The President’s Authority over Foreign Affairs: An Executive Branch Perspective

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Introduction

The United States government has enormous power to affect the lives of people all over the globe; the decisions it makes in the name of American foreign policy and national security are of great human importance. How those decisions are actually made is therefore of great importance as well. Among the major factors shaping the process by which the United States determines policy and takes actions, one is directly a product of the United States Constitution: even when one political party is dominant, American foreign and security policies are the product of two quite distinct and often antagonistic institutions—the legislative and executive branches of the federal government.1 Even if one is skeptical about the influence that constitutional law has or ought to have in these matters, the political potency, real and potential, of Congress and the President makes the constitutional law officially governing their relationship of more than academic concern.

The relevance of constitutional law to the distribution of power over foreign affairs and national security is, unfortunately, clearer than is its content. Many scholars working in the field think that the Constitution, properly interpreted, gives Congress the “preeminent role . . . in the formulation of foreign policy,”2 as well as “authority not simply to declare war but to decide on lesser acts of military hostility.”3 Proponents of this “congressional primacy” interpretation of the Constitution often assume that it is self-evidently correct,4 and although they differ over the precise implications of the congressional primacy view, they agree that whatever the President’s proper role is in the execution of foreign policy, the Constitution does not give the executive primary responsibility for the formulation of foreign policy. From this

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* Professor, Duke Law School. I greatly appreciate the comments of Neil Kinkopf and David Lange.

1 To be completely accurate, indeed, one must complicate the picture even more. On the formal or legal level, the House of Representatives and the Senate can and do come into institutional conflict. And a complete account of the creation and execution of foreign and security policy would take into account the informal tensions within the formal institutions of government, as well as the role of nongovernmental actors.

2 Introduction to THE CONSTITUTION AND THE CONDUCT OF AMERICAN FOREIGN POLICY 1, 6 (David G. Adler & Larry N. George eds., 1996).

3 JOHN HART ELY, ON CONSTITUTIONAL GROUND 143 (1996).

4 Professor Ely, for example, thinks that the correctness of his views on Congress’s authority over military matters is “utterly clear from the document’s language and legislative history.” Id. He seems equally confident about the validity of the congressional primacy position generally. See, e.g., id. at 149 (asserting that “virtually every substantive constitutional power touching on foreign affairs is vested in Congress”).

March 1999 Vol. 67 No. 3

527
perspective, what the scholars see as "[t]he unmistakable trend toward executive domination of U.S. foreign affairs in the past sixty years represents a dramatic departure from the basic scheme of the Constitution."¹⁵

As the last quotation suggests, recent scholarly wisdom in this area is in sharp conflict with the views of the executive branch, which at least in the last half century has consistently adhered to an "executive primacy" interpretation of the Constitution's allocation of power over foreign affairs and national security: the President has substantial independent authority to determine as well as carry out the foreign policy of the United States.⁶ But the executive primacy perspective can be found not only in the executive branch's obviously self-interested statements but also, at least on the face of the matter, in the opinions of the judicial branch. The Supreme Court has "recognized the generally accepted view that foreign policy [is] the province and responsibility of the Executive"; many opinions speak of "foreign and military affairs" as ones "for which the President has unique responsibility."⁷ As Louis Henkin has cautioned in his magisterial treatise on the constitutional law of foreign affairs, however, the apparent weight of judicial author-

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¹⁵ David Gray Adler, Court, Constitution, and Foreign Affairs, in The Constitution and the Conduct of American Foreign Policy, supra note 2, at 19, 19.

⁶ For an elaborate articulation of the executive primacy interpretation by the Department of Justice, see The President's Compliance with the "Timely Notification" Requirement of Section 501(b) of the National Security Act, 10 Op. O.L.C. 159, 160-70 (1986) [hereinafter Timely Notification]. As with the congressional primacy perspective, a general executive primacy approach to the subject is consistent with a variety of views on specific issues, including quite important ones.


⁸ Sale v. Haitian Ctrs. Council Inc., 509 U.S. 155, 188 (1993). The most flamboyant—and controversial—comments on the subject are to be found in United States v. Curtiss-Wright Export Corp., which referred to "the very delicate, plenary and exclusive power of the President as the sole organ of the federal government in the field of international relations— a power which does not require as a basis for its exercise an act of Congress." 299 U.S. 304, 320 (1936). The authority of Curtiss-Wright's language is often doubted in the scholarly literature. See, e.g., Michael J. Glennon, Two Views of Presidential Foreign Affairs Power: Little v. Barreme or Curtiss-Wright?, 13 Yale J. Int'l L. 5, 13 (1988) (stating that the Court's opinion in Curtiss-Wright was "a muddled law review article wedged with considerable difficulty between the pages of the United States Reports"). But Curtiss-Wright's apparent endorsement of a broad, independent presidential role in the formulation of United States foreign policy is echoed in a wide range of other opinions, many by highly respected jurists. See, e.g., Webster v. Doe, 486 U.S. 592, 605-06 (1988) (O'Connor, J., concurring in part and dissenting in part) (quoting Curtiss-Wright's description of the President's "delicate, plenary and exclusive power"); Harlow v. Fitzgerald, 457 U.S. 800, 812 n.19 (1982) (Powell, J., for an eight-judge majority) (referring to "such 'central' Presidential domains as foreign policy and national security, in which the President [has a] singularly vital mandate"); First Nat'l City Bank v. Banco Nacional de Cuba, 406 U.S. 759, 767 (1972) (Rehnquist, J., plurality opinion) ("[T]his Court has recognized the primacy of the Executive in the conduct of foreign relations . . . [and] emphasized the lead role of the Executive in foreign policy"); New York Times Co. v. United States, 403 U.S. 713, 728-29 (1971) (Stewart, J., joined by White, J., concurring) ("[T]he Constitution gives the Executive a large degree of unshared power in the conduct of foreign affairs."); id. at 756 (Harlan, J., joined by Burger, C.J., and Blackmun, J., dissenting) (acknowledging that the President has "constitutional primacy in the field of foreign affairs"); Ward v. Skinner, 943 F.2d 157, 160 (1st Cir. 1991) (Breyer, C.J.) ("[T]he Constitution makes the Executive Branch . . . primarily responsible" for the exercise of "the foreign affairs power.").
ity is somewhat less impressive than it might at first seem: with respect to broad claims of presidential authority, the Supreme Court in fact "has decided little (and most of that long ago)," and "since the Court has not said much about foreign affairs and promises to say little more, many issues have no final, 'infallible,' arbiter and expositor, and are 'resolved' only ad hoc without resolution in principle." In the face of judicial language referring to "the lead role of the Executive in foreign policy," the claim by some congressional-primacy advocates that their view is obviously correct rings a bit hollow, but at the same time, as Henkin suggests, to claim that the correctness of the executive primacy view is settled by judicial precedent would overread the limited scope of what the courts have actually asserted. Constitutional law in this area remains uncertain, perhaps more so than on most other topics.

I believe that the Constitution is best read to vest the President with primary constitutional authority over the conduct of foreign affairs and the protection of national security; in short, that what I am calling the executive primacy interpretation is correct. This Essay is part, although only part, of what I hope will be a satisfactory argument supporting that belief. Elsewhere I have tried to show that critics of executive primacy are in error when they claim that this viewpoint is a creature of the twentieth century; in fact, I have argued, there was a robust stream of founding era thought that assumed and asserted the President's leading role in the formulation as well as the execution of foreign affairs. My purpose here is to describe, in schematic form but with some detail, what the executive primacy position actually is. To put my objective another way, the Essay presents an outline of the executive primacy interpretation of the Constitution, based on the premises and citing the materials that shape the activities of the executive branch's lawyers in rendering advice and making arguments on behalf of presidential authority. I hope to show that the executive branch's own understanding of executive primacy generates an overall picture of the constitutional law of foreign affairs and national security that is internally coherent, properly respectful of Congress's legitimate constitutional prerogatives, and consistent with both Supreme Court decisions and constitutional practice. An essential element in establishing the plausibility of any overall approach to an area of constitutional law lies in demonstrating that the consequences of adopting the approach are reasonable; that the approach makes sense out of the area both internally and in terms of the broader law of the Constitution. The executive branch's perspective on the constitutional law of foreign affairs and national security, I argue, does just that, and to that extent, therefore, is a persuasive interpretation of the Constitution.

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10 Id. at 4.
11 First Nat'l City Bank, 406 U.S. at 767 (Rehnquist, J., plurality opinion).
13 I should note that although I am a former executive branch lawyer, and indeed remain a consultant to the Department of Justice, this Essay presents an executive branch perspective
A word on the limitations of this study is essential. I make no effort here to explicate or defend a general theory of constitutional interpretation. Those interested in an explanation of why and whether lawyers in the United States should employ the forms of argument they do in construing the Constitution will find none here. Nor do I attempt to refute "critical" claims that legal arguments are necessarily empty rhetoric for conclusions invariably reached on other grounds. I simply assume the meaningfulness of the forms of argument commonly shared in our legal culture.

I. Constitutional Law From an Executive Branch Perspective

A. Constitutive Premises

To take an executive branch perspective to constitutional law is not to decide that the President ought always to prevail in any legal dispute. By the executive branch perspective I mean an approach to constitutional questions that is itself constituted or defined by four basic premises, themselves characteristic of the over two-centuries-old tradition of constitutional interpretation by the presidents and their lawyers. The most fundamental premise of the executive branch perspective on constitutional law is that "the executive branch has an independent constitutional obligation to interpret and apply the Constitution."\(^{14}\) In a sense, this is a truism: few if any would suggest that the President and other executive officers may ignore the Constitution. Neither the Supreme Court nor a great many scholars, however, appear to place any great confidence in the capacity of either political branch for principled constitutional interpretation.\(^{15}\) What distinguishes the executive branch perspective is that it takes seriously executive—and for that matter legislative—interpretations of the Constitution as the constitutional views of branches of the federal government of coequal status and coordinate responsibility with the judiciary. The Constitution places the textually unique duty on the President to "preserve, protect and defend the Constitution,"\(^{16}\) and subordinate executive officers and members of Congress are under as solemn an obligation as judges "to support" the Constitution.\(^{17}\) When the executive


\(^{15}\) The Supreme Court's recent decisions in City of Boerne v. Flores, 521 U.S. 507 (1997), and Clinton v. Jones, 520 U.S. 681 (1997), for example, were stunning judicial rejections of constitutional positions that were the product, respectively, of deliberate congressional consideration and longstanding executive assertion. The bases for doubt and even cynicism about constitutional positions advanced by Congress or the President are obvious and, to many, persuasive. Refuting them is not within the scope of this Essay.

\(^{16}\) U.S. Const. art. II, § 1, cl. 8.

\(^{17}\) See id. art. VI, cl. 3.
or legislative branch encounters constitutional issues in the course of its activities, as each invariably must, it acts within its own "province and duty" in saying what the law of the Constitution is.\textsuperscript{18} Congress and the President have the independent constitutional responsibility to interpret the Constitution. Political branch constitutional interpretation is not a surrogate for judicial review, and officials of the political branches do not properly carry out their responsibility if they understand their interpretive role as limited to filling the gaps between existing points of settled judicial construction, or making prognostications about what the courts would say if they were presented a given issue.\textsuperscript{19}

The executive and the legislature do not engage in constitutional interpretation, it is true, with the same formalities and under the same mixture of constraint and freedom as do the courts, and the differences make a difference. Some of the most important constitutional decisions of both political branches are embodied in actions accompanied by little if any constitutional explanation; Congress, in particular, seldom adopts as an institution sustained constitutional argument. As a consequence, deciding exactly what, if anything, one of the political branches has concluded about constitutional meaning can be fraught with difficulties of interpretation often avoided by the judiciary's hierarchical nature and its longstanding custom of stating its views whenever possible in a single authoritative "Opinion of the Court." And of course, as cynics and critics of particular actions of the political branches are quick to point out, the constitutional decisions of Congress and the executive are reached in a political context and subject to all the pressures that the exigencies of policy, the goals of partisanship, and the urge for institutional self-aggrandizement can bring.\textsuperscript{20} All of this said and duly noted, the executive branch perspective on constitutional law is shaped by the expectation that the "considered constitutional judgments" of the political branches create meaningful and authoritative constitutional precedent that must be taken into account in subsequent interpretations of the Constitution.\textsuperscript{21} The recognition of political branch precedents as legal authorities is the second basic premise of the executive branch perspective.

\begin{itemize}
  \item \textsuperscript{18} Compare Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177 (1803) ("It is emphatically the province and duty of the judicial department to say what the law is."), with James Madison, Speech in the House of Representatives (June 17, 1789), in 1 \textit{Annals of Cong.}, 514, 520 (Joseph Gales ed., 1789) (arguing that a "great point" of constitutional interpretation could and should "be decided, at least by the whole Legislature . . . by us as well as by the Executive or Judiciary").
  \item \textsuperscript{20} Although the point cannot be pursued here, I believe that there is less separating the judicial branch from its political peers in this regard than is often believed, both because the influence of "politics" on the constitutional views of Congress and the executive is not simply a matter for regret, and because the judiciary is subject to its own temptations to intellectual and institutional aggrandizement.
\end{itemize}
The third basic premise of any executive branch perspective concerns the weight to give to judicial precedent and doctrine. Opinions of the modern Supreme Court generally imply that the judiciary's interpretations of the law, including the law of the Constitution, are binding on other constitutional actors ex proprio vigore, without regard to their intrinsic persuasiveness or to the existence of a principled conviction on the other actor's part that the courts are in error.22 On the other hand, some scholars maintain that the executive is under no obligation to accord institutional weight to the judiciary's constitutional views, as opposed to specific judicial orders,23 and indeed, a few even deny that the executive is bound to enforce or obey particular judgments.24

These views may be "pro-executive" in a sense, but they are decidedly contrary to the executive branch perspective, which does not involve denying the judiciary a central role in construing the meaning of the Constitution. When the Supreme Court's views on a debatable issue are settled, the executive branch (and Congress) may, and ordinarily should, act on the basis of the Court's views; in particular, the executive branch is constitutionally obligated to respect the limits imposed on executive authority by settled Supreme Court precedent. Three factors special to the executive branch perspective provide support for this conclusion, although I think it defensible as a general matter. First, the executive branch has repeatedly acknowledged its acceptance of the Court's central place in the interpretation of the law. The Justice Department's most elaborate recent opinion on the constitutional separation of powers, for example, states that the Department believe[s] that the constitutional structure obligates the executive branch to adhere to settled judicial doctrine that limits executive and legislative power. While the Supreme Court's decisions interpreting the Constitution cannot simply be equated with the Constitution, we are mindful of the special role of the courts in the interpretation of the law of the Constitution.

“Our analyses are guided,” the opinion continued, “and, where there is a decision of the Court on point, governed by the Supreme Court's decisions on separation of powers.”25

The second factor counseling executive acquiescence in the judiciary's claim to a special role in the interpretation of the Constitution rests on the executive's long-acknowledged duty to execute particular judicial orders. That duty's formulation stems back to James Madison, one of whose earliest acts as President was to reject the suggestion that he could interpose executive authority against a Supreme Court judgment because of a plausible argu-

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22 See City of Boerne v. Flores, 521 U.S. 507, 535-36 (1997); Cooper v. Aaron, 358 U.S. 1, 18 (1958). Whether the modern Court's high view of its own interpretive authority reflects a faithful understanding of Marshall's famous dictum that "[i]t is emphatically the province and duty of the courts to say what the law is" is not important for present purposes.


25 Dellinger Memo, supra note 14, at 3-4.
ment that the Court’s judgment violated the Constitution. In the context of a
decision by the judiciary, Madison explained, the President’s only duty was to
ensure that the decision was enforced. Apocryphal stories about President
Jackson to one side, that 1809 decision by one of the greatestconstitutionalists
among the presidents has remained the consistent position of the executive
branch. Acceptance of a duty to enforce specific judicial orders, furthermore,
provides a powerful reason for according respect to settled judicial
interpretations of the law that would clearly guide future, and specific,
orders by the courts. Executive acceptance of clear and settled judicial views
avoids the instability that would result from insisting that the courts impose
those views through an endless series of individual judicial decrees.

