Arar* court's reasoning demonstrates what I call blanket deference. Here, a 7–4 majority ruled that considering the constitutional claims raised in the complaint was tantamount to engaging in foreign and national security policy-making.<sup>163</sup> The court cited the judiciary's "limited institutional competence" in this area, although it failed to state what part of the legal question at issue judges lack the capacity to resolve or how it differs from considering constitutional questions in other areas of public policy.<sup>164</sup> Like the *Rasul* court, the majority assumed that implying a cause of action "would have the natural tendency to affect diplomacy, foreign policy, and the security of the nation," and inferred that this outcome alone counsels hesitation.<sup>165</sup>

Subsequent decisions followed these rationales. *Vance v. Rumsfeld* held that implying a cause of action for U.S. civilian contractors alleging they were tortured by U.S. military personnel in Iraq would run the risk of judges "mess[ing] up" military affairs "without appreciating what they were doing."<sup>166</sup> *Lebron v. Rumsfeld* dismissed a suit by a U.S. citizen who was held in military detention as an enemy combatant. Invoking the "special factors" test, the Fourth Circuit observed that "judicial review of military decisions would stray from the traditional subjects of judicial competence," and therefore that litigation of the sort might risk "impingement on explicit constitutional assignments of responsibility to the coordinate branches of our government."<sup>167</sup> *Meshal v. Higgenbotham* announced that "special factors" preclude a *Bivens* remedy in cases involving "military, national security or intelligence" for actions that "occurred outside the borders of the United States."<sup>168</sup> Writing for the majority, Judge Brown questioned whether a judicial inquiry into allegations of prolonged detention of a U.S. citizen without a hearing and threats of torture and disappearance does in fact bring to bear the foreign policy concerns cited by the government.<sup>169</sup> Despite this doubt, she concluded that "the unknown itself is reason for caution in areas involving national security and foreign policy."<sup>170</sup>

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<sup>162</sup> 585 F.3d 559, 574–77 (2d Cir. 2009) (en banc), *cert. denied*, 130 S. Ct. 3409 (2010).

<sup>163</sup> *Id.* at 575 (noting that the plaintiff's claim "cannot proceed without inquiry into the perceived need for the policy, the threats to which it responds, the substance and sources of the intelligence used to formulate it, and the propriety of adopting specific responses to particular threats in light of apparent geopolitical circumstances and our relations with foreign countries").

<sup>164</sup> *See id.* at 575.

<sup>165</sup> *See id.* at 574.

<sup>166</sup> 701 F.3d 193, 199 (7th Cir. 2012) (en banc).

<sup>167</sup> 670 F.3d 540, 548 (4th Cir. 2012).

<sup>168</sup> 804 F.3d 417, 425–26 (D.C. Cir. 2015), *cert. denied*, 137 S. Ct. 2325 (2017).

<sup>169</sup> *Id.* at 426.

<sup>170</sup> *Id.*

Finally, in *Ziglar v. Abbasi*, the Supreme Court dismissed a *Bivens* action against top executive officials by foreign citizens who were detained and held in severe conditions for immigration violations in the immediate aftermath of 9/11.<sup>171</sup> Implicit in the majority's special factors analysis is a logical premise linking the idea that "national-security policy is the prerogative of the Congress and President" to the conclusion that *constitutional review* of the policy "intrude[s] upon the authority of the Executive."<sup>172</sup> As discussed above, that premise is not self-evident; it is an inference that needs to be reasoned and based on contextual grounds.<sup>173</sup> Moreover, the Court found two additional special factors applicable in this context that seem to depart from previous case law. The majority, at pains to show that other effective remedies were available to the detainees, asserted that habeas relief is an adequate alternative to damages.<sup>174</sup> However, never before was prospective relief recognized as a substitute for *Bivens* and, as the opinion itself concedes, it is uncertain that habeas may be used to challenge conditions of confinement.<sup>175</sup> In addition, under *Bivens*, Congress's failure to enact an adequate damages remedy is indication in favor of implying a cause of action. But in this context, Congressional inaction was invoked as a "factor counseling hesitation."<sup>176</sup>

In sum, the special factors test invites courts to undertake a contextual analysis of relevant functional considerations before implying a common law right of action for constitutional torts. Cases involving national security and foreign relations typically involve some unique factors that warrant caution and others that—as the Supreme Court acknowledged—strongly support keeping the door open for a *Bivens* remedy.<sup>177</sup> But what played out in practice was judicial adoption

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<sup>171</sup> 137 S. Ct. 1843 (2017).

<sup>172</sup> *Id.* at 1861 (quoting *Dep't of Navy v. Egan*, 484 U.S. 518, 530 (1988)).

<sup>173</sup> *See, e.g.*, *INS v. Chadha*, 462 U.S. 919, 942–43 (1983) ("[T]he presence of constitutional issues with significant political overtones does not automatically invoke the political question doctrine. Resolution of litigation challenging the constitutional authority of one of the three branches cannot be evaded by courts because the issues have political implications . . .").

<sup>174</sup> *Abbasi*, 137 S. Ct. at 1863.

<sup>175</sup> *See id.*; *see also id.* at 1879 (Breyer, J., dissenting) ("[N]either a prospective injunction nor a writ of habeas corpus, however, will normally provide plaintiffs with redress for harms they have already suffered."); Steve Vladeck, *On Justice Kennedy's Flawed and Depressing Narrowing of Constitutional Damages Remedies*, JUST SECURITY (June 19, 2017) ("Habeas is about unlawful detention, and so is mooted by a detainee's release or transfer. It is therefore usually a woefully inefficient tool for challenging policies such as the ones at issue in *Abbasi*.") <https://www.justsecurity.org/42334/justice-kennedys-flawed-depressing-narrowing-constitutional-damages-remedies/> [<https://perma.cc/H9PY-YZU3>].

<sup>176</sup> *Abbasi*, 137 S. Ct. at 1865.

<sup>177</sup> *See, e.g.*, *Mitchell v. Forsyth*, 472 U.S. 511 (1985). In *Mitchell*, the Supreme Court held that the Attorney General is not absolutely immune from liability under *Bivens* for alleged unconstitutional conduct in authorizing domestic surveillance. The Court noted that in the context of national security, "it is far more likely that actual abuses will go uncovered than that fancied abuses will give rise to unfounded and burdensome litigation." The opinion also recognized that when national security is at stake, officials might be more prone to cross legal boundaries. *See also Abbasi*, 137 S. Ct. at 1884 (Breyer, J., dissenting) (arguing that in the national security context injunctive remedies

of a de facto foreign and military affairs exception to *Bivens*, which has resulted in the dismissal of cases alleging gross violations of constitutional rights that otherwise seem to fall within the scope of the doctrine, after, at best, minimal scrutiny. The end result is that, much like in the targeting example, here too what appears as functionalist reasoning is actually a mechanical reliance on the Hamiltonian argument about foreign affairs and institutional competence.

### *C. Judicial Enforcement of the War Powers Resolution*

Frustrated with its inability to curb the accretion of presidential war powers since World War II, Congress passed the War Powers Resolution over President Nixon's veto in 1973.<sup>178</sup> According to its drafters, the Resolution was intended to give practical effect to the original purpose underlying the distribution of war powers in the Constitution.<sup>179</sup> It provides that the President may commit the armed forces to actual or imminent hostilities only pursuant to specific Congressional approval or "a national emergency created by an attack upon the United States."<sup>180</sup> To give this provision more teeth, the Resolution establishes procedures for Congress and the President to participate in decisions concerning the initiation and termination of hostilities. Among other things, it imposes consultation and reporting requirements on the President and sets a sixty-day limit on unauthorized military operations.<sup>181</sup>

Commentators widely regard the War Powers Resolution as a futile enterprise.<sup>182</sup> It appears that the Resolution has some political effect on presidential behavior; presidents have frequently provided Congress reports consistent with the Resolution and been mindful of the sixty-day clock in situations where troops were deployed abroad without Congressional approval.<sup>183</sup> Overall, however, it did not place significant hurdles on presidents seeking to take unilateral action. As others

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have proven ineffective to guard against unnecessary deprivation of rights, and therefore, judicial inquiry is especially important after-the-fact).

<sup>178</sup> 50 U.S.C. §§ 1541–1548 (2012). For an account of the historical antecedents of the War Powers Resolution ("WPR"), see ROBERT F. TURNER, *REPEALING THE WAR POWERS RESOLUTION* 1–35 (1991).

<sup>179</sup> See 50 U.S.C. § 1541(a).

<sup>180</sup> *Id.* § 1541(c).

<sup>181</sup> See *id.* §§ 1542–1547.

<sup>182</sup> See, e.g., THOMAS E. CRONIN & MICHAEL A. GENOVESE, *THE PARADOXES OF THE AMERICAN PRESIDENCY* 191 (1998) (noting that "presidents have mostly ignored the resolution and viewed it as a nuisance"); John H. Ely, *Suppose Congress Wanted a War Powers Act That Worked*, 88 COLUM. L. REV. 1379, 1381 (1988) ("[T]hanks to a combination of presidential defiance, congressional irresolution, and judicial abstention the War Powers Resolution has not worked."); Michel Ratner & David Cole, *The Force of Law: Judicial Enforcement of the War Powers Resolution*, 17 LOY. L.A. L. REV. 715, 742–50 (1984) (providing examples of presidential non-compliance with the WPR); KOH, *supra* note 5, at 123–28 (exploring the reasons for the WPR's failure to check presidential war powers).

<sup>183</sup> See MATTHEW C. WEED, CONG. RESEARCH SERV., R42699, *THE WAR POWERS RESOLUTION: CONCEPTS AND PRACTICE* (2019), <https://fas.org/sgp/crs/natsec/R42699.pdf> [<https://perma.cc/2KM8-UYXD>] (listing over 160 reported incidents between 1975–2016).

have observed, presidents have found various ways to circumvent the limitations established by the Resolution,<sup>184</sup> even to use it as an instrument for *enhancing* presidential war powers.<sup>185</sup> One factor that helps explain why the War Powers Resolution has been largely ineffective is that courts have declined to enforce it.<sup>186</sup> Absent judicial enforcement, some basic legal questions surrounding the War Powers Resolution—e.g., is it constitutional; does it assume unilateral presidential authority for limited wars; what kind of military engagements constitute “hostilities” for purposes of the Resolution—still remain 45 years after its enactment. Because the executive branch is better structured and has more institutional incentives than Congress to capitalize on separation-of-powers ambiguity in foreign affairs,<sup>187</sup> executives were able to use the legal uncertainties underlying the Resolution to enhance presidential discretion without overtly breaking the law.<sup>188</sup>

Judicial abstention here reveals a slightly different species of totemic functionalism than previous examples. Courts have rested their reluctance to adjudicate disputes relating to the War Powers Resolution on various doctrines of non-justiciability such as standing, political question, and ripeness. The common thread in these doctrines, and what seems to be the rationale underlying judicial deference, is the premise that **Congress as an institution is better suited than courts to enforce the Resolution.** For example, the D.C. Circuit ruled that members of Congress lacked standing to challenge U.S. participation in NATO airstrikes in Kosovo because “Congress has a broad range of legislative authority it can use to

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<sup>184</sup> See *supra* note 182; see also Curtis A. Bradley, *U.S. War Powers and the Potential Benefits of Comparativism*, in OXFORD HANDBOOK OF COMPARATIVE FOREIGN RELATIONS LAW (Curtis A. Bradley ed., forthcoming June 2019) [hereinafter Bradley, *U.S. War Powers*] (manuscript at 6), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3018625](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3018625) [<https://perma.cc/S6SU-8TJG>] (describing ways in which presidents have authorized force without Congressional involvement without openly disregarding the Resolution).

<sup>185</sup> For example, current and former administrations have claimed that the WPR recognizes an independent presidential authority to introduce the military into hostilities for up to sixty days without congressional authorization. See, e.g., April 2018 Airstrikes Against Syrian Chemical-Weapons Facilities, 42 Op. O.L.C. 1, at \*6 (2018) [hereinafter OLC Syria Memo] (the Trump administration); OLC Libya Memo, *supra* note 100, at \*8–9 (the Obama administration); The President’s Constitutional Authority to Conduct Military Operations Against Terrorists and Nations Supporting Them, 25 Op. O.L.C. 188, 199–200 (2001) [hereinafter OLC 9/11 Memo] (the George W. Bush administration); Deployment of United States Armed Forces into Haiti, 18 Op. O.L.C. 173, 176 (1994) (the Clinton administration).

<sup>186</sup> See generally RICHARD F. GRIMMETT, CONG. RESEARCH SERV., R42699, THE WAR POWERS RESOLUTION: AFTER THIRTY-EIGHT YEARS 10–36 (2012) (surveying major cases chronologically).

<sup>187</sup> See *infra* Part III.A.

<sup>188</sup> See, e.g., *Koh’s Testimony on Libya*, *supra* note 105, at \*7 (arguing that U.S. participation in a NATO-led operation in Libya ‘does not constitute the kind of “hostilities envisioned by the War Powers Resolution’s 60-day automatic pullout provision.”’); Authorization for Continuing Hostilities in Kosovo, 24 Op. O.L.C. 327 (2000) (maintaining that notwithstanding the Resolution’s clear language, appropriations laws may constitute Congressional authorization for use of force). For an overview of the executive branch’s interpretation of the WPR, see generally Overview of the War Powers Resolution, 8 Op. O.L.C. 271 (1984).

stop a President's war making."<sup>189</sup> Courts also refused to consider challenges to the Gulf Wars in 1990 and 2003 under the ripeness doctrine, since litigation was initiated before Congress had an opportunity to speak on the matter.<sup>190</sup> Similarly, attempts to challenge the campaign against ISIL, the first Gulf War, and military aid to the Nicaraguan-Contras were barred on political question grounds. The courts found that Congress possesses "formidable weapons" and "ample powers" to check presidential abuses, whereas judges lack subject-matter expertise and institutional resources.<sup>191</sup>

The courts' approach in the War Powers Resolution cases can be explained in terms of Professor Alexander Bickel's "passive virtues" theory.<sup>192</sup> In brief, Bickel urged courts to use their power to avoid ruling on the merits in certain complex and politically-divisive issues, in order to preserve the judiciary's institutional power and protect the integrity of legal principles. The power "not to decide" is wielded by procedural tools such as standing and the political question doctrine that a Bickelian judge invokes in appropriate cases. The exercise of passive virtues is the outcome of a functionalist calculus in which the court concludes that the costs of deciding a case are likely to outweigh the benefits.