Third, adherence to settled judicial doctrine provides a vital context for
each political branch’s vigorous defense of what it sees as its legitimate
constitutional powers. The maintenance of the Constitution’s system of “dis-
persed powers” depends both on the institutional self-interest of each branch
and on the ability of each to recognize the legitimate claims of the other
two. From the beginning of the Republic, the political branches have in-
sisted on the need to protect their respective constitutional roles: as Attorney
General William Mitchell wrote in 1933

[s]ince the organization of the Government, Presidents have felt
bound to insist upon the maintenance of the Executive functions
unimpaired by legislative encroachment, just as the legislative
branch has felt bound to resist interferences with its power by the
Executive. To acquiesce in legislation having a tendency to en-
encroach upon the executive authority results in establishing danger-
ous precedents.

By recognizing the authority of settled judicial doctrine and precedent,
the political branches place within their own constitutional analyses a signifi-
cant check on the tendency of healthy institutional self-interest to become
simple institutional aggrandizement. An executive branch legal opinion, for
example, that supports a debatable claim of executive authority through a
responsible analysis of the Supreme Court’s decisions has a claim to respect
and attention from others that an opinion ignoring those decisions would not.
The judicial branch’s decisions on constitutional issues are thus entitled from
an executive branch perspective to significant weight, not just as specific di-
rectives to the executive, but as statements about the meaning of the Constitu-
tion more generally.

The fourth basic premise of the executive branch perspective concerns
not the locus of interpretive authority, but rather the modalities of inter-
pretation that are used in construing the Constitution. From the recogni-

26 For documents relating to the incident and a discussion of its significance, see Jeffer-
son Powell, Languages of Power: A Source Book of Early American Constitu-
27 See id.
29 Constitutionality of Proposed Legislation Affecting Tax Refunds, 37 Op. Att’y Gen. 56,
64 (1936).
30 As Professor Philip Bobbitt has persuasively argued, to understand United States con-
that the courts have a special and preeminent role in constitutional interpretation, it follows that executive branch interpreters employ the same basic forms of argument and evaluate their persuasiveness by essentially the same standards that the courts and those who seek to persuade them use. What is distinctive about the executive branch perspective, so distinctive that it amounts to a premise of the entire approach, is its recognition that structural arguments about the Constitution’s meaning—“claims that a particular principle or practical result is implicit in the structures of government and the relationships that are created by the Constitution among citizens and governments”—can generate conclusions that are as creditable as are conclusions based on the Constitution’s text. Structural argument is, of course, a well-recognized modality of constitutional interpretation and its use by the Supreme Court dates back to the founding era. Despite its lineage and its legitimacy in principle, however, at times courts and other interpreters of the Constitution have appeared uneasy about reliance upon it, preferring the ostensible clarity of arguments based on the language of the constitutional text to the apparent vagueness of “inference from the structures and relationships created by the constitution in all its parts or in some principal part.”

Whatever one’s general view about the place of structural reasoning in constitutional law, structural reasoning has an inescapably central role in interpreting the distribution of powers over foreign affairs and national security. The Constitution contains no provision expressly granting either political branch a general power to formulate or execute foreign policy, or provide for national security, or indeed to make war. In clear if implicit acknowl-

stitutional law one must understand the “methods of constitutional construction” accepted within our legal system that provide it with its characteristic and defining means of understanding and decisionmaking. Bobbitt refers to these forms of argument as “modalities.” See, e.g., PHILIP BOBBITT, CONSTITUTIONAL INTERPRETATION (1991). The quoted phrase is at page xix in that book.

31 PHILIP BOBBITT, CONSTITUTIONAL FATE 7 (1982).


33 Id. at 7. Black argued, correctly in my view, that the use of structural argument was not a matter of supplanting “precision . . . by wide-open speculation,” and that, indeed, “[t]he precision of textual explication” in many areas “is nothing but specious.” Id. at 29.

34 See Perez v. Brownell, 356 U.S. 44, 57 (1958) (“[T]here is in the Constitution no specific grant to Congress of power to enact legislation for the effective regulation of foreign affairs.”), overruled in part by Afroyim v. Rusk, 387 U.S. 253 (1967). The same is obviously true of the President.

35 There is a candidate here: a judicious use of ellipses permits one to read the introductory clause of Article I, Section 8 to grant Congress the power “to . . . provide for the common Defence and general Welfare.” U.S. CONST. art. I, § 8, cl.1. However, it is, I think, settled and settled correctly that this reading is erroneous. As Madison and Jefferson both pointed out in 1791, “[t]o consider the phrase . . . as giving a distinct and independent power to do any act they [Congress] please which might be for the good of the Union, would render all the preceding and subsequent enumerations of power completely useless.” Thomas Jefferson, Opinion on the Constitutionality of the Bill for Establishing a National Bank (Feb. 15, 1791), in POWELL, supra note 26, at 42; accord, James Madison, Speech in the U.S. House of Representatives (Feb. 2, 1791), in POWELL, supra note 26, at 38. Although both practice and judicial precedent have rejected Madison’s and Jefferson’s own preferred construction of the phrase (that it was a sum-
gment of the impossibility of resolving many issues involving foreign affairs and the defense of the Republic through textual exegesis, founding era interpreters regularly argued on the basis of structure, and many subsequent judicial and executive opinions have followed their example. Structural argument in this, as in other areas, is not an unfortunate second-best, but a desirable aspect of the enterprise of “dealing with words that also are a constituent act.” Thus, from the executive branch perspective, the fact that the arguments for the President’s authority over foreign affairs rest largely on structural inference, while Article I expressly delegates power to Congress over foreign commerce, does not suggest that the presidential authority is any less legitimate or is to be interpreted any less liberally than the congressional power. The words of the Constitution are authoritative, and any persuasive constitutional argument must make sense of the provision or provisions of the text that bear on the issues being considered, but the interpreter is equally responsible for giving due weight and proper respect to the political and legal institutions and relationships that the text creates.

B. The Special Role of Executive Branch Legal Opinions and Historical Practice

Executive branch lawyers interpret the Constitution employing the same tools of analysis that are generally employed by the legal profession in the United States. In particular, executive branch lawyers’ concern for historical practice is not unique. The Supreme Court has identified separation of powers as an area that, due to the lessons of history, warrants heightened re-

mary reference to the following specifically enumerated powers), they have done so by accepting the view of Hamilton and Story, that the reference to the common defense and the general welfare is part of the conferment of power on Congress to collect and expend money. See South Dakota v. Dole, 483 U.S. 203, 206-07 (1987).

36 See Bobbitt, supra note 21, at 1365 (“[T]he power to make war is not an enumerated power.”).

37 See Powell, supra note 12.

38 Much of the Supreme Court’s modern separation of powers jurisprudence explicitly rests on structural inference. See, e.g., Bowsher v. Synar, 478 U.S. 714, 726 (1986) (“The structure of the Constitution does not permit Congress to execute the laws; it follows that Congress cannot grant to an officer under its control what it does not possess.”). Professor Henry Monaghan’s important article on the President’s “protective power” is an excellent example of persuasive structural argument on the scope of executive authority in areas overlapping with the subject of this Essay. See Henry P. Monaghan, The Protective Power of the Presidency, 93 COLUM. L. REV. 1 (1993).


40 The Curtiss-Wright opinion, often criticized for a cavalier attitude toward the constitutional text, in fact carefully noted that the President’s structurally inferred foreign affairs power “must be exercised in subordination to the applicable provisions of the Constitution.” United States v. Curtiss-Wright Export Corp., 299 U.S. 304, 320 (1936).

41 I think that Professor Black’s summary of the relationship between textual and structural argument is both right in principle and consistent with the general interpretive practices of the executive branch: “There is . . . a close and perpetual interworking between the textual and the relational and structural modes of reasoning, for the structure and relations concerned are themselves created by the text, and inference drawn from them must surely be controlled by the text.” Black, supra note 32, at 31.
spect. At various times, the Court has suggested that weight must be given to old, or longstanding, governmental practice as a matter of constitutional design, or because of the special claim to insight of the First Congress or the founding generation, or for sheerly practical reasons. What is unique about constitutional reasoning from an executive branch perspective is the weight given to the considered legal judgments of the two political branches, and particularly to legal opinions and arguments that the President and other executive branch officials formally advanced.

An executive branch perspective on constitutional law is one formulated in the context of a history, now two centuries old, of presidential action and assertion, and of efforts by the President’s legal advisors to defend executive authority and, at times, to prevent its misuse. Walter Dellinger, a former acting Solicitor General, and before that head of the Office of Legal Counsel (“OLC”), has written:

[An executive branch attorney [has] an obligation to work within a tradition of reasoned, executive branch precedent, memorialized in formal written opinions. Lawyers in the executive branch have thought and written for decades about the President’s legal authority . . . . When lawyers who are now at the Office of Legal Counsel begin to research an issue . . . [t]hey are expected to look to the previous opinions of the Attorneys General and of heads of [OLC] to develop and refine the executive branch’s legal positions.]

From an executive branch perspective, therefore, presidential assertions of authority, and executive branch legal opinions interpreting the Constitution, are legal authorities that shape the contours within which lawyers should address constitutional issues—especially in the areas of foreign affairs and national security where there is relatively little judicial precedent. The authoritative nature of the “tradition of reasoned, executive branch precedent” is not simply a pragmatic issue of institutional authority—indeed the existence of such a tradition “memorialized in written opinions” is one of the factors that enables executive branch lawyers to press the claims of law

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42 See, e.g., Dames & Moore v. Regan, 453 U.S. 654, 686 (1981) ("[A] systematic, unbroken, executive practice, long pursued to the knowledge of Congress and never before questioned . . . . may be treated as a gloss on 'Executive Power' vested in the President by § 1 of Art. II," (quoting Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 637 (1952) (Jackson, J., concurring)) ("Steel Seizure Case").

43 See, e.g., Mistretta v. United States, 488 U.S. 361, 381 (1989) ("[T]he Constitution . . . contemplates that practice will integrate the dispersed powers into a workable government.") (quoting Youngstown, 343 U.S. at 635 (Jackson, J., concurring)).


45 See, e.g., United States v. Midwest Oil Co., 236 U.S. 459, 473 (1915) (accepting the authority of longstanding practice on "the basis of a wise and quieting rule that in determining . . . the existence of a power, weight should be given to the usage itself—even when the validity of the practice is the subject of investigation").

46 See GATT II, supra note 21, at *3, *5-7.

47 Walter Dellinger, After the Cold War: Presidential Power and the Use of Military Force, 50 U. MIA MI L. REV. 107, 109-10 (1995). The Office of Legal Counsel is the component of the Department of Justice to which the Attorney General has delegated the function of preparing formal legal opinions for the Department.
against the urgencies of policy. The tradition of formal legal argument by presidents and their legal advisors is, instead, central to the executive’s fulfillment over time of the President’s duty to interpret and ensure the faithful execution of the Constitution.

Executive branch legal opinions are of great importance to any constitutional argument from an executive branch perspective, but they are central to the discussion of issues in the areas of foreign affairs and national security. As the Supreme Court itself has acknowledged, its decisions on these topics are peculiarly unlikely to generate broad doctrinal frameworks. The Court has frequently observed that the Constitution confers authority over foreign affairs and national security, with few exceptions, to the political branches, creating the risk that judicial intervention will itself be a serious violation of separation of powers.\(^{48}\) As a result, when the Court does address issues involving these topics, it typically avoids broad pronouncements about the Constitution’s meaning. In a leading modern case involving foreign affairs, for example, the Court noted that “the decisions of the Court in this area have been rare, episodic, and afford little precedential value for subsequent cases.”\(^{49}\) Because of “the broad range of vitally important day-to-day questions regularly decided by Congress or the Executive” with respect to foreign affairs and national security, the Court described itself as “acutely aware of the necessity to rest [judicial] decision[s] on the narrowest possible ground capable of deciding the case.”\(^{50}\) Unlike its tendency in the domestic sphere to give short shrift to the constitutional views of the political branches, the Court’s practice in cases involving foreign affairs and national security invites Congress and the President to exercise the interpretive role that the executive branch perspective maintains is theirs generally, and in principle. Executive branch thinking on the constitutional issues raised by foreign policy and national security takes place against this backdrop of judicial reticence.

As a historical matter, the form in which the executive branch has articulated its “considered constitutional judgments” has varied, and a contemporary executive branch perspective will give differing weights to various types

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\(^{48}\) The Court’s comments in a case implicating the conduct of foreign affairs are typical: such issues

are wholly confided by our Constitution to the political departments of the government, Executive and Legislative. . . . They are decisions of a kind for which the Judiciary has neither aptitude, facilities nor responsibility and which has long been held to belong in the domain of political power not subject to judicial intrusion or inquiry.

Chicago & S. Air Lines, Inc. v. Waterman S.S. Corp., 333 U.S. 103, 111 (1948); see also Rostker v. Goldberg, 453 U.S. 57, 65-66 (1981) (“It is difficult to conceive of an area of governmental activity in which the courts have less competence” than “military affairs” and the Supreme Court’s decisions display “a healthy deference to legislative and executive judgments in [that] area.” (quoting Gilligan v. Morgan, 413 U.S. 1, 10 (1973)).


\(^{50}\) Id. at 660-61. The Dames & Moore Court later stressed its own adherence to this policy of narrow decisionmaking. See id. at 688 (“re-emphasizing the narrowness of [the Court’s] decision”). In his classic opinion in the Steel Seizure Case, Justice Jackson remarked that “court decisions are indecisive because of the judicial practice of dealing with the largest questions in the most narrow way.” Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 635 (1952) (Jackson, J., concurring).
of statements depending on their original historical context. Obviously, formal statements that the President signs himself have the clearest institutional status. Constitutional conclusions articulated in any form by the administration of George Washington are of great importance. Washington and his advisors were acutely aware that they were setting precedents, and considered many constitutional issues in a collective fashion that lends added weight to their decisions. The largest corpus of executive branch constitutional reasoning consists of the opinions signed by or issued under the authority of the Attorney General. Since the enactment of the Judiciary Act of 1789, the Attorney General has been the chief law officer of the government, and his or her legal opinions ordinarily are the definitive expressions of the executive branch’s legal view. By regulation, the actual execution of the Attorney General’s opinion function is now delegated to the Office of Legal Counsel, and only a small percentage of the legal opinions are now signed by the Attorney General personally, but for the most part OLC opinions are equally authoritative. The Department of Justice shares “jurisdiction” over legal issues involving foreign affairs with the office of the Legal Adviser to the Department of State; the Legal Adviser’s views on the treaty power and on the interpretation of treaties and other international agreements are particularly important.

Constitutional practice unaccompanied by express legal argument may also be entitled to precedential weight, although the executive branch tempers its reliance on such practice with the recognition that the meaning of practice is often opaque, and that political practice can be the product of constitutional error. In assessing the significance of a practice that has not been the subject of extensive constitutional discussion, executive branch lawyers give weight to the origins and duration of the practice, although it is

51 The cabinet, which as a practical matter soon came to include the Attorney General, often debated constitutional issues, and with some frequency rendered collective legal opinions to the President, although Washington also called on individual secretaries and attorneys general as well as members of Congress for their views. See Glenn A. Phelps, George Washington and American Constitutionalism 162-63 (1993).

52 The Act imposed two duties on the Attorney General: representation of the United States in the Supreme Court and the provision of legal advice to the President and other executive branch officials. See Judiciary Act of 1789, ch. 20, § 35, 1 Stat. 73, 92-93. Since the creation of the Department of Justice in 1870, furthermore, the Attorney General has had a constitutional duty to provide the President with an “Opinion, in writing, . . . upon any Subject relating to the Duties of [his or her] Office[.]” U.S. CONST. art. II, § 2, cl. 1.