The problem is that this calculus is distorted as applied to the War Powers Resolution. A functionalist analysis calls for consideration of the implications of a ruling on the *function* the law in question serves. If absent judicial enforcement the law faces the risk of becoming a dead letter, then the functional argument for the exercise of the passive virtues is weakened dramatically. But this crucial factor did not receive any attention by the judges, as the opinions found that all conceivable plaintiffs lack standing and that challenges under the Resolution were inextricably political.<sup>193</sup> The opinions reflect an idealized image of a Congress unaffected by electorate and partisan biases and guided by principle, whereas the fact is that the Resolution's most constraining tool—the automatic sixty-day pullout provision—was designed precisely under the recognition that Congress would be unable to force limits on the President after troops had been deployed to the frontlines.<sup>194</sup>

<sup>189</sup> *Campbell v. Clinton*, 203 F.3d 19, 23 (D.C. Cir. 2000). For other WPR cases invoking standing, see, for example, *Smith v. Obama*, 217 F. Supp. 3d 283 (D.D.C. 2016), *vacated, appeal dismissed as moot sub nom.* *Smith v. Trump*, 731 Fed. App'x 8 (D.C. Cir. 2018) (per curiam); *Kucinich v. Obama*, 821 F. Supp. 2d 110 (D.D.C. 2011).

<sup>190</sup> See Bradley, *U.S. War Powers*, *supra* note 184, at \*7–8 (citing *Doe v. Bush*, 323 F.3d 133 (1st Cir. 2003); *Dellums v. Bush*, 752 F. Supp. 1141 (D.D.C. 1990)).

<sup>191</sup> See *Sanchez-Espinoza v. Reagan*, 770 F.2d at 210–11 (Ginsburg, J., concurring); *Ange v. Bush*, 752 F. Supp. 509, 514 (D.D.C. 1990); *Smith*, 217 F. Supp. at 301–04.

<sup>192</sup> See generally Alexander M. Bickel, *The Supreme Court, 1960 Term—Foreword: The Passive Virtues*, 75 HARV. L. REV. 40 (1961).

<sup>193</sup> It is worth noting that the effect of this robust use of the standing doctrine on foreign affairs disputes goes beyond the WPR context. See *Clapper*, 568 U.S. at 409 (noting that "we have often found a lack of standing in cases in which the Judiciary has been requested to review actions of the political branches in the fields of intelligence gathering and foreign affairs.").

<sup>194</sup> See, e.g., Ely, *supra* note 182, at 1380 ("[T]he War Powers Resolution is designed to force a decision regarding matters that Congress has in the past shown itself unwilling to face up to.").

Indeed, the historical practice suggests that Congress hardly ever asserts its power to limit the presidential use of force<sup>195</sup> and, when it does, its considerations are political.<sup>196</sup> The opinions also narrowly conceive the judicial role in the war powers area on comparative institutional competence grounds,<sup>197</sup> even though courts are best situated to resolve the persistent interpretive and constitutional uncertainties in the Resolution.

In sum, in this example also, the courts have relied on functionalism to find judicial oversight of an important area of foreign affairs law improper. As shown above, their functionalist analysis in reaching this conclusion has been flawed and incomplete, giving rise to the pathologies of totemic functionalism.

### III. Implications

This Part examines the implications of totemic functionalism. Section III.A considers its effect on the constitutional system of checks and balances. Section III.B focuses on the checks and balances within the executive branch. With respect to both, the analysis reveals that the way in which the courts consider and structure deference itself is important: while a restricted and principled use of the deference doctrine by courts can enhance non-judicial checks, the near-total judicial deference arising from totemic functionalism undermines them in a way that insulates the President from any sort of accountability.

#### A. *Judicial Deference and the Separation of Powers*

Judicial deference in the case studies presented in Part II was at least partly driven by a belief that the political process was a viable, more appropriate check on executive power.<sup>198</sup> If we think of checks and balances as public goods, the case studies invite us to view them as substitute goods: insofar as one check can function, there ought to be no social demand for the others. But this conception reflects an inaccurate characterization of the dynamics between the presidency and the institutions that are thought to check that office. In reality, neither Congress nor

<sup>195</sup> See, e.g., OLC Libya Memo, *supra* note 100, at \*7 (surveying multiple examples of “presidential uses of military force abroad in the absence of prior congressional approval.”).

<sup>196</sup> See *Jaber II*, 861 F.3d at 253 (Brown, J., concurring) (“Anyone who has watched the zeal with which politicians of one party go after the lawyers and advisors of the opposite party following a change of administration can understand why neither the military nor the intelligence agencies puts any trust in congressional oversight committees.”); see also TURNER, *supra* note 178; Bradley, *U.S. War Powers*, *supra* note 184, at \*7 (observing that in responding to unilateral presidential uses of force “Congress has been content to wait and see how a campaign unfolds without taking a vote on it, thereby avoiding accountability if the campaign does not turn out well.”).

<sup>197</sup> See, e.g., Campbell, 203 F.3d at 24–26 (Silberman, J., concurring) (arguing that the WPR’s “statutory threshold standard is not precise enough and too obviously calls for a political judgment to be one suitable for judicial determinations”); *Lowry v. Reagan*, 676 F. Supp. 333, 339 (D.D.C. 1987) (“[I]f the Court were to intervene in this political process, it would be acting ‘beyond the limits inherent in the [c]onstitutional scheme.’”).

<sup>198</sup> For examples, see *supra* notes 121–144 (targeted killing); notes 156–177 (*Bivens* litigation); notes 189–197 (WPR), and accompanying text.

other informal, extra-constitutional checks—the press, public opinion, or civil society organizations—are in a position independently to significantly challenge presidential assertions of power in the foreign affairs area. In this domain, checks and balances are better viewed as complementary goods: they should be used together in order to be valuable. **When courts withdraw entirely from playing a role in foreign affairs, they do not validate the outcome of a healthy political process—they instead perpetuate presidential unilateralism and undermine the separation of powers.**<sup>199</sup> In this area, judicial oversight has a significant role in stimulating and facilitating the other checks, and how judges respond to deference claims bears dramatically on their capacity to fulfill this role.

To illustrate this point, let us revisit the targeting example. Consider how Congress and other checks have performed in the face of judicial abstention.

*Congress.* — During the 17-year war on terror, Congress has proven unable and unwilling to effectively regulate the President’s claimed authority to employ targeted killing. Over a decade, and across three administrations, counterterrorism targeting was expanded to include new territories, new armed groups, and new methods (e.g., signature strikes) with Congress either acquiescing or implicitly endorsing every legal position advanced by the President.<sup>200</sup> Even in situations where a majority in Congress seemed unsatisfied with the President’s broad reading of the existing legal regime, no proposal to update the Authorizations on Military Force (AUMFs) garnered enough support to pass new, sustaining legislation.<sup>201</sup> In

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<sup>199</sup> See, e.g., David J. Barron & Martin S. Lederman, *The Commander in Chief at the Lowest Ebb—Framing the Problem, Doctrine, and Original Understanding*, 121 HARV. L. REV. 689, 723–24 (2008) (“One need only consider the cases that could arise in the contemporary setting to see that leaving the question of the President’s constitutional authority to defy a statutory restriction on his war powers to the give-and-take of the political branches would be quite radical in its implications . . . . [T]he insistence that allocation of war powers should be ‘left to politics’ would hardly be a neutral solution to the problem: it would inevitably tilt the constitutional structure decidedly in favor of executive supremacy.”).

<sup>200</sup> For example, the National Defense Authorization Act of 2012 affirmed that the President’s original mandate under the AUMF included the authority to detain individuals who were part of or substantially supported “associated forces” of Al-Qaeda or Taliban. Though the provision does not apply directly to targeting, both Obama and Trump have uninhibitedly authorized the use of force against associated forces under the same rationale. National Defense Authorization Act for Fiscal Year 2012, Pub. L. No. 112-81, § 1021, 125 Stat. 1298, 1562 (2011).

<sup>201</sup> Overall, Congress considered numerous proposals to update the AUMFs or limit the use of force in other arenas but was unable to pass new legislation. See, e.g., H.R.J. Res. 125, 113th Cong. (2014); S.J. Res. 44, 113th Cong. (2014); S.J. Res. 26, 114th Cong. (2015); S. Amdt., 871-1003, 115th Cong. (2017); Preventing Preemptive War in North Korea Act of 2017, S. Res. 2047, 115th Cong. (2017). While some of the proposals sought to reauthorize the status quo or even broaden the President’s mandate, there now appears to be bipartisan support for a more restrictive legal regime that would limit the military scope of counterterrorism campaigns and require ongoing Congressional oversight. See *Authorizing the Use of Military Force: Hearing on S.J. Res. 59 Before the S. Comm. on Foreign Relations*, 115th Cong. (2018). The fate of that proposal is currently unclear, as it competes with proposals endorsed by other Members and would likely not survive a Presidential veto. See *The Authorizations for the Use of Military Force: Administration Perspective: Hearing Before the S. Comm. on Foreign Relations*, 115th Cong. (2017) (statement of James Mattis,

any case, it would be a mistake to assume that new legislation will necessarily constrain the President. The proliferation of statutes creates opportunities for a vigilant President and his legal team to accumulate more powers.<sup>202</sup> In authorizing force against the Islamic State (ISIS), for example, the Obama and Trump administrations argued that Congressional appropriations and the Iraq AUMF ratified the President's authority.<sup>203</sup>

In addition, attempts to increase routine monitoring by Congressional committees were also ineffective. In 2013, the House and Senate Judiciary committees held hearings on the use of drones for targeted killing,<sup>204</sup> and the press reported that "once a month, a group of staff members from the House and Senate intelligence committees drives across the Potomac River to CIA headquarters in Virginia, assembles in a secure room and begins the grim task of watching videos of the latest drone strikes in Pakistan and Yemen."<sup>205</sup> One of the stated goals for this unusual practice was for Congress to work with the intelligence agencies and the Department of Justice to "understand the legal basis supporting targeted killing."<sup>206</sup> But, much like legislative initiatives, these goals never came to fruition and the close monitoring ultimately waned without having had any apparent impact on the legal architecture regulating targeted killings. In a number of instances, the administration blocked oversight by refusing to allow officials to testify or to submit information to the relevant bodies.<sup>207</sup>

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Secretary of Defense) ("[A] new [AUMF] is not legally required to address the continuing threat posed by Al Qaeda, the Taliban and ISIS.").

<sup>202</sup> Moe & Howell, *supra* note 13, at 143; see also Curtis A. Bradley & Trevor W. Morrison, *Historical Gloss and the Separation of Powers*, 126 HARV. L. REV. 411, 444 (2012) ("The power of the modern presidency has been enhanced by the gradual accumulation over time of an extensive array of legislative delegations of power.").

<sup>203</sup> See Defendant's Memorandum of Law in Support of Motion to Dismiss at 2, *Smith v. Obama*, 217 F. Supp. 3d 283 (D.D.C. 2016) (No. 16-843), 2016 WL 7785731 (arguing that Congress ratified President Obama's determination that the use of force against ISIL is lawful "by appropriating billions of dollars in support of the military operation."); WHITE HOUSE, REPORT ON THE LEGAL AND POLICY FRAMEWORKS GUIDING THE UNITED STATES' USE OF MILITARY FORCE AND RELATED NATIONAL SECURITY OPERATIONS 3 (Mar. 13, 2018) [hereinafter 2018 PRESIDENTIAL REPORT ON NATIONAL SECURITY], <https://www.justsecurity.org/wp-content/uploads/2018/03/Legal-and-Policy-Frameworks-on-US-Use-of-Force.pdf> [<https://perma.cc/Q54M-UJPL>] (arguing that the Iraq AUMF authorizes force against ISIS in Iraq and elsewhere).

<sup>204</sup> See *Drone Wars: The Constitutional and Counterterrorism Implications of Targeted Killing: Hearing before the Subcomm. on the Const., Civ. Rts. and Hum. Rts. of the S. Comm. on the Judiciary*, 113th Cong. (2013); *Drones and the War on Terror: When Can the U.S. Target Alleged American Terrorists Overseas: Hearing before the H. Comm. on the Judiciary*, 113th Cong. (2013).

<sup>205</sup> Ken Dilanian, *Congress Zooms in on Drone Killings*, L.A. TIMES (June 25, 2012), <http://articles.latimes.com/2012/jun/25/nation/la-na-drone-oversight-20120625> [<https://perma.cc/55ZG-U8AP>].

<sup>206</sup> S. REP. NO. 113-7, at 11 (2013).

<sup>207</sup> In 2013, the Senate Subcommittee on the Constitution held a hearing on the targeted killings program. Despite the Committee's request, the administration refused to allow testimony by executive-branch personnel. See Senate Judiciary Comm. Drone Hearing, *supra* note 204, at 2 (opening statement of Senator Richard J. Durbin, Chairman)

This account is consistent with scholarship in political science on the relationship between the modern presidency and Congress. In short, the President, as the head of the executive branch, has a number of structural advantages that enable him to capitalize on constitutional ambiguities and to shift the balance of power in his favor. Presidents are “seekers of power”—their desire to shape their legacies and enhance their record of achievements motivates their pursuit of broad powers.<sup>208</sup> The unitary nature of the executive branch, the fact that “virtually all authoritative governmental decisions are made within the executive,” and the expertise and resources available to presidents put them in a position “to shift the status quo by taking unilateral action on their own authority, whether or not that authority is clearly established in law.”<sup>209</sup> Congress, in contrast, faces structural and collective action problems in resisting presidential power.<sup>210</sup> Legislation is a costly and difficult process that must navigate countless roadblocks before, during, and even after enactment (consider the President’s veto power and the practice of issuing signing statements).<sup>211</sup> Because individual legislators are largely motivated by reelection, they frequently respond to partisan, personal, local, and group interests—none of which are sufficient incentives to check presidential powers in foreign affairs.<sup>212</sup> Moreover, scholars have shown that foreign policy issues give rise to conditions that encourage legislative inaction or broad delegations of