53 See 28 C.F.R. § 0.25 (1998).

54 Justice Frankfurter’s discussion of the interpretive value of practice in his opinion in the Steel Seizure Case parallels modern executive branch thought: The Constitution is a framework for government. Therefore the way the framework has consistently operated fairly establishes that it has operated according to its true nature. Deeply embedded traditional ways of conducting government cannot supplant the Constitution or legislation, but they give meaning to the words of a text or supply them. It is an inadmissibly narrow conception of American constitutional law to confine it to the words of the Constitution and to disregard the gloss which life has written upon them. Youngstown, 343 U.S. at 610 (Frankfurter, J., concurring).

55 See, e.g., GATT II, supra note 21, at *6 n.19 ("[L]egislative precedent is most persuasive when it can be traced back to the Nation's founding."); The Sufficiency of the President's Certifi-
not the case, as is sometimes suggested, that conduct can rise to the level of constitutional practice only if it "can be traced back to the Nation's founding."\textsuperscript{56} Agreement between the political branches on a course of conduct is important evidence that the conduct should be deemed constitutional.\textsuperscript{57} An express concession by one branch that the other possesses a given power is not necessary to establish the existence of authoritative practice;\textsuperscript{58} indeed, acquiescence in unilateral actions by the other political branch is presumptive acceptance of their legitimacy,\textsuperscript{59} although that presumption properly applies with full force only in circumstances in which the acting branch of government asserted de jure constitutional power and the acquiescent branch had some effective means of protest.\textsuperscript{60} The consistency with which the executive branch has adopted a legal position through changes of president and party.\textsuperscript{61}

\textsuperscript{56} See GATT II, supra note 21, at *6 n.19 ("Even early legislative decisions may have violated the Constitution.").

\textsuperscript{57} See, e.g., id. at *3 ("[A] significant guide to the interpretation of the Constitution's requirements is the practical construction placed on it by the Executive and Legislative Branches acting together.").

\textsuperscript{58} The Justice Department recently noted that despite its extensive history and widespread acceptance, Congress has seldom acknowledged that the President's authority to control the disclosure of diplomatic information is a constitutional power: "To be sure, the houses of Congress have rarely conceded unequivocally that [congressional respect for the practice] is constitutionally required. This is hardly surprising: Congress is subject to strong 'hydraulic pressures' to describe its powers in expansive terms and consequently minimize the independent authority of the Executive." Mexican Debt, supra note 55, at 692 n.62. The same point can be made in reverse, of course: executive branch officials and lawyers are subject to parallel pressures to define the President's powers in an expansive manner. An important aspect of the executive branch perspective is its reliance on precedent and practice as internal brakes on executive branch self-aggrandizement.

\textsuperscript{59} Neither the courts nor the executive branch consistently distinguish the argument that a "pattern of presidential initiative and congressional acquiescence ... evidences ... constitutional power," see Presidential Power to Use the Armed Forces Abroad Without Statutory Authorization, 4A Op. O.L.C. 185, 187 (1980) [hereinafter Presidential Power], from the contention that Congress has implicitly authorized the President to take the action at issue. Compare Dames & Moore v. Regan, 453 U.S. 654, 680 (1981) ("Crucial to our decision today is the conclusion that Congress has implicitly approved the [executive] practice."); with id. at 682 ([P]rior cases of this Court have also recognized that the President does have some measure of power" to engage in the practice.). See also Youngstown, 343 U.S. at 613 (Frankfurter, J., concurring) ("[L]ong-continued acquiescence of Congress" gives "decisive weight to a construction by the Executive of its powers."); Ex parte Grossman, 267 U.S. 87, 118-19 (1925) ([L]ong practice under the pardoning power and acquiescence in it strongly supports the construction it is based on.); Presidential Power, supra, at 187 n.6 ([T]he Supreme Court has recognized the validity of longstanding presidential practices never expressly authorized by Congress but arguably ratified by its silence.").


\textsuperscript{61} See Haiti Deployment, supra note 60, at *7 ("[A] pattern of Executive conduct . . . engaged in by Presidents of both parties.").
and the ambiguity of the constitutional provision or institutional relationship at issue, are also factors to consider in according precedential weight to a particular historical practice.62

C. The Distinction Between Independent and Autonomous Powers

The constitutional law of foreign affairs and national security is fundamentally shaped by two realities. First, both Congress and the President possess significant constitutional authority in these areas. This factor sharply differentiates separation of powers questions in these areas from those that arise out of domestic issues. In the domestic sphere, the President’s main constitutionally defined role is that of chief administrator: at least the principal officers of the administration are presidentially appointed, subject to Senate advice and consent, and the Take Care Clause presumably confers on the President some constitutional authority to supervise the activities of his or her subordinates.63 The great bulk of the substantive powers wielded by the executive branch in the domestic arena stems from acts of Congress, and as long as Congress refrains from interfering with the President’s constitutional duties of appointment and supervision it has substantial freedom to grant, withhold, and condition domestic authority to the executive.64 Other than issuing pardons and making state of the union addresses, the President can do very little domestically without congressional authorization.65 In the areas of foreign affairs and national security, by contrast, constitutional text66 and structure vest the President with substantive constitutional authority not de-

62 See GATT II, supra note 21, at *6 n.19 (longstanding congressional use of legislative veto was not a historical practice with precedential force because the relevant constitutional provisions were ""explicit and unambiguous"" (quoting INS v. Chadha, 462 U.S. 919, 945 (1983))). It is not the case, however, that apparent textual clarity absolutely precludes historical practice from having executive perspective significance. See Postal Communications with Foreign Countries, 19 Op. Att’y Gen. 513, 514 (1890) (stating that in some circumstances, the interpretation of a constitutional provision that would follow from “the ordinary rule of construction . . . may be varied by the course of Congress in its legislation and the practice of the Executive Departments since the adoption of the Constitution”).

63 See generally Statute Limiting the President’s Authority to Supervise the Director of the Centers for Disease Control in the Distribution of an AIDS Pamphlet, 12 Op. O.L.C. 47 (1988).

64 The Supreme Court’s separation of powers decisions over the past two decades show that legislative creativity can find a remarkable number of ways to violate the constitutional separation of powers even in the domestic sphere.

65 See Charles L. Black, Jr., Some Thoughts on the Veto, 40 Law & Contemp. Probs. 87, 89 (1976) (asserting that without violating the Constitution, Congress could "‘reduce the President’ [to] a man [or woman] living in a modest apartment, with perhaps one secretary to answer mail’"). The modern executive branch’s views of the separation of powers limitations on Congress’s domestic powers, if they were noted, have varied somewhat in recent years. Some executive branch opinions published between the mid-1980s and 1993 reflect a slightly more stringent view of the Constitution’s limitations than do opinions from before and after that period. Compare Dellinger Memo, supra note 14, with Barr Memo, supra note 14 (expressly superseded by Dellinger Memo).

66 In addition to whatever general weight the Vesting Clause of Article II, Section 1 may have, the courts and the executive have identified several other clauses of Article II as delegating significant authority to the President in the areas of foreign affairs and national security. See U.S. Const. art. II, § 2, cl. 1 (President is Commander in Chief); id. § 2, cl. 2 (power, subject to senatorial advice and consent, to make treaties and appoint “Ambassadors, other public Ministers and Consuls”); id. § 2, cl. 3 (power to make temporary appointments during Senate re-
dependent on congressional enactments, while Congress itself, of course, possesses a variety of relevant powers. When separation of powers questions arise in these areas, therefore, their resolution requires the interpreter to give due weight and proper respect to executive and legislative powers of equal constitutional dignity. These powers, moreover, overlap and thus create potential conflicts in which each branch can lay claim to a legitimate constitutional warrant for its actions.

Second, the President's constitutional powers in the areas of foreign affairs and national security do not all stand in the same relationship to the powers of Congress. Although this point has been recognized since the beginning, Justice Robert Jackson's concurring opinion in the Steel Seizure Case is the classic exposition. Justice Jackson reasoned that "[p]residential powers . . . fluctuate, depending on their disjunction or conjunction with those of Congress," and he famously divided presidential exercises of authority into three categories depending on whether the President was acting with congressional approval, against congressional disapproval, or in the absence of either approval or disapproval. In the absence of congressional authorization, the President can "rely only upon his own independent powers"; in the teeth of congressional prohibition, the President can "rely only

\footnotesize{cesses); \textit{id.} § 3 (duty to "receive Ambassadors and other public Ministers" and to "take Care that the Laws be faithfully executed").}
\footnotesize{67 See, e.g., Advances to Public Ministers, 2 Op. Att'y Gen. 204 (1829) (discussing relationship between constitutional powers of the President, Senate, and the Congress as a whole).}
\footnotesize{68 Justice Jackson, to be sure, was not writing exclusively, or indeed at all, about the President's authority in dealing with foreign affairs. Indeed, the legal conclusion that the presidential exercise of power at issue was properly to be classed as domestic rather than foreign in nature probably was essential to Jackson's concurrence in the judgment of the Court.}
\footnotesize{I should indulge the widest latitude of interpretation to sustain [the President's] exclusive function to command the instruments of national force, at least when turned against the outside world for the security of our society. But, when it is turned inward, not because of rebellion but because of a lawful economic struggle between industry and labor, it should have no such indulgence.}
\footnotesize{Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 645 (1952) (Jackson, J., concurring).}
\footnotesize{Jackson's crystallization of earlier thinking on the relationship between presidential and congressional powers in general is of most relevance, however, in the foreign affairs and national security areas precisely because it is only there that the President possesses a significant set of substantive constitutional powers.}
\footnotesize{69 \textit{id.} at 635 (Jackson, J., concurring).}
\footnotesize{70 Jackson's three categories of presidential exercises of authority are:}
\footnotesize{1. When the President acts pursuant to an express or implied authorization of Congress, his authority is at its maximum, for it includes all that he possesses in his own right plus all that Congress can delegate. . . .}
\footnotesize{2. When the President acts in absence of either a congressional grant or denial of authority, he can only rely upon his own independent powers, but there is a zone of twilight in which he and Congress may have concurrent authority, or in which its distribution is uncertain. . . .}
\footnotesize{3. When the President takes measures incompatible with the expressed or implied will of Congress, his power is at its lowest ebb, for then he can rely only upon his own constitutional powers minus any constitutional powers of Congress over the matter. . . .}
\footnotesize{\textit{id.} at 635-37 (Jackson, J., concurring).}
upon his own constitutional powers minus any constitutional powers of Congress over the matter."\textsuperscript{71}

The chief contribution of Jackson's opinion, for purposes of this Essay, is his express recognition of the inadequacy of any model of separation of powers that envisions presidential authority as an undifferentiated sphere of prerogative within which the executive is free of congressional interference, and beyond which Congress possesses plenary control over presidential actions. The interplay between Congress's powers, which (it is vital to remember) include the express authority "[t]o make all Laws which shall be necessary and proper for carrying into Execution . . . all . . . Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof,"\textsuperscript{72} and the President's "delicate, plenary and exclusive power . . . as the sole organ of the federal government in the field of international relations,"\textsuperscript{73} requires a more nuanced analysis. In principle and practice, the constitutional powers of the two political branches overlap, and the freedom with which each branch may exercise its constitutional authority is affected by the existence and employment of the other branch's powers. In the areas of foreign affairs and national security, consequently, it is useful to make two analytical distinctions.

The first, and most obvious distinction, is between powers that the Constitution directly grants the President, and those that can be exercised only pursuant to an act of Congress or a treaty. It is a fundamental proposition of United States constitutional law, one essential to the rule of law, that the President has no authority to act that is not ultimately derived from the Constitution, a statute or a treaty; there are no extraconstitutional executive powers.\textsuperscript{74} If the Constitution does not of its own force vest the President with a

\textsuperscript{71} \textit{Id.} (Jackson, J., concurring).

\textsuperscript{72} U.S. Const. art. I, § 8, cl. 18 (emphasis added).

\textsuperscript{73} United States v. Curtiss-Wright Export Corp., 299 U.S. 304, 320 (1936) (emphasis added).

\textsuperscript{74} See \textit{Youngstown}, 343 U.S. at 585 ("The President's power, if any, to issue the order must stem either from an act of Congress or from the Constitution itself."). The Court's opinion in \textit{Curtiss-Wright} can be read at one point to suggest that the President's authority over foreign affairs does not depend on constitutional or statutory delegation, but was derived in some fashion from the transfer of sovereignty from the King to the United States at the time of the Revolution. \textit{See Curtiss-Wright}, 299 U.S. at 316-18. The Court's holding in \textit{Curtiss-Wright}, which was that Congress had not exceeded the nondelegation doctrine in providing the President authority to issue the executive order at issue in the case, did not depend on this suggestion, and the intended significance of the Court's discussion of the origins of the federal government's foreign affairs power is uncertain. The \textit{Curtiss-Wright} opinion expressly stated that the President's authority over foreign affairs is exercised subject to constitutional limitations, which seems an implicit acknowledgment that the authority is not extraconstitutional in nature. In any event, the executive branch quickly acknowledged that \textit{Curtiss-Wright} should not be read to endorse any kind of legally limitless prerogative, and that remains the executive's view, as clearly it is that of the contemporary Supreme Court. \textit{See Presidential Authority to Decline to Execute Unconstitutional Statutes}, 18 Op. O.L.C. No. 35 (Nov. 2, 1994) \textit{, available in 1994 WL 813349}, at *2 ("The President's office and authority are created and bounded by the Constitution; he is required to act within its terms."); \textit{Acquisition of Naval and Air Bases in Exchange for Over-Age Destroyers}, 39 Op. Att'y Gen. 484, 487 (1940) (acknowledging that the presidential "power over foreign relations" discussed in \textit{Curtiss-Wright} "is not unlimited," but subject to limitations imposed by constitutional text and structure).
particular power, the executive’s ability to wield that power lawfully is entirely dependent on authorization by statute or treaty.\textsuperscript{75} And in turn, the scope and mode of exercise of a statutory or treaty power is defined and limited by the terms of the authorizing instrument. When the President can claim no direct constitutional authority for an action, the existence of power to undertake it is a matter of statutory or treaty construction, and as a general matter the limitations and conditions that the statute or treaty places on the President’s authority create no constitutional problems.\textsuperscript{76} Despite the breadth of the President’s constitutional powers in the areas of foreign affairs and national security, there are a number of significant powers bearing on these topics that are available to the executive only if a statute or treaty has affirmatively vested the executive with them.\textsuperscript{77}

The second distinction is less obvious, although it is equally important and is implicitly relied upon in many executive branch opinions. In relationship to Congress’s powers, the President’s constitutionally derived powers can be usefully seen as existing on a spectrum. At the presidential end of the spectrum are those executive powers that are genuinely exclusive: the Constitution not only vests them in the President, but also prohibits or severely limits congressional attempts to curtail, control, or usurp the President’s authority. Congress cannot lawfully regulate the President’s exercise of such “autonomous” presidential powers, as I shall call them, either by direct legislation or through indirect means such as its spending power. At the congressional end of the spectrum are those executive powers that do not require a basis in statute or treaty: the Constitution directly authorizes the President to exercise them, but leaves executive action subject to legislative regulation.

\textsuperscript{75} The question of what a president ought to do—as a political or moral matter—in a situation in which exigent national needs require executive action unauthorized by the Constitution or any other source of legal authority raises quite different issues: by definition, any presidential action in that circumstance could be justified only on nonlegal grounds. On at least one occasion, President Jefferson defended his negotiation of the Louisiana Purchase on such grounds, but he made it plain that in doing so he was not offering a legal argument for his authority to act:

A strict observance of the written laws is doubtless one of the high duties of a good citizen, but it is not the highest. The laws of necessity, of self-preservation, of saving our country when in danger are of higher obligation. . . . [T]he Executive, in that case, [ought] to have secured the good to his country, and to have trusted to [the people’s] justice for the transgression of the law.