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<https://www.judiciary.senate.gov/imo/media/doc/04-23-13DurbinStatement.pdf> [<https://perma.cc/73V3-TETV>]. In another example, Senator Dianne Feinstein, then Chairman of the Senate Select Committee on Intelligence, issued a statement in which she noted that “the committee had been provided access to only two of the nine OLC opinions that we believe to exist on targeted killings.” Dianne Feinstein, *Feinstein Statement on Intelligence Committee Oversight of Targeted Killings* (Feb. 13, 2013), <https://www.feinstein.senate.gov/public/index.cfm/press-releases?ID=5b8dbe0c-07b6-4714-b663-b01c7c9b99b8> [<https://perma.cc/X7TJ-9SNX>]. In 2014, the Senate Armed Services Committee sought to convene a joint classified hearing with the Senate IC to assess operations involving both CIA and the Joint Special Operations Command (JSOC). Again, the White House barred effective review by refusing to grant security clearances to members of the Armed Services Committee necessary for briefings on covert CIA operations. See THE STIMSON CENTER, RECOMMENDATIONS AND REPORT THE TASK FORCE ON US DRONE POLICY 38–39 (2014).

<sup>208</sup> Moe & Howell, *supra* note 13, at 136.

<sup>209</sup> *Id.* at 138.

<sup>210</sup> See Bradley & Morrison, *supra* note 202, at 439–47 (surveying structural impediments of Congressional checking power); Moe & Howell, *supra* note 13, at 144–46 (describing a “fundamental imbalance” between the capacity of the President and Congress to promote their institutional power); Posner & Vermeule, *supra* note 5, at 25–29 (describing factors that hamper legislative oversight of executive action).

<sup>211</sup> Moe & Howell, *supra* note 13, at 145–46.

<sup>212</sup> Note that even though partisanship may motivate Congress to check presidential power (particularly in times of party-divided government), the literature shows that such motivation is weaker in the foreign affairs area. See AMY ZEGART, EYES ON SPIES: CONGRESS AND THE UNITED STATES INTELLIGENCE COMMUNITY 65–84 (2011) (noting that American voters typically do not rank foreign policy high on their list of issues; explaining that by virtue of a lack of direct and noticeable impact on constituents, as well as its secret nature, intelligence oversight appeals to a few, weak interest groups).

authority to the President.<sup>213</sup> Overall, the literature on modern presidential-Congressional relations shows that Congress's inability to check the President in foreign affairs is the result of long-lasting, structural problems, which the distinctive nature of the war on terror further cement. Absent dramatic change, future attempts to resist unilateral executive action are likely to be futile as well.

*Informal Checks.* — In recent years, scholars have argued that even if Congress and the judiciary cannot constrain the President by themselves, an alternative system of extra-constitutional checks and balances has been developed over the years, helping to hold the President accountable. In *Power and Constraint*, Professor Jack Goldsmith describes how an array of forces—traditional press, bloggers, internet reporters, civil society organizations, human rights activists, and others—mobilized public opinion and the institutions of government to check the President's war powers during the war on terror.<sup>214</sup> In another influential account, Professors Eric Posner and Adrian Vermeule assert that while the Madisonian model of mutual checks between the branches of government has failed, executive power is constrained by the fact that presidents need to maintain popularity and credibility.<sup>215</sup> As the Office has grown and accumulated more powers, Posner and Vermeule argue, so has the public focus on presidents, making it more essential for them to be politically responsive.<sup>216</sup>

The key weakness of these informal checking mechanisms, however, is that they operate interdependently with, and through, the traditional constitutional checks. When the latter are dysfunctional, the former can only get so far. Targeting is illustrative. In Goldsmith's thesis, the nongovernmental forces play a supportive role in checking the President: they report, uncover stories, leak secret legal opinions, file Freedom of Information Act (FOIA) requests and suits, and provide legal assistance to alleged victims of unlawful executive action. Ultimately, however, they can have an impact only if they either enlist the courts, mobilize Congress, or persuade enough voters that something is wrong, rendering the policy too politically costly for the President. These forces have operated extensively in the targeting context, especially after it became public that the government was targeting American citizens. But the fact is that informal checks elicited only

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<sup>213</sup> Moe & Howell, *supra* note 13, at 141. For particular illustrations, see, for example, JOHN H. ELY, *WAR AND RESPONSIBILITY* ix, 47–52 (1993) (analyzing Congressional oversight of war powers during the Vietnam War); Huq, *supra* note 44, at 918–43 (demonstrating why meaningful congressional participation in post-9/11 counterterrorism oversight is unlikely); ZEGART, *supra* note 212 (using public choice analysis to explain why intelligence oversight fails); LINDA L FOWLER, *WATCHDOGS ON THE HILL: THE DECLINE OF CONGRESSIONAL OVERSIGHT OF U.S. FOREIGN RELATIONS* (2015) (documenting a steady decline in national security oversight since the 1990s; concluding that oversight failures “likely were commonplace rather than exceptional.”).

<sup>214</sup> See generally GOLDSMITH, *POWER AND CONSTRAINT*, *supra* note 134.

<sup>215</sup> See POSNER & VERMEULE, *supra* note 5, at 12–14 (summarizing their thesis).

<sup>216</sup> *Id.* at 13.

intermittent Congressional and judicial action.<sup>217</sup> Similarly, Posner and Vermeule's claim that public opinion and politics properly incentivize the President to be transparent and self-impose constraints on his powers has proven problematic. First, the evidence is inconclusive. While President Obama put in place an elaborate set of policy restrictions on the use of lethal force in counterterrorism operations and published data on the law and facts of the targeting policy, most of the steps were taken near the end of his second term in office, perhaps in an attempt to constrain his successor.<sup>218</sup> President Trump is less forthcoming about his legal and policy choices—the administration replaced Obama's targeting playbook, known as the Presidential Policy Guidance (PPG),<sup>219</sup> with a new set of rules, known as the Principles, Standards, and Procedures (PSP),<sup>220</sup> but did not disclose its content. Second, even if public opinion did affect presidential behavior, it is not clear whether it produced the optimal incentives: the targeting policy has no direct effect on most Americans—it largely impacts the rights of foreigners. And the fact that the administration currently targets people worldwide, while causing an unknown number of casualties and operating under classified targeting standards, hardly suggests that the President is being held accountable.

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The foregoing discussion leads to the conclusion that when courts stay out of foreign affairs, they do not just foreclose judicial review as one channel of accountability. A realistic consequence of total deference is stagnation throughout the system of checks and balances. In contrast, when courts do weigh in and properly choose when and how much to defer, they can stimulate public debate by Congress and other informal institutions, and help creating a stronger accountability regime.

Consider Congress first. As noted, Congress is poorly equipped and motivated to challenge presidential assertion of foreign affairs powers. It tends to

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<sup>217</sup> See *N.Y. Times Co. v. U.S. Dep't of Justice*, 756 F.3d 100 (2d Cir. 2014) (ordering the release of an OLC opinion on the legality of targeting Al-Aulaqi). For congressional action in the targeting context, see *supra* notes 178–197 and accompanying text.