Thomas Jefferson, Letter to John B. Colvin (Sept. 20, 1810), in Powell, supra note 26, at 159-60.

\textsuperscript{76} This sentence should not be read for more than it says. Of course, any statute or treaty is subject to constitutional limitations, including the general principles of separation of powers as well as more particularized rules such as the doctrine of unconstitutional conditions. If the legislative branch is incautious or overreaching, it might run afoul of constitutional prohibitions even in the exercise of its most undisputed and exclusive powers. For present purposes, the point is that analytical clarity requires that we clearly distinguish those “executive” powers that exist (if at all) through statute and treaty from those powers vested in the President by the text and structure of the Constitution.

\textsuperscript{77} The great congressional powers over spending, foreign commerce, and declarations of war are discussed below in the text. Another example of a power relating to foreign relations that the President can exercise only if authorized to do so by statute or treaty is the power of extradition. See Valentine v. United States ex rel. Neildex, 299 U.S. 5, 8 (1936); Foreign Requisitions—Law of Nations, 1 Op. Att’y Gen. 509, 521 (1821).
In the absence of legislation, the President may employ such “independent” presidential powers, as I shall call them, at his or her discretion, but Congress can structure, limit, or deny that discretion by statute.\textsuperscript{78} From an executive branch perspective, the distinction between autonomous powers and independent powers is crucial to sound constitutional analysis.

The Supreme Court’s understanding of the nature of separation of powers issues supports the proposed distinction. The Court has often asserted that the Constitution’s delegation and distribution of powers to the three branches is intended both to provide “a vital check against tyranny,”\textsuperscript{79} and to create an effective government affirmatively capable of pursuing the common interests of the people through cooperation among the branches.\textsuperscript{80} The Court’s modern decisions therefore recognize that the Constitution places two basic forms of restraint on interference by one branch in the sphere of another. First, the Constitution requires each branch to refrain from usurping the role of the others: “it remains a basic principle of our constitutional scheme that one branch of the Government may not intrude upon the central prerogatives of another.”\textsuperscript{81} Second, the Constitution limits the extent to which any branch can employ its own powers in ways that interfere with the “integrity” or “functioning” of another branch, so that “[e]ven when a branch does not arrogate power to itself . . . the separation-of-powers doctrine requires that a branch not impair another in the performance of its constitutional duties.”\textsuperscript{82} In the Court’s terminology, autonomous presidential powers are among those “central prerogatives” of the executive into which the legislature “may not intrude,” and congressional legislation regulating independent but not autonomous presidential powers is subject to the requirement that Congress “not impair” the executive “in the performance of [the executive’s] constitutional duties.” In this Essay, I often consider the question of where a given presidential power lies along the spectrum between autonomous and independent powers.

\textsuperscript{78} The clearest label for this class of executive powers would arguably be “non-autonomous.” That essentially negative term, however, would obscure both the constitutional nature of the powers in question, and the fact that congressional interference with them raises constitutional issues, and so I do not adopt it. The reader should bear in mind, however, that in this Essay I use “independent” to mean “constitutional but not autonomous.” The term “inherent powers” is often found in judicial and executive opinions, but is used indiscriminately for both autonomous and independent powers, in my terminology, and thus it is not useful as a designation for the necessary distinctions.

\textsuperscript{79} Buckley v. Valeo, 424 U.S. 1, 121 (1976) (per curiam).

\textsuperscript{80} See Loving v. United States, 517 U.S. 748, 757 (1996) (“Deterrence of arbitrary or tyrannical rule is not the sole reason for dispersing the federal power among three branches . . . . By allocating specific powers and responsibilities to a branch fitted to the task, the Framers created a National Government that is both effective and accountable.”); Mistretta v. United States, 488 U.S. 334, 381 (1989) (“While the Constitution diffuses power the better to secure liberty, it also contemplates that practice will integrate the dispersed powers into a workable government. It enjoins upon its branches separateness but interdependence, autonomy but reciprocity.”) (quoting Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 635 (1952) (Jackson, J., concurring))).

\textsuperscript{81} Loving, 517 U.S. at 757.

\textsuperscript{82} Id.
II. The Basic Structure of Constitutional Authority Over Foreign Affairs and National Security

The Constitution delegates to the political branches of the federal government responsibility for the conduct of foreign affairs and the preservation of national security. It does so, however, in a complex and indeed rather oblique manner. As noted above, no provision of the Constitution vests either the President or Congress with a general power over foreign affairs or national security. Instead, the constitutional text enumerates a variety of powers bearing on these areas that it delegates to one or the other political branch without specifying how the enumerated powers are to be related to one another or organized into a coherent framework of governance and responsibility. Although scholarly commentary sometimes indicates that the result is permanent instability or uncertainty in the law of the Constitution governing these matters, from an executive branch perspective the basic structure of the constitutional distribution of authority is quite clear, even though the resolution of specific questions can pose some of the most difficult issues of United States constitutional law.

A. The Fundamental Principle: The President as "Constitutional Representative" of the Republic

The President has primary responsibility for the conduct of the foreign affairs of the United States. "Primary" responsibility does not mean, and has never meant in any responsible executive branch statement, exclusive or unlimited authority; Congress clearly has powers of great scope that concern or

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83 In these areas, the role of the judicial branch is limited. The Supreme Court has repeatedly said that for the most part decisions relating to foreign affairs and national security are wholly confided by our Constitution to the political departments of the government, Executive and Legislative. . . . They are decisions of a kind for which the Judiciary has neither aptitude, facilities nor responsibility and which has long been held to belong in the domain of political power not subject to judicial intrusion or inquiry.

Chicago & S. Air Lines, Inc. v. Waterman S.S. Corp., 333 U.S. 103, 111 (1948); see also Rostker v. Goldberg, 453 U.S. 57, 65-66 (1981) (finding it "difficult to conceive of an area of governmental activity in which the courts have less competence" than "military affairs," and that the Court's decisions accordingly display "a healthy deference to legislative and executive judgments in [that area]" (quoting Gilligan v. Morgan, 413 U.S. 1, 10 (1973))). This by no means suggests, of course, that the entire domain of foreign affairs and national security is nonjusticiable. Indeed, courts play a vital role in requiring the political branches to observe the outer limits of the authority conferred on them in these areas, and in adjudicating at least some disputes between Congress and the President over the distribution of authority within this domain. The famous Steel Seizure Case is the classic example: while deciding that the President lacked power to seize the mills, the Court simultaneously protected the claim of private parties not to suffer unlawful intrusion into their property right, upheld Congress's exclusive authority to create federal law regulating labor relations, and rejected any suggestion that during time of war the President's authority as commander in chief provides the executive with a general license to act as it deems best. See Youngstown, 343 U.S. at 579.

bear upon foreign affairs. But the presidency is the institution on which the Constitution places the duty to look to the Republic's interests in the international arena. The executive has independent responsibility for the maintenance of diplomatic relations with other nations, the protection of American rights and the fulfillment of American obligations, the gathering and analysis of information necessary to the formulation of goals and policies in the conduct of foreign affairs, and the formulation and execution of those goals and policies. Because of the intricate interplay and overlap between foreign policy and the preservation of national security, the President's primacy in foreign affairs implies a further primacy in ensuring the security of the Republic. Although the President is dependent on Congress for the provision of most of the tools of foreign policy—the executive cannot itself raise an army or appropriate funds for diplomacy—the President needs no legislative authorization to use such tools as may exist to create and pursue a foreign policy, and in some instances (though not all) is constitutionally entitled to adhere to presidential policy even in the teeth of the contrary wishes of the legislature.

Executive branch officers have articulated this understanding of the Constitution since the beginning of government under the Constitution. In 1790, Secretary of State Thomas Jefferson wrote a formal legal opinion for President Washington in which he asserted that the text and structure of the Constitution give the President plenary and exclusive authority over the conduct of foreign affairs.

The constitution has divided the powers of government into three branches [and] has declared that the executive powers shall be vested in the president, submitting only special articles of it to a negative by the senate . . . .

The transaction of business with foreign nations is executive altogether; it belongs, then, to the head of that department, except as to such portions of it as are specially submitted to the senate. Exceptions are to be construed strictly . . . .

Jefferson's subsequent discussion of the Senate's role in diplomacy made it clear that he did not believe that the Senate, any more than Congress as a whole, had a general duty or power to designate or direct the goals the President was to pursue in the "transaction of business with foreign nations." Jefferson's reasoning and conclusions were repeatedly echoed by other executive branch officials during the founding era, as well as by distinguished constitutionalists outside the executive branch. In 1816, the Senate Foreign

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85 This is a debated assertion. For my attempt to show that it is true of the Washington administration in particular and of various other founding era constitutionalists, see Powell, supra note 12. In the present discussion, I shall rely on the detailed argument there that the early documents quoted in this Essay are properly read to endorse the executive primacy view.

86 Thomas Jefferson, Opinion on the Question Whether the Senate Has the Right to Negative the Grade of Persons Appointed by the Executive to Fill Foreign Missions (Apr. 24, 1790), in 5 The Writings of Thomas Jefferson 161, 161 (Paul L. Ford ed., New York, G.P. Putnam's Sons 1895) (internal quotation marks and citation omitted).

87 The best known noneexecutive statement during the early period is the speech that John Marshall gave in the House of Representatives in March 1800, in which Marshall said that "[t]he [executive] department . . . is entrusted with the whole foreign intercourse of the nation." John
Relations Committee summarized this line of thinking in a report recommending that the Senate refrain from adopting resolutions urging the President to pursue negotiations with the United Kingdom on various matters. The committee reasoned that “the interference of the Senate in the direction of foreign negotiations,” even in so limited a form as a set of precatory resolutions, was “calculated to diminish [the President’s] responsibility” for foreign affairs, and “thereby to impair the best security for the national safety.”

The President is the constitutional representative of the United States with regard to foreign nations. He manages our concerns with foreign nations, and must necessarily be most competent to determine when, how, and upon what subjects negotiation may be urged with the greatest prospect of success. For his conduct he is responsible to the Constitution.

The Constitution’s text expressly delegates several important powers to the President that relate to foreign affairs and national security. Article II makes the President “Commander in Chief of the Army and Navy of the United States, and of the Militia of the several States, when called into the actual Service of the United States,” and it grants the President the power “to make Treaties” and to “appoint Ambassadors, other public Ministers and Consuls” subject to Senate concurrence. Article II also imposes the duty on the President to “receive Ambassadors and other public Ministers” and to “take Care that the Laws be faithfully executed”; it is unclear that the former provision was originally understood to confer much substantive power, but founding era exponents of executive primacy frequently cited the Take Care Clause as one basis for the President’s authority to execute the obligations and protect the rights of the United States in the international sphere. Their acceptance of the executive primacy interpretation of the Constitution, however, seldom if ever rested on any particular clause of Article II. Their
reasoning, instead, involved a complex mixture of textual arguments, often noting the apparent limitation of the Senate to a checking function in appointments and treaty-making, and structural arguments about the implications of the President's undisputed roles in the dispatch and reception of diplomats and the control of the armed forces; they frequently put great weight on pragmatic considerations about the executive's superior capacity for actually carrying out the tasks of foreign policy.94

Early executive branch officers and others thus inferred from the President's enumerated powers and from the goals and functions of the federal government in the area of foreign affairs the principle that the President is the constitutional representative of the people and the Republic in foreign affairs. This view was not universally shared, to be sure, and the actual conduct of foreign affairs, then as now, reflects a complex interplay between international events, policy goals, political concerns, and legal arguments rather than the straightforward execution of anyone's constitutional vision.95 The historical point is that an executive primacy view of the Constitution can rightly claim founding era origins for its account of the President's central authority in foreign affairs.

From an executive branch perspective, this historical background is of great importance in legitimating the executive primacy view; in addition, and crucially, the modern executive branch claims such authority for the President as a matter of constitutional right, and has done so for many decades, across many administrations of both political parties, and with great consistency.96 A central feature of constitutional law from the executive branch perspective, therefore, is the proposition that the Constitution grants the President "plenary authority" over foreign affairs, "subject only to limits specifically set forth in the Constitution or to such statutory limitations that the Constitution permits Congress to impose by exercise of its enumerated pow-

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94 See, e.g., Jefferson, supra note 86, at 162 (resting exclusive presidential authority over location and grade of diplomatic mission on fact that Senate is not "qualified to judge of the necessity which calls for a mission to any particular place, or of the particular grade . . . which special and secret circumstances may call for. All this is left to the president."); Marshall, supra note 87, at 104 (resting presidential role as "sole representative with foreign nations" in part on President's ability to "direct[ ] the force of the nation" and on his possession of "the means of executing" treaties); Senate Report, supra note 88, at 21 (resting presidential role as "constitutional representative" on "[t]he nature of transactions with foreign nations [which] requires caution and unity of design, and [on the fact that] their success frequently depends on secrecy and dispatch").

95 The constitutional history of United States foreign policy in the early years is exhaustively reviewed in Abraham D. Sofaer, War, Foreign Affairs and Constitutional Power: The Origins (1976).

The "authority of the President in foreign affairs" is "presumptively exclusive" and includes "far-reaching discretion to act on his own authority in managing the external relations of the country." This constitutional authority, furthermore, is not limited to the management or execution of policies determined by Congress. Although Congress through legislation, and the President and Senate through treaty-making, may enunciate foreign policy goals and influence foreign policy decisions, it is the President who, as a general matter, is vested with the authority to determine the policies and objectives that the United States should pursue in its international relations.

B. Competing Considerations: The Powers of Congress Over Foreign Affairs

As the Office of Legal Counsel opinion just quoted acknowledges, the President's authority over foreign affairs may be plenary within its scope, but it does not exclude the legislature from participation in the formulation of foreign policy: the Constitution delegates to Congress a variety of powers concerning, directly or potentially, foreign affairs and national security. The executive branch perspective requires that the interpreter accord full recognition to Congress's powers, and one consequence is that interpreters working within that perspective must address extremely complicated constitutional issues posed by the juxtaposition of potentially conflicting executive and legislative powers, neither of which can be simply ignored. Four sources of legislative authority are of particular importance.

(1) Article I, Section 8 "expressly grants Congress, not the President, the power to 'regulate Commerce with foreign Nations.'" As a consequence, "Congress—whose voice, in this area, is the Nation's—possesses broad power to set United States foreign policy with respect to foreign trade and investment." The President has no independent power directly to regulate, tax, or interdict foreign commerce. The executive branch's views on the

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98. Timely Notification, supra note 6, at 162.
99. See supra note 97 and accompanying text.
100. The legislative branch's practical ability to influence foreign policy is not limited to the assertion of the constitutional power of legislation. Congress and its committees can wield influence over the executive's conduct of foreign affairs in a wide variety of ways, including informal interaction with executive branch officials, the exercise of legislative oversight, and nonbinding public expressions of the legislature's views on foreign policy issues. This vitally important topic is beyond the scope of this Essay.
102. Id. at 331.
103. See California Bankers Ass'n v. Shultz, 416 U.S. 21, 59 (1974) (describing Congress's regulatory power over foreign commerce as "plenary"); Export Sales of Agricultural Commodities to Soviet Union and Eastern European Bloc Countries, 42 Op. Att'y Gen. 229, 237-38 (1963) (recognizing that a congressional decision to give the executive discretion over certain international trade issues was a decision "to avoid restricting the Executive unduly" on a subject that Congress could have completely regulated).
104. See United States v. Yoshida Int'l, Inc., 526 F.2d 560, 571-72, 582 (C.C.P.A. 1975) (stating that "no undelegated power to regulate commerce, or to set tariffs, inheres in the Presi-
effect state legislation has on transnational markets, furthermore, are not dispositive on the question of whether the state is violating the dormant foreign commerce clause, and the President’s authority to enter into executive agreements concerning commerce without congressional approval is extremely doubtful. Congress’s possession of substantive policymaking authority, and the President’s control over the means and direction of negotiation, make accommodation between the political branches over foreign commerce issues especially desirable. At least from a constitutional perspective, fast-track legislation (which enhances the President’s ability to negotiate on commercial issues) and a preference for statutorily approved executive agreements over treaties (which ensures the participation of Congress as a body in commercial agreements with other countries) are desirable means of enabling both branches to play appropriate roles in this area.

(2) Several of Congress’s enumerated powers concern national security and military matters. The constitutional text expressly grants Congress the powers to “define and punish Piracies and Felonies committed on the high Seas, and Offenses against the Law of Nations”; to “declare War, grant Letters of Marque and Reprisal, and make Rules concerning Captures on Land and Water”; to “raise and support Armies” and “provide and maintain a Navy”; to “make Rules for the Government and Regulation of the land and naval Forces”; and to enact similar rules with respect to the training and deployment of the militia. These provisions put the legitimacy of congressional involvement in the creation, governance, and use of the armed forces beyond doubt, and advocates of congressional primacy understandably view them as proving the legislature’s preeminence in providing for national security. From the executive branch perspective, the task of the conscientious constitutional interpreter is to resolve particular issues in ways that respect and give appropriate latitude both to these congressional powers and to the President’s authority as constitutional representative in foreign affairs and commander in chief.

Congress’s powers over military matters overlap with the President’s authority as chief executive and commander in chief. The President appoints and commissions military officers in accordance with the relevant provisions of Article II, for example, but Congress’s rulemaking authority over the governance of the armed forces empowers it to create the general principles and procedure governing appointment and promotion. The central issue in this area, however, involves the relationship between the legislative power to de-

dency”; the Constitution grants the power “to ‘regulate commerce’ to the Congress, not to the Executive” and Congress “remains the ultimate decisionmaker and the fundamental reservoir of power to regulate commerce”); The Orono, 18 F. Cas. 830 (C.C.D. Mass. 1812) (No. 10,585) (Story, Circuit Justice) (asserting that the President “has no common law prerogative to interdict commercial intercourse with any nation . . . . His authority for this purpose must be derived from some positive law . . . .”).

105 See Barclays Bank, 112 U.S. at 329-30.
106 U.S. Const. art. I, § 8, cl. 10-16.
107 See generally Promotion of Marine Officer, 41 Op. Att’y Gen. 291, 293-94 (1956) (asserting that although statutes creating a military promotion system are valid, in appropriate circumstances the President may “depart from the statutory procedures and . . . . rely on constitutional authority to appoint key military personnel to positions of high responsibility”).
clare war and the powers of the President. The executive branch and the
courts have long recognized that the President’s responsibilities as constitutio-
nal representative of the United States in foreign affairs entail significant
independent authority to advance foreign policy goals and safeguard the se-
curity of the United States through the threat or use of military force. The
argument often made by proponents of congressional primacy that Congress
has (near-) plenary power over decisions to use military force, and that legis-
lative authorization is (almost always) necessary to render the use of force
lawful, is wrong in principle. At the same time, the Declaration of War
Clause and the overall place of Congress in the constitutional structure must
be read to accord the legislature the powers to limit or terminate the use of
force and to determine whether the nation should voluntarily enter into
armed conflicts that exhibit the intensity or the legal ramifications of
“war.”

(3) The Constitution clearly requires that the federal government’s
spending power be exercised only under legislative authority. Congress
therefore may affect or curtail the exercise of the President’s authority over
foreign affairs through its control of funding. At an early stage in the na-
tion’s history, the executive branch conceded that its constitutional authority
in that area does not empower it to expend government monies that have not
been appropriated for the purpose, even though the practical result is that
the executive is prevented from carrying out its responsibilities. In
the area of foreign affairs as elsewhere, “Congress holds the purse strings, and it
may grant or withhold appropriations as it chooses, and when making an
appropriation may direct the purposes to which the appropriation shall be de-
voted and impose conditions in respect to its use.”

Congress’s power over spending thus gives it a far-reaching, but not un-
limited, ability to influence or regulate the President’s exercise of authority
over foreign affairs. As a general proposition of constitutional law, it is true
that “[b]road as the spending power of the Legislative Branch undoubtedly
is, it is clear that Congress may not deploy it to accomplish unconstitutional
ends.” This principle takes a pointed form when the legislative branch at-
tempts to employ the spending power to usurp an autonomous presidential

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108 I give more detailed attention to the scope of the Declaration of War Clause in the
discussion below of the President’s military authority.
109 In addition to delegating Congress the powers to raise revenue and to spend monies for
“the common Defence and general Welfare,” U.S. Const. art. I, § 8, cl. 1, the constitutional text
expressly provides that “[n]o Money shall be drawn from the Treasury, but in Consequence of
Appropriations made by Law,” id. § 9, cl. 7, and prohibits any appropriation of funds for the
army “for a longer Term than two Years.” Id. § 8, cl. 12.
186, 209 (1855) [hereinafter Ambassadors] (“The President’s power of appointment is practically
limited, to a certain degree, by the necessity of obtaining appropriations from Congress to defray
the expenses of a mission . . . “); Expense of Presents to Foreign Governments—How Defrayed,
4 Op. Att’y Gen. 358, 359 (1845) (stating that in “the conduct of our foreign relations,” the
executive “cannot exceed the amount . . . appropriated”); Advances to Public Ministers, 2 Op.
Att’y Gen. 204, 206-07 (1829).
111 Constitutionality of Proposed Legislation Affecting Tax Refunds, 37 Op. Att’y Gen. 56,
61 (1933) [hereinafter Tax Refunds].
112 Mexican Debt, supra note 55, at 684.
power: ""Congress cannot use the appropriations power to control a Presidential power that is beyond its direct control.""\textsuperscript{113} A condition on the appropriation or expenditure of funds is invalid if it is properly analyzed as an attempt either to exercise an autonomous executive power or to compel the President to employ such a power in accordance with congressional policy.\textsuperscript{114} The classic example of a condition on spending that raised the issue of interference with the President's constitutional authority occurred in 1860, when a congressional appropriations bill appeared on its face to condition the availability of funds for a particular Army project to its supervision by a named officer, Captain Montgomery Meigs, of the Corps of Engineers.\textsuperscript{115} In a statement accompanying his signature of the bill, President Buchanan stated that if the bill were so construed it would ""interfere with the clear right of the President to command the Army and to order its officers to any duty he might deem most expedient for the public interest.""\textsuperscript{116} He therefore construed the bill's reference to Captain Meigs as a mere statement of congressional ""preference"" that did not purport to interfere with his ""perfect right"" to order Meigs to some other duty.\textsuperscript{117}

The doctrine of unconstitutional conditions is clear; its application in this area (as in other areas of constitutional law), however, frequently is not. It is often unclear whether to interpret a conditional spending provision as a legislative assumption of authority the Constitution grants to the President, or as the legitimate use of a congressional power to express congressional views on foreign policy, or even to accomplish other proper legislative goals, in a manner that affects, without usurping, presidential authority. The 1860 bill's mention of Captain Meigs would have been a clear violation of the President's command authority if interpreted as more than precatory\textsuperscript{118} as a consequence, the only interpretive problem it presented was whether its words could be read other than as an attempt to bind the President legally. At times, however, the proper force and purpose to ascribe to a conditional spending provision for the purposes of analyzing its constitutionality is itself debatable. A recent example of this problem was presented by the Jerusalem Embassy Act of 1995, which provided that only fifty percent of the funds

\textsuperscript{113} Id. at 685 (citation omitted). See Mutual Security Program—Cutoff of Funds from Office of Inspector General and Comptroller, 41 Op. Att'y Gen. 507, 530 (1960) [hereinafter Mutual Security Program] (""[T]he Constitution does not permit any indirect encroachment by Congress upon the authority of the President through resort to conditions attached to appropriations.""); see also William H. Taft, The Boundaries Between the Executive, the Legislative and the Judicial Branches of the Government, 25 Yale L.J. 599, 612 (1916) (characterizing such conditions as an unconstitutional interference with the President's responsibilities).

\textsuperscript{114} ""Congress may not, by conditions attached to appropriations, provide for a discharge of the functions of Government in a manner not authorized by the Constitution. If such a practice were permissible, Congress could subvert the Constitution."" Tax Refunds, supra note 111, at 61.

\textsuperscript{115} See infra notes 116-118 and accompanying text.

\textsuperscript{116} James Buchanan, Message to the House of Representatives (June 25, 1860), in 7 Messages and Papers of the Presidents 3128, 3129 (James D. Richardson ed., 1897) [hereinafter Messages & Papers].

\textsuperscript{117} See id.; see also Memorial of Captain Meigs, 9 Op. Att'y Gen. 462, 468-70 (1860) (endorsing the President's constitutional views and his avoidance of a constitutional problem through statutory construction).

\textsuperscript{118} See infra notes 121-121 and accompanying text.
appropriated for United States diplomatic buildings in fiscal year 1999 could be obligated until the executive branch informed Congress that a new United States embassy in Jerusalem was open. 119 Interpreted simply as a means of insisting that the executive abide by the legislature's timetable for the construction of a new building, the condition would be uncontrovertially valid, although the executive might object to it on policy grounds. If, in contrast, the condition were interpreted as a means of coercing the executive branch into taking a particular position on Jerusalem's status, there would be a serious question whether it was a usurpation of the President's exclusive authority to recognize foreign governments. 120

When a conditional spending provision must be interpreted as an unconstitutional interference with the President's authority, another difficult question presents itself: the consequence of finding the condition invalid. Because under ordinary circumstances it is constitutional for Congress simply to deny the President the authority to spend funds for a particular purpose, one could argue that the unconstitutionality of a condition on spending always renders the entire appropriation invalid and makes the funds unavailable. The executive branch has not accepted this position. In his opinion in the case of Captain Meigs, Attorney General Jeremiah S. Black reasoned that "if a condition . . . is void, it can have no effect whatever either upon the subject-matter or upon other parts of the law to which it is appended. . . . [The President is] therefore entirely justified in treating this condition (if it be a condition) as if the paper on which it is written were blank." 121 Subsequent executive branch opinions suggest a more nuanced position than either the hypothesized argument or that of Attorney General Black: the effect of an invalid condition on the appropriation it purports to condition depends on whether Congress's main purpose in enacting the appropriation was to create a means of forcing the congressional policy embodied in the condition on the President. If that is so, it would be inappropriate to interpret the statute to provide the funds free of the condition. If, on the other hand, the better reading of Congress's will is that the provision of the funds was in itself a legislative goal, Black's conclusion follows and the funds have been validly appropriated without being subject to the invalid condition. 122 It is unclear that this is in fact the current view of the executive branch, although I believe


120 In fact, the Department of Justice gave the Act the latter interpretation, and on that basis concluded that the spending condition was unconstitutional. See Malvina Halberstam, The Jerusalem Embassy Act, 19 Fordham Int'l L.J. 1379, 1381 (1996) (describing the Justice Department's position). The point, of both the Act and the executive branch's objection to it, is that the United States has maintained its embassy to Israel in Tel Aviv even though Israel's capital, from Israel's perspective, has been Jerusalem for many years.

121 Memorial of Captain Meigs, supra note 117, at 469-70. Attorney General Black noted the close analogy between unconstitutional conditions on spending and conditions on grants illegal at common law: "The principle universally applied to public and private grants is, that where a grant is made upon an illegal condition, the grant is absolute and the condition void." Id. at 469.

122 See generally Mutual Security Program, supra note 113, at 530-31 (discussing effects of invalid condition); Mexican Debt, supra note 55, at 673 (same).
it to be a position consistent with an executive branch perspective and one that has a significant advantage over an across-the-board adoption of Attorney General Black’s approach: the proposed position enables the interpreter to adhere more closely to Congress’s probable purposes in utilizing its spending power while insisting on the invalidity of legislative attempts to usurp executive authority.

(4) Congress possesses legislative power with respect to all the institutions and responsibilities of the federal government; the final grant of authority in Article I, Section 8 is the power “[t]o make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers [of Congress], and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof.” 123 “The Necessary and Proper Clause . . . authorizes Congress not only to choose any appropriate means of exercising the legislative powers it has been delegated, but also, ‘to exercise its best judgment in the selection of measures to carry into execution the constitutional powers of the government’ as a whole.” 124 Executive primacy in foreign affairs therefore does not entail congressional exclusion from the area, 125 and as already noted, many of the President’s specific constitutional powers over foreign affairs are not autonomous, but are rather subject to regulation or curtailment through legislation. Even with respect to executive powers that are autonomous and cannot be denied or controlled by statute, Congress has legislative authority to support or enhance the President’s ability to exercise those powers, or to decline to do so and thus leave the President with whatever tools otherwise exist. 126

C. Reconciling Presidential and Congressional Authority

As the preceding discussion of conditional spending indicates, the executive branch perspective involves challenging questions of how to reconcile the existence of the President’s broad authority as constitutional representative of the United States in foreign affairs with Congress’s far-reaching powers. It is as unacceptable to allow Congress to seize control of the executive’s responsibilities for foreign policy and national security as it is to give crabbed readings to the authority of the national legislature to provide for the common defense and general welfare. Responsible constitutional reasoning from the executive branch perspective seeks to serve both of these goals: “we fully acknowledge the broad sweep of Congress’s powers while insisting, as we must, that those powers cannot be legitimately employed so as to undermine

123 U.S. Const. art. I, § 8, cl. 18.
124 Dellinger Memo, supra note 14, at *39-40 n.16 (quoting McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 420 (1819)).
125 See Kennedy v. Mendoza-Martinez, 372 U.S. 144, 160 (1963) (“Congress has broad power under the Necessary and Proper Clause to enact legislation for the regulation of foreign affairs.”).
126 For example, the President’s control over the confidentiality of diplomatic information is an autonomous power and Congress is without power to compel the President to disclose such information. See infra notes 162-162 and accompanying text. But Congress does have the legislative power to provide civil or criminal sanctions for unauthorized disclosures, and its decision whether to do so and, if so, in what form, obviously has a significant effect on the President’s practical ability to exercise his or her constitutional authority.
the constitutional authority of the executive branch."  Understood from
the executive branch perspective, in other words, executive primacy in for-
eign affairs and national security is a faithful exposition not only of judicial
precedent and historical practice, but also of the fundamental notion that the
Constitution is meant to provide checks on the tendency of power, including
executive power, to become arbitrary. As I noted in the Introduction, execu-
tive primacy is a persuasive interpretation of the Constitution only if it can
generate a set of doctrines concerning power over foreign affairs and national
security that makes sense in light of the whole of constitutional law. The next
Part of this Essay provides a schematic outline of those doctrines, a descrip-
tion of the executive primacy position rather than a direct defense of its supe-
rioritv over competing views of the Constitution.

III. An Outline of the President’s Constitutional Authority Over
Foreign Affairs

The formulation and conduct of United States foreign policy and the
protection of national security involve over time an indefinitely large number
of factual situations and governmental decisions. As a consequence, a read-
ing of the Constitution that accords the President primacy in these areas will
lead over time, and over two centuries has led, to a rather large and, at first
glance, heterogeneous collection of judgments about what actions the Presi-
dent may undertake on his own authority, which require congressional ap-
proval, and how to resolve disputes between the President and Congress
about what is to be done. I believe, however, that these judgments fall into
logical clusters, reflecting an underlying coherence of vision about the con-
crete implications of the executive primacy view. The subsections into which
I have divided the following discussion attempt to describe this underlying
coherence. The discussion itself is, for the most part, a series of statements
rather than a sustained argument for their legal validity; as I noted in the
Introduction, my goal is simply to indicate that the executive branch perspec-
tive can generate a sensible set of propositions about the law of the Con-
stitution.