<sup>218</sup> DIR. OF NAT'L INTELLIGENCE, SUMMARY OF INFORMATION REGARDING U.S. COUNTERTERRORISM STRIKES OUTSIDE AREAS OF ACTIVE HOSTILITIES (July 1, 2016) (releasing information on casualties from U.S. counterterrorism strikes); WHITE HOUSE, REPORT ON THE LEGAL AND POLICY FRAMEWORKS GUIDING THE UNITED STATES' USE OF MILITARY FORCE AND RELATED NATIONAL SECURITY OPERATIONS, at 15–18 (2016) [hereinafter 2016 PRESIDENTIAL REPORT ON NATIONAL SECURITY] (laying out the legal and policy positions of the Obama administration in the war on terror).

<sup>219</sup> See PPG, *supra* note 130.

<sup>220</sup> See Complaint for Injunctive Relief at \*4, *Am. Civil Liberties Union v. Dep't of Def.*, No. 1:17-CV-09972 (S.D.N.Y. Dec. 17, 2017) (Freedom of Information Act suit seeking to advertise Trump administration's rules governing the use of lethal force abroad); see also Adriana E. Jones, *Implications of Trump's New Drone Policy for Countries Assisting the U.S.*, JUST SECURITY (Nov. 13, 2017), <https://www.justsecurity.org/47011/implications-trumps-drone-policy-countries-assisting-u-s/> [<https://perma.cc/DG9T-UZLH>].

delegate power much more frequently than to actually regulate executive action. In the years that followed the terrorist attacks of 9/11, Congress, nonetheless, passed two major pieces of legislation that regulated presidential power—the Detainee Treatment Act (DTA) and the Military Commissions Act (MCA).<sup>221</sup> The DTA came on the heels of the Supreme Court’s decision in *Rasul v. Bush*,<sup>222</sup> in which the Court held that the federal habeas statute applies to detainees held at Guantanamo Bay, and of FOIA cases, which order disclosure of materials that raised public awareness of aggressive interrogation practices by the CIA.<sup>223</sup> The MCA was enacted in similar fashion after *Hamdan v. Rumsfeld* invalidated President Bush’s military commissions program.<sup>224</sup> Both statutes partly validated and partly rejected legal positions previously held by the President.<sup>225</sup> The important point for present purposes is that, in both instances, less deferential judicial decisions roused the legislature to action and compelled the President to work on the substantive issues in a dialogue with Congress. This is a desired outcome, in the sense that it serves the separation of powers and enhances political and legal accountability. What policy Congress ultimately adopts or whether it is satisfied with the judicial outcome matters less than the fact that it does not recede into the background of foreign policy making.

The same goes for the effective operation of the informal checks. Civil society organizations, activist lawyers, and private parties who seek redress for injuries caused by unlawful government action use the courts as a vehicle for holding the President to account. When courts avoid deciding cases implicating foreign affairs matters, these actors have fewer tools to challenge the government, and it is likely that their activity will be decreased. Moreover, valuable information which these actors may possess and which the government, for various reasons, has no access to, will be excluded.<sup>226</sup> The significance of additional information brought by non-governmental litigants in the national security context varies from case to case. However, in the long run, one of the costs of a sweeping deference doctrine is to foreclose this information channel. The result, once again, is a less accountable President.

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<sup>221</sup> Detainee Treatment Act of 2005, Pub. L. No. 109-148, 119 Stat. 2739 (codified at 42 U.S.C. §§ 2000dd to 2000dd-1 (2006)); Military Commissions Act of 2006, Pub. L. No. 109-366, 120 Stat. 2600 (codified as amended at 10, 18, 28 and 42 U.S.C.).

<sup>222</sup> 542 U.S. 466, 468 (2004).

<sup>223</sup> GOLDSMITH, POWER AND CONSTRAINT, *supra* note 134, at 118–19.

<sup>224</sup> 548 U.S. 557 (2006).

<sup>225</sup> For example, the DTA prohibited “cruel, inhuman, or degrading treatment or punishment” of detainees and compelled the CIA to modify its interrogation methods. *See* Detainee Treatment Act of 2005 §1003(a) (codified at 42 U.S.C. §§ 2000dd(a)). On the other hand, in both statutes Congress heeded the President’s request to restrict jurisdiction of federal courts over alien detainees. *See* Detainee Treatment Act of 2005 §1005(e) (codified at 28 U.S.C. § 2241); Military Commissions Act of 2006 § 7(a) (codified at 28 U.S.C. § 2241), *abrogated by* *Boumediene v. Bush*, 553 U.S. 723 (2008).

<sup>226</sup> Chesney, *supra* note 72, at 1405–08 (discussing the information gathering advantages of the adversarial process in national security litigation).

*B. Judicial Deference and Self-Policing*

Even if totemic functionalism undermines the constitutional system of checks and balances as I suggest, the costs may still be tolerable so long as the checks and balances within the executive branch provide a plausible alternative. But here too, total deference will prove destructive: legal gatekeepers inside the executive branch rely on some degree of judicial involvement in order to be effective. Otherwise, they have little material to work with in urging legal caution on policymakers.

Internal legal review mechanisms are first and foremost part of the administration, and as such, geared towards achieving presidential goals.<sup>227</sup> It does not mean that executive lawyers cannot stop the presidency from exceeding its legal authority, but their capacity for doing so is limited. First, as a formal matter, the President does not have to follow their advice.<sup>228</sup> It is, literally, just that—“advice,” and while bluntly ignoring it might be politically costly (if the public is aware of the advice, which is frequently uncertain in the context of security and foreign policy), sometimes the President can cherry-pick the advice most favorable to his desired outcome from the views of different legal advisers.<sup>229</sup> Second, as an empirical matter, executive lawyers have, for the most part, adopted a broad view of presidential powers in foreign policy and war powers, sometimes while ignoring clear constitutional and statutory stop signs.<sup>230</sup> Since internal interpretations of constitutional and legal authorities tend to dovetail with the President’s agenda more than those of an independent interpreter, there will probably be fewer “no’s”

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<sup>227</sup> See Memorandum from David J. Barron, Acting Assistant Att’y Gen., Office of Legal Counsel, to Att’ys of the Office, Re: Best Practices for OLC Legal Advice and Written Opinions, at 1 (July 16, 2010) [hereinafter OLC Best Practices Memo] (arguing that “OLC must provide advice based on its best understanding of what the law requires” while “facilitating the work of the Executive Branch and the objectives of the President”); see also Renan, *supra* note 96, at 812 (“[E]xecutive branch legalism has never been an external, or exogenous, constraint on presidential power. It has always been a tool of presidential administration itself.”).

<sup>228</sup> The Constitution vests the president with the responsibility to “take Care that the Laws be faithfully executed.” U.S. CONST. art. II, § 3; see also OLC Best Practices Memo, *supra* note 227, at 1 (noting that legal opinions of the Attorney General and the OLC are treated as binding within the executive branch, subject to the ultimate authority of the President).

<sup>229</sup> See *supra* notes 96–105 and accompanying text.

<sup>230</sup> See, e.g., OLC Syria Memo, *supra* note 185 (endorsing a broad view of the President’s independent constitutional authority to initiate military force abroad); Memorandum from Jay S. Bybee, Assistant Att’y Gen., Office of Legal Counsel to Alberto Gonzales, Counsel to the President, U.S. Dep’t of Justice, Re: Standards of Conduct for Interrogation Under 18 U.S.C. §§ 2340–2340A, at \*2 (Aug. 1, 2002), <https://www.justice.gov/olc/file/886061/download> [<https://perma.cc/2H6Y-DNT4>] (asserting that a Federal statute prohibiting torture may “represent an unconstitutional infringement of the President’s authority to conduct war”); OLC 9/11 Memo, *supra* note 185, at \*1 (arguing that the President “may deploy military force preemptively against terrorist organizations or the states that harbor or support them, whether or not they can be linked to the specific terrorist incidents of September 11”); Memorandum from Randolph D. Moss, Assistant Att’y Gen., Office of Legal Counsel to the Att’y Gen., Re: Authorization for Continuing Hostilities in Kosovo (Dec. 19, 2000) (concluding that Congress had implicitly authorized military action in Serbia by appropriating funds, even though a bill authorizing the action failed in Congress).

to the President in areas where external oversight is limited or entirely foreclosed.<sup>231</sup> And third, as a practical matter, while legally dubious policies might meet resistance inside the executive when the President tries to go too far, there will be an effort to avoid firm documented legal redlines.<sup>232</sup> One way is by casting limiting principles as policy choices rather than legal constraints—the President agrees to impose limits on agency discretion but in order to retain the legal authority for future instances, characterizes his decision as a policy choice. The President’s own discretion, however, is not limited by those policies since their applicability and meaning are subject to his final authority.<sup>233</sup> None of these points poses a problem on its own and even serves important values in the conduct of foreign affairs like flexibility and efficiency. But in the aggregate, they create a fragile and weak accountability regime.

The war powers and targeting examples are illustrative. Under the auspices of judicial abstention and Congressional silence, the last three administrations engineered a targeting regime that appears to be highly regulated but, at the same time, retains unfettered presidential discretion. As a matter of law, the President claims expansive constitutional, statutory, and international law powers to use force abroad for counterterrorism. The U.S. continues to rely on the right of self-defense arising out of the 9/11 attacks in multiple arenas and invokes international humanitarian law as the only applicable international legal regime for its worldwide targeting operations.<sup>234</sup> The administration construes the AUMF to permit targeting a broad range of entities and individuals, and when new threats emerge, there are broad criteria for including them in existing war authorizations.<sup>235</sup> In addition, the

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<sup>231</sup> Morrison, *supra* note 89, at 1716–17.

<sup>232</sup> Rebecca Ingber, *The Obama War Powers Legacy and the Internal Forces That Entrench Executive Power*, 110 AM. J. INT’L L. 680, 689–92 (2016) (contending that executive branch legalism features a “tacit soft norm against written redlines”).

<sup>233</sup> For an example on the authority of the President to deviate from the targeting policy framework, see Brian Egan, Legal Adviser, U.S. Dep’t of State, International Law, Legal Diplomacy, and the Counter-ISIL Campaign: Some Observations, Address to the Annual Meeting of the American Society of International Law (Apr. 1, 2016), in 92 INT’L L. STUD. 235, 246 (2016) (“[T]he President always retains authority to take legal action consistent with the law of armed conflict, even if the PPG’s heightened policy standards may not be met.”).

<sup>234</sup> Under international law, the U.S. considers itself involved in a non-international armed conflict (NIAC) with Al-Qaeda and associated forces. Actions taking place away from areas of active hostilities are considered part of this NIAC as long as they target members of the organizations or individuals covered by the AUMF. The significance of this is that for most targeted strikes carried out in Pakistan, Somalia, Yemen, and Libya, the U.S. relies on its right of self-defense, which originated in the war against Al-Qaeda, and/or the consent of the territorial state. If the host state has not permitted the use of force in its territory, the U.S. considers operations lawful if the state is deemed unable or unwilling to address the threat effectively. The U.S. maintains that targeting practices both inside and outside areas of active hostilities conform to applicable IHL rules, particularly the rules of distinction, military necessity, precautions in attack and proportionality. *See generally* 2018 PRESIDENTIAL REPORT ON NATIONAL SECURITY, *supra* note 203; 2016 PRESIDENTIAL REPORT ON NATIONAL SECURITY, *supra* note 218.

<sup>235</sup> *See* Authorization for Use of Military Force, Pub. L. No. 107-40, 115 Stat. 224 (2001). The two principal statutory limitations on the use of force are that (1) force may be directed only against

constitutional framework adopted by the executive enables the President “to direct U.S. military forces in engagements necessary to advance American national interests abroad” without requesting Congressional authorization.<sup>236</sup> Scholars have noted that the “national interest” test used in this framework “provides no meaningful constraint on presidential power.”<sup>237</sup> Meaningful constraints on the conduct of counterterrorism targeting under the current regime are located primarily in policy directives such as the PPG and, apparently, the PSP. For example, the PPG allowed the use of force only against individuals that were deemed to constitute a continuing and imminent threat to U.S. persons, when capture was not feasible, and when the risk to civilians was minimal.<sup>238</sup>

The introduction of restrictive policy directives obscures the controversial legal positions underlying the policy at the level of both domestic and international law, but what often goes unnoticed is that those policy frameworks lack the constraining force of law.<sup>239</sup> The adoption of the PPG did not entail any constraint on presidential discretion just as the shift to Trump’s PSP did not entail a claim of new powers. Policy frameworks such as the PPG and PSP are subject to the ultimate authority of the president and, by delegation, of his staff. As scholars have shown,

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entities or persons covered by the AUMFs; and (2) individuals targeted for their association with covered entities must be sufficiently identified as members of that entity. In reality, however, the executive branch has interpreted these limitations loosely. The Bush administration claimed, and subsequent administrations have agreed, that the AUMF authorizes force against “associated forces;” namely, militant groups that have aligned with al Qaeda and entered the fight against the U.S, irrespective of any geographical limitations or actual operational ties to Al-Qaeda. *See* 2016 PRESIDENTIAL REPORT ON NATIONAL SECURITY, *supra* note 218, at 4. In regards to membership, individuals are deemed targetable if they are found to have functional ties to covered armed groups, which are analogous to those of members of national armies. *See* Egan, *supra* note 233, at 243.

<sup>236</sup> OLC Syria Memo, *supra* note 185, at \*5.

<sup>237</sup> Curtis Bradley & Jack Goldsmith, *OLC’s Meaningless ‘National Interests’ Test for the Legality of Presidential Uses of Force*, *LAWFARE* (June 5, 2018), <https://www.lawfareblog.com/olcs-meaningless-national-interests-test-legality-presidential-uses-force> [<https://perma.cc/C62S-XTJL>].

<sup>238</sup> PPG, *supra* note 130, ¶ 1–3; 2016 PRESIDENTIAL REPORT ON NATIONAL SECURITY, *supra* note 218, at 24–26.