The United States possesses “all the attributes of sovereignty [and] pow-
ers of nationality, especially those which concern its relations and intercourse
with other countries.”  As constitutional representative of the United
States in its external relations, the President is the presumptive locus of all
those “powers of nationality . . . which concern its relations and intercourse
with other countries.”  These powers can be usefully divided into five gen-
eral categories: the powers of recognition, negotiation, treaty-making, inter-
national advocacy, and national security. These categories are not, of course,
mutually exclusive or hermetically sealed, and a single action or issue in the
foreign affairs area can involve several at once. Nonetheless, I believe that
the suggested divisions illuminate the meaning, interrelationship, and limits

127 Dellinger Memo, supra note 14, at *39-40 n.16.
129 Id.
of the specific presidential powers the courts and the executive branch have identified.

A. The Recognition Power

The Constitution "authorize[s] the President to determine the form and manner in which the United States will maintain relations with foreign nations." A fundamental aspect of that authority is the power to decide which foreign nations—or to be more exact, which foreign governments and would-be governments—the United States will recognize for the purpose of establishing and maintaining relations. This aspect of the President's foreign affairs authority is an autonomous power. "Political recognition is exclusively a function of the Executive." The Constitution should be read to accord the President broad enough power under this heading to make recognition an effective tool "in handling the delicate problems of foreign relations," and thus to authorize the President to take actions in connection with recognition whenever denying the executive the ability to do so would mean that "the power of recognition might be thwarted or seriously diluted." The recognition power also includes the independent discretion to determine what policies the United States will pursue through the extension or denial of recognition: "That authority is not limited to a determination of the government to be recognized. It includes the power to determine the policy which is to govern the question of recognition." The President's recognition power, finally, extends to forms of interaction acknowledgment that fall short of full diplomatic recognition, and once again the decision of what form and level of dealings to have with a foreign government is exclusively executive.

The leading Supreme Court cases construing the recognition power date from the 1930s, and both cases concerned the President's authority, in negotiating an agreement to recognize the Soviet government, to enter into agreements with that government settling or assigning outstanding claims between the two countries. The Court upheld the validity of that authority as "a modest implied power of the President," and recognized that the resulting agreements had the force of law and displaced contrary state laws under the

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131 Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398, 410 (1964); see also Goldwater v. Carter, 444 U.S. 996, 1007 (1979) (Brennan, J., dissenting) ("Our cases firmly establish that the Constitution commits to the President alone the power to recognize, and withdraw recognition from, foreign regimes."); United States v. Pink, 315 U.S. 203, 229-30 (1942) (finding that the power to recognize foreign governments belongs solely to the executive); United States v. Belmont, 301 U.S. 324, 330 (1937) (stating that "the Executive had authority to speak as the sole organ of th[e] government" in negotiating and extending recognition to a government).
132 See Pink, 315 U.S. at 229-30; see also Belmont, 301 U.S. at 330.
133 Pink, 315 U.S. at 229.
134 The President's exclusive authority over recognition and diplomacy is not limited to those situations in which formal recognition is contemplated. See generally 54 Cong. Rec. 663 (1897) (Memorandum upon Power to Recognize Independence of a New Foreign State) (analyzing historical practice). The President's power to extend recognition to a de facto government as a belligerent, logically part of the recognition power, also involves issues of international law and advocacy that are independently part of the executive's authority over foreign affairs. See Baker v. Carr, 369 U.S. 186, 212-13 (1962).
Supremacy Clause. Other aspects of the recognition power that the courts or the executive have identified are the power to control the access of foreign governments to courts in the United States, the powers “to refuse to receive [foreign diplomats], to require their departure, and to determine their eligibility under our laws” for diplomatic status.

As an autonomous executive power, the recognition power neither requires legislative approval nor is subject to direct legislative control. The executive branch has therefore resisted legislative attempts to usurp or undermine the free exercise of the recognition power. The seminal case occurred during the administration of President Grant, when Congress sent the President an appropriations bill purporting to require the executive to shut down certain diplomatic posts. President Grant signed the bill but informed Congress that it was his “duty to call attention to a provision in the act directing that notice be sent to certain of the diplomatic and consular officers of the Government ‘to close their offices.’” Grant reasoned that if the provision were given its “literal sense,” it would be an attempt “to direct the closing or discontinuing . . . of the diplomatic or consular offices of the Government,” thus directly affecting the effective level of recognition the United States was extending the foreign states involved. Because this “would be an invasion of the constitutional prerogatives and duty of the Executive. . . . which [he] should be compelled to resist,” Grant construed the provision as limited to “fix[ing] a time at which the compensation of certain diplomatic and consular officers shall cease.”

135 See Pink, 315 U.S. at 229-30; see also Belmont, 301 U.S. at 330-31 (finding that “the negotiations, acceptance of the assignment and agreements and understandings in respect thereof were within the competence of the President may not be doubted” and that “[t]he supremacy of these agreements has been recognized from the beginning”).

136 See Pfizer Inc. v. Government of India, 434 U.S. 308, 319-20 (1978) (“It has long been established that only governments recognized by the United States and at peace with us are entitled to access to our courts, and that it is within the exclusive power of the Executive Branch to determine which nations are entitled to sue.”).

137 Presidential Power to Expel Diplomatic Personnel from the United States, 4A Op. O.L.C. 207, 209 (1980); see also United States v. Benner, 24 F. Cas. 1084, 1086 (C.C.E.D. Pa. 1830) (No. 14,568) (Baldwin, Circuit Justice). In his charge to the jury, Justice Baldwin stated: In the reception of ambassadors and ministers, the president is the government, he judges of the mode of reception, and by the act of reception, the person so received, becomes at once clothed with all the immunities which the law of nations and the United States, attach to the diplomatic character.

138 See Pink, 315 U.S. at 229 (stating that the President's powers do not require “consent of the Senate”); Belmont, 301 U.S. at 330 (asserting that “recognition, establishment of diplomatic relations, the assignment of outstanding claims, and agreements with respect thereto” were all matters on which “the Executive had authority to speak as the sole organ of the [g]overnment”); Benner, 24 F. Cas. at 1086 (declaring that the President's power to receive public ministers “is plenary and supreme, [and] no other department of the government can interfere”).


140 See id. at 377-78.

141 Id. Two decades earlier, Attorney General Caleb Cushing anticipated Grant's assertion that Congress can neither require nor forbid the President to appoint diplomatic officers in a particular country and thus, in effect, recognize or terminate relations with that country. See Appointment of Consuls, 7 Op. Att’y Gen. 242, 250 (1855). Because “public ministers, as a
B. The Negotiation Power

1. Negotiations in General

The President's authority over foreign affairs encompasses the processes and purposes of diplomacy: the President has plenary and exclusive control over negotiation with foreign nations and other entities, subject to the Senate's role in the appointment of diplomatic officers. Like the recognition power, the negotiation power is a direct and obvious corollary of the President's basic role as constitutional representative of the United States in foreign affairs, and the courts and the executive branch acknowledged it at an early point. The executive branch has consistently maintained, furthermore, that the negotiation power is, in my terminology, an autonomous power: "In the conduct of negotiations with foreign governments, it is imperative that the United States speak with one voice. The Constitution provides that that one voice is the President's." The courts have agreed. "The President alone has the authority to negotiate treaties with foreign countries. 'Into the field of negotiation the Senate cannot intrude; and Congress itself is powerless to invade it.' . . . [The negotiation] power [is] exclusively granted to the Executive Branch under the Constitution." Congress therefore cannot require "that the Executive initiate discussions with foreign nations" or "order[ ] the Executive to negotiate and enter into treaties" or other types of international agreements.

Like the recognition power, the executive's power over negotiations vests in it the discretion to determine the goals as well as the modes of diplomacy: the power includes the "exclusive authority to determine the time, class, are created by the Constitution . . . not by act of Congress," the President needs no statutory basis for appointing diplomatic officers with the advice and consent of the Senate, and may undertake new diplomatic initiatives without even Senate concurrence when "no 'ambassador' or other 'public minister' exists . . . and the exigency for some springs up" during a Senate recess. Ambassadors, supra note 110, at 212. Cushing also anticipated Grant's acknowledgment that Congress may affect the exercise of the President's recognition power through its control over spending. See id. at 209 (noting that "[t]he President's power of appointment is practically limited, to a certain degree, by the necessity of obtaining appropriations from Congress to defray the expenses of a mission").

142 See Chas. T. Main Int'l v. Khuzestan Water & Power Auth., 651 F.2d 800, 813 (1st Cir. 1981) ("As the Supreme Court has consistently recognized, it is the President who is charged with responsibility as the United States' representative and negotiator in the international arena.").

143 See, e.g., Ex parte Hennen, 38 U.S. (13 Pet.) 230, 235 (1839) ("As the executive magistrate of the country, [the President] is the only functionary intrusted with the foreign relations of the nation."); Jefferson, supra note 86, at 161 ("The transaction of business with foreign nations is executive altogether."); Senate Report, supra note 88, at 21 ("The President is the constitutional representative of the United States with regard to foreign nations. He manages our concerns with foreign nations . . . .").

144 See infra notes 153-155 and accompanying text.


146 Id. at 652-53.
scope, and objectives" of all negotiations. The range of subjects on which the President may negotiate, and thus on which the executive may formulate and pursue policy, is very broad. The President may pursue domestic policy goals through international negotiations, and in doing so may affect the practical choices open to Congress in carrying out its legislative responsibilities. The President is equally free to choose the particular means and modes of diplomacy. Executive branch officers have repeatedly denied that the President is obligated to carry out diplomacy through officers appointed with Senate advice and consent, and the Department of Justice has formally denied the validity of statutory limitations on the President's discretion to conduct negotiations secretly.

2. Executive Agreements

Since the beginning of the Republic, the executive branch has entered into agreements with other nations that are intended to have legal force and effect, and yet are not submitted to the Senate for its concurrence under the constitutionally ordained treaty-making procedure. Such executive agree-

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148 See United States Military and Naval Bases in the Philippines, 41 Op. Att'y Gen. 143, 163 (1953) (stating that "the President is authorized by the Constitution to negotiate on any appropriate subject for negotiation with a foreign government").

149 See Waiver of Claims for Damages Arising out of Cooperative Space Activity, Op. O.L.C. (June 7, 1995), available in 1995 WL 917147, at *8 n.19 ("'Usually, matters of international concern have both international and domestic effects, and the existence of the latter does not remove a matter from international concern.'" (citations omitted)). The extent to which the executive can settle private claims between the United States and another country without statutory authority, except in the context of recognition, is unclear—the authorities are split. Compare Dames & Moore v. Regan, 453 U.S. 654, 680 (1981) ("Crucial to our decision today is the conclusion that Congress has implicitly approved the practice of claim settlement by executive agreement"); with Ozanic v. United States, 188 F.2d 228, 231 (2d Cir. 1951) (Hand, C.J.) ("[i]t would be unreasonable to circumscribe [the executive power to settle claims] to . . . controversies" that are "incident to the recognition of [a] government").

150 See United States v. Louisiana, 363 U.S. 1, 35 (1960) (holding that although Congress has the power to determine boundaries of new states, the President has "the power to determine how far this country will claim territorial rights . . . as against other nations").

151 See, e.g., Ambassadors, supra note 110, at 197 ("[T]he President may negotiate a treaty through the intervention of a person not commissioned, or intended to be commissioned, on a nomination to the Senate."); Authorization Bill, supra note 144, at 41 (claiming that the President is vested with the "constitutional responsibility . . . to choose the individuals through whom the Nation's foreign affairs are conducted"). These statements probably should not be read to suggest that it would be constitutionally appropriate for the President to determine to carry out diplomacy as a general matter through lower-rank officials or private agents; the President's authority to choose diplomats must be balanced against the constitutional expectation embodied in the Senate's advice and consent role in the appointment of ambassadors and other public ministers.

152 See Timely Notification, supra note 6, at 165.

153 See Weinberger v. Rossi, 456 U.S. 25, 30 n.6 (1982) ("We have recognized . . . that the President may enter into certain binding agreements with foreign nations without complying with the formalities required by the Treaty Clause . . . ."); Postal Conventions with Foreign Countries, 19 Op. Att'y Gen. 513, 519 (1890); Whether the GATT Uruguay Round Must Be Ratified as a Treaty, O.L.C. Memorandum to Ambassador Michael Kantor at 2-4 (July 29, 1994) [hereinafter GATT I] (on file with The George Washington Law Review).
ments are always, at least in part, an exercise of the President’s negotiation power, but their precise legal force may depend on whether the President is acting not only on the basis of executive authority but also pursuant to a statute. The legitimacy of such “congressional-executive agreements” is settled: the Supreme Court has squarely rejected arguments that they are an invalid delegation of power to the President or the House of Representatives, or an improper invasion of the Senate’s advice and consent power. From the executive branch perspective, there seems no obvious reason to doubt that a congressional-executive agreement is a legitimate alternative to a treaty on any subject within the legislative authority of Congress, and historical practice supports the conclusion that under such circumstances “[n]othing in the . . . Constitution . . . constrain[s Congress and the President] to choose one procedure rather than the other.” The executive branch has not clearly asserted the broader claim that “the Congressional-Executive agreement is a complete alternative to a treaty,” however, and under the modern, liberal view of Congress’s powers, accepting that claim would seem to render the treaty power almost nugatory.

In some circumstances the President may enter into international agreements based solely on his or her independent constitutional authority. The Supreme Court’s decisions in United States v. Belmont and United States v. Pink, discussed earlier, establish that the President may make such “sole executive agreements” pursuant to the recognition power, and that under such circumstances the agreements have binding legal force, at least against contrary state law. Outside the context of recognition, although a sole executive agreement may well have international law implications, its legal force from the standpoint of the United States legal system seems debatable. The essentially unlimited scope of the President’s negotiation power, if that were the measure of the breadth of the President’s authority to enter into binding sole executive agreements, would make such agreements a virtually

154 The President may presumably negotiate executive agreements based in part on authority granted the executive branch by a treaty, but there appears to be little published authority on this topic.

155 See Hampton & Co. v. United States, 276 U.S. 394, 410-11 (1928); Field v. Clark, 143 U.S. 649, 694 (1892). “[I]t has been a well established principle of our constitutional law that the Congress, as distinguished from the Senate alone, may direct and participate in the making or implementation of certain international agreements.” GATT I, supra note 153, at 2 (quoting Memorandum for the Attorney General from J. Lee Rankin, Assistant Attorney General, at 24 (Nov. 19, 1954)).

156 See GATT II, supra note 21, at *10.

157 See GATT I, supra note 153, at 4 (quoting Louis Henkin, Foreign Affairs and the Constitution 175-76 (1975)).

158 The executive branch has suggested the existence of this power since the early Republic. See, e.g., Message to the Senate from President James Monroe (Apr. 6, 1818), in 2 Messages & Papers, supra note 116, at 33 (raising question of whether agreement on naval armaments negotiated with Great Britain is “such an arrangement as the Executive is competent to enter into by the powers vested in it by the Constitution” without the advice and consent of the Senate).

159 301 U.S. 324 (1937).


161 See supra notes 131-131 and accompanying text.
complete alternative to treaties. That conclusion seems unacceptable on principle, and there is little or no judicial or executive branch support for it.

3. *The Confidentiality of Diplomatic Information*

One of the oldest and most clearly settled aspects of the President’s negotiation power is the executive’s authority to control the release of diplomatic information and state secrets. The executive first asserted the power, and its autonomy from control by legislative action, during the Washington administration.\(^{162}\) Modern judicial and executive branch opinions concur:

The President’s constitutional authority to control the disclosure of documents and information relating to diplomatic communications has been recognized since the beginning of the Republic. . . . \[^{163}\] The Constitution delegates to the President the authority to withhold documents relating to diplomatic negotiations from Congress when disclosure would be, in his judgment, contrary to the public interest.

The President’s assertion of the need to withhold diplomatic information, unlike a claim of executive privilege, is not ordinarily subject to review and reversal by the courts or Congress.\(^{164}\)

C. *The Treaty Power*

The Constitution expressly delegates to the President the power to make treaties “by and with the Advice and Consent of the Senate . . . provided two thirds of the Senators present concur.”\(^{165}\) Historical practice dating from a very early period has settled the proper understanding of the Senate’s role: although the President may certainly consult with the Senate prior to negotiating a treaty, it is constitutionally permissible for the executive to decide on negotiations and to negotiate a treaty entirely on its own understanding of the nation’s interests, and only then to present the treaty to the Senate for its approval.\(^{166}\) In any event, the Senate has no lawful authority to intrude itself into the process of treaty negotiation.\(^{167}\) The Senate is not, on the other hand, confined to a simple up or down vote on a treaty that the President

\(^{162}\) See Powell, supra note 12.

\(^{163}\) Mexican Debt, supra note 55, at 688.

\(^{164}\) See Halkin v. Helms, 598 F.2d 1, 7 (D.C. Cir. 1978) (declaring that presidential control over communications containing state secrets is absolute); Mexican Debt, supra note 55, at 695 (“Authority over diplomatic information, unlike certain other constitutionally grounded privileges, is not subject to balancing: it is absolute.”). A bona fide need to obtain diplomatic information in the context of an impeachment proceeding, and against presidential objection, would raise difficult constitutional questions.

\(^{165}\) U.S. Const. art. II, § 2, cl. 2.

\(^{166}\) See Constitutionality of Proposed Conditions to Senate Consent to the Interim Convention on Conservation of North Pacific Fur Seals, 10 Op. O.L.C. 12, 16 (1986) [hereinafter Fur Seals] (“In practice, the Senate’s formal participation in the treaty-making process has been to approve, to approve with conditions, or to disapprove treaties negotiated by the Executive.”). The practice was settled at an early stage. See 3 Joseph Story, Commentaries on the Constitution of the United States § 1517 (Boston, Hilliard, Gray & Co. 1833).

\(^{167}\) See United States v. Curtiss-Wright Export Corp., 299 U.S. 304, 319 (1936) (“Into the field of negotiation the Senate cannot intrude.”). This constitutional preclusion of the Senate
submits: it may attach conditions or reservations to its consent, and these are
binding on the President if he or she proceeds to ratify the treaty. But the
device of conditions and reservations is a historically sanctioned means by
which the Senate can to some degree shape the treaty it is willing to endorse,
not a means by which it can circumvent the constitutional division of foreign
affairs powers. A condition that purported to bind the President with respect
to future exercises of his or her constitutional authority would not be legally
binding.

The President is generally charged with the duty to “take Care that the
Laws be faithfully executed,” but the courts and the executive have long
recognized that this duty takes on special dimensions with respect to the law
of treaties. Both for this reason and because the interpretation of treaties
cannot be separated from the President’s power over international advocacy,
the courts give substantial deference to the executive’s construction of treaty
provisions, and Congress cannot impose its views of what a treaty means
on the executive through legislation.

Despite its obvious importance and the substantial history surrounding
the issue, the question of which political branch has the power to withdraw
from or terminate treaties remains unsettled. The executive has long as-
does not, of course, prevent the President from deciding to involve the Senate or its members in
any part of the process.

168 See, e.g., United States v. Stuart, 489 U.S. 355, 375 (1989) (Scalia, J., concurring in judg-
ment) (“If [the conditions] are not agreed to by the President, his only constitutionally permis-
sible course is to decline to ratify the treaty.”); Haver v. Yaker, 76 U.S. (9 Wall.) 32, 35 (1869)
(stating that “the Senate [is] not required to adopt or reject [a treaty submitted to it by the
President] as a whole, but may modify or amend it.”).

169 See Fur Seals, supra note 166, at 17-18 (concluding that a proposed conditional reservation
obliging the executive to take certain positions in future negotiations would not bind the
executive because it “takes effect only after the scope of the legal obligations of all parties has
been agreed upon”). Presidential ratification of a treaty approved with such an unconstitutional
condition could not, of course, legally bind either the ratifying President or a successor.

170 U.S. CONST. art. II, § 3.

171 See United States v. The Amistad, 40 U.S. (15 Pet.) 518, 571-72 (1841) (“[T]he execution
of treaties being connected with public and foreign relations, is devolved upon the executive
to the observance of treaties is an executive responsibility.” (citing Jefferson Letter, in 4 MOORE,
DIOET INTR. L. 680-81 (1906)).

172 See, e.g., Charlton v. Kelly, 229 U.S. 447, 468 (1913); Mendaro v. World Bank, 717 F.2d
610, 620-21 (D.C. Cir. 1983).

173 See RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 326
& cmt. a (1986). See also SENATE COMMITTEE ON FOREIGN RELATIONS, 102d CONG., TREATIES
AND OTHER INTERNATIONAL AGREEMENTS: THE ROLE OF THE UNITED STATES SENATE XXX-
xxv (Comm. Print 1993) (“The executive branch has the primary responsibility for carrying out
treaties and ascertaining that other parties fulfill their obligations . . . . The executive branch
interprets the requirements of an agreement as it carries out its provisions.”).

174 The question of the power to terminate a treaty as an exercise of constitutional authority
must not be confused with two quite different issues, on which there is no ambiguity: the
power to displace a treaty for purposes of domestic United States law, and the power to termi-
nate the United States’ treaty obligations under international law. Congress has the undoubted
power to end the domestic legal force of a treaty simply by passing inconsistent legislation, even
when the treaty is self-executing:

It is well settled by the decisions of the United States Supreme Court that
treaty provisions, which are self-executing in the sense that they require no addi-
sserted, without, to my knowledge, congressional challenge, the power to determine when the United States can and should declare a treaty inoperative or suspended under international law principles. A United States court of appeals, furthermore, has upheld the President's unilateral authority to terminate a treaty as part of the exercise of the recognition power. And in the absence of contrary practice, the close connection between treaty termination and the President's undoubted powers of recognition, negotiation, treaty interpretation, and international advocacy strongly suggests that, in principle, the power to terminate treaties is exclusively vested in the President. Historical practice and judicial authority negate this conclusion, however, and the executive branch has conceded that "[t]he authorities treat the power of Congress to enact statutes that supersede executive agreements and treaties for purposes of domestic law as a plenary one, not subject to exceptions based on the President's broad powers concerning foreign affairs." The power of Congress to terminate a treaty over the President's direct objections is unclear.

175 See Goldwater v. Carter, 617 F.2d 697, 706 (D.C. Cir.) (en banc) (stating that the President has authority "to determine whether a treaty has terminated because of a breach, [and] to determine whether a treaty is at an end due to changed circumstances"), vacated on other grounds, 444 U.S. 996 (1979); International Load Line Convention, supra note 171, at 123-24.

176 See Carter, 617 F.2d at 708-09. The Supreme Court vacated the judgment of the court of appeals on justiciability grounds. The only Justice to reach the merits agreed with the court of appeals that the President could unilaterally terminate the treaty under the circumstances. Compare Carter, 444 U.S. at 1007 (Brennan, J., dissenting), with id. at 1002-05 (Rehnquist, J., plurality opinion) (finding the issue to be a political question).

177 The judiciary generally treats the executive branch's view about whether a treaty is still in effect as dispositive. See Trans World Airlines, Inc. v. Franklin Mint Corp., 466 U.S. 243, 253 (1984); Charlton, 229 U.S. at 474.

178 See La Abra Silver Mining Co. v. United States, 175 U.S. 423, 460 (1899) ("It has been adjudged that Congress by legislation, and so far as the people and authorities of the United States are concerned, could abrogate a treaty made between this country and another country."). The first treaty termination in United States history was by statute, see Act of July 7, 1798, 1 Stat. 578 (declaring treaties and consular convention with France no longer "legally obligatory"), and a subsequent Supreme Court decision treated the statute as legally effective. See Chirac v. Chirac, 15 U.S. (2 Wheat.) 259, 272 (1817) (Marshall, C.J.).


180 The executive branch has at least once declined to obey a statute directing the President to terminate certain treaty provisions. See Green Haywood Hackworth, Digest of International Law 322-25 (1943) (discussing Wilson administration's refusal to comply, on constitutional grounds, with provision of Merchant Marine Act of 1920 that purported to direct the President to terminate restrictive clauses of commercial treaties). On that occasion, the Department of State announced that the President had determined that "he d[id] not deem the direction contained in [the statute directing termination] an exercise of any Constitutional power possessed by the Congress." Statement by the State Department (Sept. 24, 1920), in 18 Messages & Papers, supra note 116, at 8871. It is possible to reconcile this executive position
D. The Power of International Advocacy

As a member of the community of nations, the United States has both the power and the responsibility to participate in that community's collective endeavors and the ongoing evolution of public international law. The President's fundamental role as constitutional representative of the United States in that community carries with it the specific power to determine when and what the United States shall speak in international forums, and with respect to questions of international law.

When articulating principles of international law in its relations with other states, the Executive Branch speaks not only as an interpreter of generally accepted and traditional rules, as would the courts, but also as an advocate of standards it believes desirable for the community of nations and protective of national concerns.\(^{181}\)

This power is independent, requiring no statutory authorization for its exercise, but not autonomous, for both Congress and the judiciary participate in it: Congress in exercising its power “[t]o define and punish Piracies and Felonies committed on the high Seas, and Offences against the Law of Nations,”\(^{182}\) and the courts in determining the proper application of international law to cases within their jurisdiction.

The decision whether to participate in an international forum or organization is, in the first instance, a straightforward exercise of the negotiation power, and thus presidential. Participation in ongoing institutions, by contrast, ordinarily requires the United States to enter into standing commitments through treaty or executive agreement, and as discussed above, Congress has the constitutional authority to terminate such commitments, or to render them practically unrealizable by denying funds. On the other hand, there is no sound basis for according Congress the power directly to prohibit United States participation in diplomatic or international discussion, and the executive consistently regards statutes purporting to bind the President to take certain positions in international talks as precatory.\(^{183}\)

E. The Power to Protect the National Security

Judicial opinion and common sense alike suggest a close connection between the conduct of foreign affairs and the preservation of the nation's se-

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181 Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398, 432-33 (1964); see also Rappenecker v. United States, 509 F. Supp. 1024, 1028-29 (N.D. Cal. 1980) (“Under the doctrine of separation of powers, the making of those determinations [under international law] is entrusted to the President.”); International Load Line Convention, supra note 171, at 123-24 (asserting that the President “speak[s] for the nation” in making determinations under international law).

182 U.S. Const. art. I, § 8, cl. 10.

183 See Barr Memo, supra note 14, at 257.
cility. Nonetheless, much of the scholarly discussion of the Constitution's distribution of authority over national security, and in particular over the employment of military force, treats the subject as analytically distinct from the constitutional law of foreign affairs. The consequence, not surprisingly, is that the discussion has a strong tilt toward congressional supremacy in national security: Congress, after all, has a remarkable array of military powers culminating in the Declaration of War Clause, while the executive's only express power, the Commander in Chief Clause, reads plausibly enough in isolation as a limited grant of tactical control over the military. The executive branch perspective, in contrast, insists on analyzing questions about the locus of authority over national security and the use of the armed forces not by "clause-bound interpretation" of discrete constitutional provisions, but through a reading of the Constitution as a whole that construes its individual clauses in light of the overall constitutional structure. Taking this approach, the executive branch has, since Washington, asserted some independent power to protect the national security, and for a century executive branch officers have expressly asserted that the President's constitutional authority to ensure national security is inextricably linked with his or her constitutional authority to conduct foreign affairs.

Solicitor General John K. Richards articulated the basic principle in an 1898 opinion upholding the President's power, "in the absence of legislative enactment, to control the landing of foreign submarine cables."

The preservation of our territorial integrity and the protection of our foreign interests is intrusted, in the first instance, to the President. . . . In the protection of these fundamental rights, which are based upon the Constitution and grow out of the jurisdiction of this nation over its own territory, . . . the President is not limited to the enforcement of specific acts of Congress. [The President] must preserve, protect, and defend those fundamental rights which flow from the Constitution itself and belong to the sovereignty it created.

Richards's opinion rested on longstanding executive branch views about the President's responsibility for preserving the physical and legal integrity of the United States, but his precise language and his clear linkage of executive power to exert force to the President's foreign affairs authority followed a Supreme Court decision. In In re Neagle, the Court stated that the scope of the President's power to enforce the laws of the United States "include[s] the rights, duties and obligations growing out of the Constitution itself, our international relations, and all the protection implied by the nature of the government under the Constitution." Subsequent executive branch opin-

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186 Id. at 25-26.
187 The argument that the Constitution requires the President to preserve the nation's security and interests both physically and legally dates back to the Washington administration. See Powell, supra note 12.
188 135 U.S. 1 (1890).
189 Id. at 64. In re Neagle is not a sport in Supreme Court case law, although its discussion
ions on the distribution of authority over national security issues are best understood as resting on the recognition, implicit from the beginning but given clear voice by Solicitor General Richards and In re Neagle, that the President’s broad constitutional authority over foreign affairs necessarily provides the executive with a significant measure of independent power to use the force of the nation to protect the interests of the nation.\textsuperscript{190} The judiciary, as well, has repeatedly drawn an analytical link between the President’s authority over foreign affairs and executive responsibility for and power respecting national security.\textsuperscript{191} Recognizing that the primary source of executive authority to ensure national security is the President’s foreign affairs power, and not, say, the Commander in Chief Clause viewed in isolation, is no mere logical nicety, or an expression of some Victorian era concern for the \textit{elegantia juris}. Rather, it is necessary to a correct understanding of the relationship between presidential authority long sanctioned by practice, and the Constitution’s unmistakably broad delegation of power to Congress over a wide variety of military and related matters. Congress alone has the power to create and fund the armed forces, and its express authority to organize\textsuperscript{192} and provide for the government of the military\textsuperscript{193} is, although not exclusive, superior in legal force to that of the President. The President has no means beyond diplomacy to protect national security except for those instruments that Congress sanctions of the President’s foreign affairs authority was undeniably dicta. In addition to the cases discussed later in this subsection, there are other cases that make the same point. \textit{See, e.g.,} Huig, 453 U.S. at 293 (holding that the executive has constitutional authority to “withhold passports on the basis of substantial reasons of national security and foreign policy”); United States \textit{ex rel.} Knauff v. Shaughnessy, 338 U.S. 537, 542 (1950) (“The exclusion of aliens . . . is inherent in the executive power to control the foreign affairs of the nation.”).


\textsuperscript{191} \textit{See, e.g.,} Johnson v. Eisentrager, 339 U.S. 763, 789 (1950) (asserting that a challenge to “the legality . . . of the Commander-in-Chief in sending our armed forces abroad or to any particular region . . . involves a challenge to conduct of diplomatic and foreign affairs, for which the President is exclusively responsible”); Chicago & S. Air Lines, Inc. v. Waterman SS Corp., 333 U.S. 103, 109 (1948) (noting the close relation between the President’s commander in chief power and his authority as “the Nation’s organ in foreign affairs”); United States v. Brown, 484 F.2d 418, 426 (5th Cir. 1973) (linking the President’s “constitutional duty to act for the United States in the field of foreign relations” and his or her “power to protect national security in the context of foreign affairs”). Professor Monaghan’s argument that the Supreme Court has acknowledged a general presidential power to take independent action to protect the personnel, property, and interests of the United States from harm is, I think, both correct and complementary to the specific foreign affairs reasoning I am articulating. \textit{See} Monaghan, \textit{supra} note 38.


and supports. Congress's own sense of responsibility for the Republic, and its political responsibility to the electorate, limit the extent to which it can exert control over the President by structuring and limiting the national security resources it provides the executive. The legislature's ultimate and absolute control over the creation and maintenance of the armed forces is nonetheless a potent source of congressional power that counterbalances the President's plenary foreign affairs power and his or her corollary authority to protect national security.