<sup>239</sup> Notably, the question of whether the limiting principles set by the PPG and the PSP are merely policy guidelines is controversial. International actors and many commentators argue that at least some of these limiting principles should be understood as binding rules of law. *See, e.g.*, Ben Emmerson (Special Rapporteur), *Report of the Special Rapporteur on the Promotion and Protection of Human Rights and Fundamental Freedoms While Countering Terrorism*, ¶ 57–58, U.N. Doc. A/68/389 (Sept. 18, 2013) (discussing the meaning of imminence as a legal constraint); COMM. ON LEGAL AFFAIRS AND HUMAN RIGHTS, PARLIAMENTARY ASSEMBLY OF THE COUNCIL OF EUROPE, DRONES AND TARGETED KILLINGS: THE NEED TO UPHOLD HUMAN RIGHTS AND INTERNATIONAL LAW ¶ 48 (Mar. 16, 2015), <http://semanticpace.net/tools/pdf.aspx?doc=aHR0cDovL2Fzc2VtYmx5LmNvZS5pbmQvbncveG1sL1hSZWYvWDJlURXLWV4dHIuYXNwP2ZpbGVpZD0yMTU4MCZsYW5nPUVO&xsl=aHR0cDovL3NiZWVudGljcGFjZS5uZXQvWHNsdC9QZGYvWFJlZi1XRC1BVC1YTUwyUERGLnhzbA==&xsltparams=ZmlsZWlkPTIxNTgw> [<https://perma.cc/2LN3-TCUB>] (calling for “strict adherence to well-established interpretations of international human rights law”).

officials have interpreted the rules set by those frameworks rather loosely;<sup>240</sup> they suspended and re-imposed them in certain arenas to serve immediate needs;<sup>241</sup> and each administration has treated its policy framework differently in terms of transparency (at the time of writing, President Trump had not made the PSP public). Moreover, policy directives do not confer actionable rights. The PPG, for example, “is not intended to, and does not, create any right or benefit, substantive or procedural, enforceable at law or in equity by any party against the United States, its departments, agencies, or entities, its officers, employees, or agents, or any other person.”<sup>242</sup> With so much room to maneuver and deviate from any limits anticipated by policy directives, it can hardly be said that the President is constrained by them.

None of this is illegitimate. But insofar as rules and procedures are meant to regulate behavior and constrain discretion of policymakers—including the chief executive—those instruments create a weak accountability regime. This regime is enabled by the total deference the courts gave the presidents in the targeting cases. Executive lawyers are part of a presidential administration that strives to maximize its power and flexibility. It is impractical to expect that they will be able to meaningfully constrain the President when other institutions allow him to act freely.

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This is where the question of how the deference doctrine is structured and applied becomes important. In every area in which it operates, totemic functionalism enables a deference regime that gives the President carte blanche to shape the legal framework designed to regulate his action—think of targeting, war powers, and every national security action that might involve constitutional torts but is exempted from *Bivens* (e.g., interrogations of suspected terrorists). This is not a functionally desired outcome because accountable executives are better incentivized and more capable of making professional judgments within their legal authority than executives acting freely. Indeed, many foreign affairs areas genuinely feature legal ambiguities that executives acting alone have no incentive

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<sup>240</sup> See Shirin Sinnar, *Rule of law Tropes in National Security*, 129 HARV. L. REV. 1566, 1570, 1600–04 (2016) (arguing that policy rules often include legal terms of art, but allow meanings that “deviate, at least partly in secret, from prevalent understandings of those terms.”). One example used by Professor Sinnar is the imminence-of-the-threat requirement in the PPG. She notes that the administration “left aside traditional understandings of imminence” for a permissive definition that is not grounded in any known legal source.” *Id.* at 1602.

<sup>241</sup> For example, President Obama temporarily designated Libya an area of active hostilities when U.S. forces aided the fighting against ISIL. See Charlie Savage, *U.S. Removes Libya From List of Zones with Looser Rules for Drone Strikes*, N.Y. TIMES (Jan. 20, 2017), <https://www.nytimes.com/2017/01/20/us/politics/libya-drone-airstrikes-rules-civilian-casualties.html> [<https://perma.cc/GTY8-S37X>]. Similarly, President Trump recently designated Yemen an area of active hostilities. See Charlie Savage & Eric Schmitt, *Trump Eases Combat Rules in Somalia Intended to Protect Civilians*, N.Y. TIMES (Mar. 30, 2017), <https://www.nytimes.com/2017/03/30/world/africa/trump-is-said-to-ease-combat-rules-in-somalia-designed-to-protect-civilians.html> [<https://perma.cc/ANE5-GKVN>].

<sup>242</sup> PPG, *supra* note 130, § 8.

to clarify. But “it is essential that there be definite limits to [the government’s] discretion.”<sup>243</sup>

One way to fix, or at least to mitigate this problem is to avoid the practices that give rise to totemic functionalism. First, if courts will avoid “reflexive deference,” they will signal to the President that he has to earn the privilege of judicial deference. He will then be incentivized to avoid decisions based on unsubstantiated convictions and prejudice, seek the advice of experts, engage in inter-agency processes, gather all credible evidence, and articulate clearly stated and defensible legal positions. It is more likely that good and lawful policies will result from those processes. Second, by avoiding “blanket deference,” courts will ensure that the scope of judicial deference will be tailored to the question at issue. It is plausible to assume that executives will continue to receive deference with respect to policy choices and assessments of foreign affairs facts (pending evidence that they have used their expertise and epistemic advantages), but there will be less deference in the legal domain simply because there are rarely functional justifications for such deference. In most cases, executives do not have special expertise that judges lack in the craft of legal interpretation, and judges have the benefit of insulation from the political process that renders them more reliable interpreters. The prospect of more intrusive judicial review will have a positive effect on the checks and balances inside the executive branch. Once judges begin to grapple with the substantive legal questions and clarify interpretive ambiguities (by, for example, articulating legal standards for national security activities and clarifying the constitutional controversies concerning the War Powers Resolution), they will provide executive lawyers more materials to work with in urging caution among policymakers, and will motivate the President to seek the most capable legal advice instead of the most comfortable. At the same time, the shadow of the courts will constrain the lawyers, reducing the risk that they will endorse indefensible legal positions.

### Conclusion

Some measure of deference is vital to reducing the costs of judicial errors in the complicated and highly-consequential spheres of foreign policy and national security. But insofar as foreign affairs deference is justified for that function—reducing the risks of errors and ensuring optimal decisional processes—courts must reject the practice of totemic functionalism. The fact that executives have unique expertise and other institutional advantages in foreign affairs cannot undo the effects and problems associated with an unaccountable presidency: self-serving legal preferences, self-aggrandizement of the Office, political influence on professional judgments, influence of powerful interest groups, and other kinds of biases. The basic point of this Article has been that a proper functional analysis cannot begin and end with reciting the executive’s special competence in foreign affairs. Instead, judges should be very prudent with deference and consider the

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<sup>243</sup> *Trump v. Hawaii*, 138 S. Ct. at 2448 (Sotomayor, J., dissenting) (quoting *Korematsu v. United States*, 323 U.S. 214, 234 (1944) (Murphy, J., dissenting)) (alteration in original).

effect of the scope and degree of deference claimed by the government on the topic at issue. When the result of deference is exempting the President from any scrutiny or constraint, it should be limited and sometimes rejected. Such an approach can better balance foreign policy interests with the need to draw legal limits and hold the President to account.