The greatest interest in this area—and the greatest uncertainty—revolves around the relationship between the express delegation to Congress of the power to "declare War" and the constitutional authority of the President. Advocates of congressional primacy contend that this clause is a plenary grant of power over all employment of military force save in response to an immediate attack on the United States. This strikingly nonliteral interpretation of the Declaration of War Clause stands in a mutually supportive relationship with the usual congressional primacy interpretation of the President's relevant constitutional authority: the President is expressly declared the commander in chief of the armed forces, a textual provision that can be given what seems satisfactory latitude if interpreted to give the President immediate tactical control over military actions authorized by Congress. Beyond that, the congressional primacy advocates maintain, the President has no independent power.

From the executive branch perspective, in contrast, the constitutional distribution of power is considerably more complicated. The protection of national security is one of the chief ends of the Republic's international relations and thus the conclusion is inescapable that the President's authority over those relations demands him or her to make national security a chief priority in what is the executive branch's most important area of independent constitutional responsibility. Historical practice, furthermore, strongly supports the conclusion that the executive rightfully considers national security a "central" Presidential domain . . . in which the President [has] a singu-

194 See U.S. CONST. art. I, § 8, cl. 11.
195 See, e.g., JOHN HART ELY, WAR AND RESPONSIBILITY 5-6 (1993). Professor Ely is in theory rather uncompromising on this issue, yet admits that the power to respond to attack should not be construed over-literally and thus gives the President authority to respond to at least some exigent threats to national security that take a form other than invasion or airstrike. See id. at 6-7, 108-09. Ely's admission is, I think, a necessary part of any responsible congressional primacy position; once made, however, the admission in practice goes a significant distance toward conceding to the President significant independent authority to use force to protect national security. Professor Charles Lofgren's painstaking study of the contemporaneous debate over President Truman's actions at the beginning of the Korean war concluded that virtually everyone agreed that he had the lawful authority "to counter an immediate, dangerous threat to American interests and security." CHARLES A. LOFGREN, GOVERNMENT FROM REFLECTION AND CHOICE 225 (1986). "Thus the real issue became (and remains): What constitutes such a threat? To answer that question takes one beyond the province of constitutional law." Id.
196 ELY, supra note 195, at 5, 142-43 n.22.
197 See New York Times Co. v. United States, 403 U.S. 713, 728-29 (1971) (Stewart, J., concurring) (stating that "the Constitution gives the Executive a large degree of unshared power in . . . the maintenance of our national defense"); id. at 761 (Blackmun, J., dissenting) ("Article II . . . places in the executive branch the responsibility for the Nation's safety.").
larly vital mandate." On the other hand, the courts and the executive branch have consistently recognized that the Declaration of War Clause entrusts Congress with powers beyond the decision whether the United States should enter a formal state of war for the purposes of domestic and international law. There is no definitive judicial opinion on the scope of the Declaration of War Clause in relation to the President’s independent authority, and the executive’s precise approach has varied, but two basic principles seem clear: (1) Congress alone must decide whether the United States should commit itself to full-scale war, de jure and de facto, and (2) Congress may decide to prohibit the employment of the coercive force of the United States with respect to any particular issue, situation, or geographical area. Exceptions to both principles may exist, but they mark the outer limits within which the executive branch may use the instruments of national security as tools of the President’s conduct of foreign affairs: “As a structural matter, Congress has the first and last word. It must provide forces before the President can commence hostilities, and it can remove those forces, by decommitting them or by forbidding their use in pursuit of a particular policy at any time.” This view of the Constitution is supported by legislative as well as executive branch precedent: the War Powers Resolution implicitly recognizes independent presidential authority to deploy United States armed forces into situations of hostilities, while asserting Congress’s power to regulate that authority.

I. The President’s Authority as Commander in Chief

The most dramatic tool the Constitution provides the President for the protection of the nation’s security is his or her authority as commander in

199 See generally Bas v. Tingy, 4 U.S. (4 Dall.) 37 (1800).
200 The President has no authority to use “the war power as an instrument of domestic policy,” Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 644 (1952) (Jackson, J., concurring), and judgments about the expenditure of the industry and wealth of the nation for national security purposes are within the “lawmaking power of Congress” and thus “not subject . . . to presidential or military supervision or control,” id. at 588 (opinion of the Court). See also id. at 644 (Jackson, J., concurring) (noting that the commander-in-chief power was not intended “to supersede representative government of internal affairs”); id. at 659 (Burton, J., concurring) (arguing that in the absence of congressional authorization, a presidential seizure of industrial assets could not be “a military command addressed by the President . . . to a mobilized nation waging, or imminently threatened with, total war”).
201 There are many judicial and executive branch precedents. See, e.g., Little v. Barrere, 6 U.S. (2 Cranch) 170, 177-79 (1804) (Marshall, C.J.) (accepting legal force of statute restricting naval operations during an undeclared war); Tingy, 4 U.S. (4 Dall.) at 43 (seriatim opinion of Chase, J.) (stating that Congress may authorize war “limited in place, in objects, and in time”); id. at 45 (seriatim opinion of Paterson, J.) (stating that Congress may authorize warfare “as to certain objects, and to a certain extent”); Presidential Power, supra note 59, at 186 (acknowledging that “Congress may terminate presidentially initiated hostilities through the enactment of legislation”); Dellinger, supra note 47, at 113 (“I assume that the [Declaration of War] Clause, together with the Necessary and Proper Clause and the power over appropriations, confers broad (though not limitless) authority on Congress to pass legislation governing” the use of force “short of war.”).
202 Bobbitt, supra note 21, at 1390.
chief of the armed forces. In an opinion written several months before the United States entered the Second World War, Attorney General Robert H. Jackson summarized the executive branch perspective on the scope of the Commander in Chief Clause.

Article II, section 2, of the Constitution provides that the President "shall be Commander in Chief of the Army and Navy of the United States." By virtue of this constitutional office he has supreme command over the land and naval forces of the country and may order them to perform such military duties as, in his opinion, are necessary or appropriate for the defense of the United States. These powers exist in time of peace as well as in time of war.

Thus the President's responsibility as Commander in Chief embraces the authority to command and direct the armed forces in their immediate movements and operations designed to protect the security and effectuate the defense of the United States. . . . [T]his authority undoubtedly includes the power to dispose of troops and equipment in such manner and on such duties as best to promote the safety of the country.204

For analytical purposes, the President's authority as commander in chief can be seen as consisting primarily of two distinct powers, which I shall term the powers of deployment and operational control.

a. The Deployment Power

The Constitution vests the President with the authority to determine the goals and policies to be pursued through the use of the armed forces, and to direct the military to carry out the executive's objectives. This power is independent—in other words, the President needs no statutory authorization to exercise it—but it is not for the most part autonomous. As discussed above, Congress can limit the exercise of the deployment power indirectly, by failing to provide the President with the military force necessary to execute presidential policy. Congress may also limit the President's exercise of the deployment power directly, by regulating or prohibiting the use of the armed forces in a particular situation or for a particular purpose: the provision of the War Powers Resolution that requires the President to withdraw United States troops from hostilities after sixty days unless Congress affirmatively directs otherwise is a facially valid limitation on the President's deployment power.205 In the absence of such a prohibition, the President has constitut-

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204 Training of British Flying Students in the United States, 40 Op. Att'y Gen. 58, 61-62 (1941) [hereinafter British Flying Students]. Jackson expressed a greater agnosticism about the meaning of the Clause in his famous concurrence in the Steel Seizure Case.

These cryptic words have given rise to some of the most persistent controversies in our constitutional history. Of course, they imply something more than an empty title. But just what authority goes with the name has plagued presidential advisers who would not waive or narrow it by nonassertion yet cannot say where it begins or ends.

Youngstown, 343 U.S. at 641 (Jackson, J., concurring).

205 See 50 U.S.C. § 1544(c). The executive branch's expressions of opinion on the validity
tional authority to deploy the armed forces to perform any military duties short of "war" (a concept explored below) that serve, in the President's judgment, the foreign policy and national security interests of the United States.206 Historical practice and both judicial and executive branch legal opinions support this conclusion.207 The possibility or even certainty that there will be armed conflict or loss of life does not, in itself, remove a particular deployment from the set of those the President has independent authority to order.208

The most recent formal executive branch opinion on the scope of the deployment power addressed the President's authority to deploy military forces in Haiti in support of the restoration of the democratically elected government recognized by the United States.209 The Department of Justice noted as an initial premise the existence of military forces adequate to the proposed deployment and, finding no statutory prohibition on this use of the armed forces, concluded that as far as the legislative action was concerned, "Congress ha[d] left the President both the authority and the means to take such initiatives."210 However, even in the absence of statutory limitations, the Justice Department acknowledged, the Declaration of War Clause and Congress's structural role in the government require the President to obtain

of the 60-day limitation have not been entirely clear. The position I take is, I believe, the most defensible view both on principle and in terms of the overall tradition of executive branch constitutional interpretation. See Haiti Deployment, supra note 60, at *4 n.2 ("T[his Administration has not yet had to face the difficult constitutional issues raised by the provision of the WPR . . . that requires withdrawal of forces after 60 days involvement in hostilities, absent congressional authorization"); Ronald Reagan, Statement on Signing the Multinational Force in Lebanon Resolution (Oct. 12, 1983), in II PUB. PAPERS RONALD REAGAN 1444-45 (1985) (appearing to reject constitutionality of 60-day limitation); Presidential Power, supra note 59, at 196 ("Congress may, as a general constitutional matter, place a 60-day limit on the use of our armed forces" in the absence of statutory authorization.).

206 For present purposes, it is unnecessary to consider the extent of the President's constitutional authority, if any, to order military personnel to perform purely domestic tasks wholly unrelated to the foreign affairs and security of the United States.

207 See, e.g., Johnson v. Eisentrager, 339 U.S. 763, 789 (1950) (stating that the President has authority to deploy United States armed forces "abroad or to any particular region"); Maul v. United States, 274 U.S. 501, 515-16 (1927) (Brandeis, J., concurring) (declaring that the President "may direct any revenue cutter to cruise in any waters in order to perform any duty of the service"); Fleming v. Page, 50 U.S. (9 How.) 603, 615 (1850) ("As commander-in-chief, [the President] is authorized to direct the movements of the naval and military forces placed by law at his command, and to employ them in the manner he may deem most effectual."); Massachusetts v. Laird, 451 F.2d 26, 32 (1st Cir. 1971) (stating that the President has "power as Commander-in-Chief to station forces abroad"); Rappenecker v. United States, 509 F. Supp. 1024, 1029 (N.D. Cal. 1980) (asserting that "responsibility for the use of military forces is clearly committed to the President by the Constitution"); Ex parte Vallandigham, 28 F. Cas. 874, 922 (C.C.S.D. Ohio 1863) (No. 16,816) (noting that in acting "under this power where there is no express legislative declaration, the president is guided solely by his own judgment and discretion"); British Flying Students, supra note 204, at 61 (affirming that the President "has within his control the disposition of troops [and] the direction of vessels of war" (citation and internal quotation marks omitted)); Overview of the War Powers Resolution, 8 Op. O.L.C. 271, 274 (1984) (rejecting "[a]ny attempt to set forth all the circumstances" in which the President may deploy the armed forces).

208 See Haiti Deployment, supra note 60, at *8 n.10.

209 See id. at *1.

210 Id. at *5.
prior legislative authorization, whenever possible, before committing United States forces to hostilities that rise to the level of "war": the President’s independent authority to deploy the military into situations involving, or likely to involve, armed conflict must be predicated on a good-faith judgment by the executive that the “nature, scope and duration of the . . . deployment” do not require “the conclusion that the event [would be] a ‘war.’”211 The Justice Department concluded that it was highly unlikely that the proposed deployment would result in a war in the constitutional sense: historical practice sanctioned the President’s independent authority to order operations with similar purposes,212 and “the anticipated nature, scope and duration of the planned deployment” were sufficiently modest to make the operation a forceful exercise of the President’s foreign affairs authority rather than a commitment of the United States to full-scale combat.213 As the Haiti opinion demonstrates, from the executive branch perspective the question of whether a military operation requires legislative approval is a judgment blending factual and legal considerations.

Although the deployment power is generally subject to congressional regulation, there are exceptions—situations in which the President is constitutionally entitled, and indeed obliged, to act without statutory authorization even though the result is war in the constitutional sense. The guiding principle is that the Constitution empowers “the executive branch of the Government to preserve order and insure the public safety in times of emergency, when other branches of the Government are unable to function, or their functioning would itself threaten the public safety.”214 From the beginning, the President’s authority to defend the nation against actual military attack

211 See id. at *6, *8. In a later statement, the author of the Justice Department opinion noted that the judgment about the legal need for legislative authorization is necessarily the President’s in the first instance.

[Because the President orders the deployment of troops, he must decide in the first instance whether a planned operation would be within his authority or whether it would be “war” in a constitutional sense. The President, along with his legal advisers, necessarily must determine whether he is obliged to seek congressional approval.

Dellinger, supra note 47, at 114.

212 The Justice Department noted that deployment was to be “at the invitation of [the] fully legitimate government” of Haiti and thus fit within “a pattern of Executive conduct, made under claim of right, extended over many decades and engaged in by Presidents of both parties” supporting independent executive authority to deploy United States military personnel into foreign countries “at the invitation of [the] legitimate government[s of those countries].” Haiti Deployment, supra note 60, at *7-8.

213 See id. at *8. In evaluating “the anticipated nature, scope and duration of the planned deployment,” the Justice Department took account not only of the size of the operation, but also of “the limited antecedent risk that United States forces would encounter significant armed resistance or suffer or inflict substantial casualties as a result of the deployment,” and “the fact that it would not involve extreme use of force, as for example preparatory bombardment.” Id.

214 Duncan v. Kahanamoku, 327 U.S. 304, 335 (1946) (Stone, C.J., concurring). Judicial recognition of this principle goes back to the early Republic. See, e.g., The Apollon, 22 U.S. (9 Wheat.) 362, 365-67 (1824) (Story, J.) (“It may be ... proper for the government, in the exercise of the high discretion conferred to the executive, for great public purposes, to act on a sudden emergency, or to prevent an irreparable mischief, by summary measures, which are not found in the text of the laws.”).
by all available means has been generally acknowledged, and there seems no reason in principle not to recognize the same power to respond to threats different in form but equivalent in severity to that posed by invasion. For similar reasons, the President needs no congressional authorization in order to ensure the safety of United States personnel through at least modest military means, even in circumstances in which a statute such as the War Powers Resolution requires the withholding or withdrawal of United States armed forces.

b. The Power of Operational Control

The President's power of operational control of the armed forces is autonomous, neither dependent on congressional authorization nor subject to congressional regulation that interferes with the President's discretion. This principle is settled: the Supreme Court, for example, long ago stated that Congress has no authority to "interfere[] with the command of the forces and the conduct of campaigns. That power and duty belong to the President as commander-in-chief." Attorney General Jackson's 1941 opinion was equally emphatic: "in virtue of his rank as head of the forces, [the President] has certain powers and duties with which Congress cannot interfere. For instance, he may regulate the movements of the army and . . . of the vessels of the navy, sending them wherever in his judgment it is exped-

215 See, e.g., Mitchell v. Laird, 488 F.2d 611, 613 (D.C. Cir. 1973) ("[T]here are some types of war which, without Congressional approval, the President may begin to wage: for example, he may respond immediately without such approval to a belligerent attack."); Massachusetts v. Laird, 451 F.2d 26, 31 (1st Cir. 1971) (stating that "[t]he executive may without Congressional participation repel attack"); United States v. Smith, 27 F. Cas. 1192, 1230 (C.C.D.N.Y. 1806) (No. 16,342) (Paterson, Circuit Justice) (declaring that regardless of statutory authorization, it is "the duty . . . of the executive magistrate . . . to repel an invading foe"); 3 Story, supra note 166, § 1485 (stating that "[t]he command and application of the public force . . . to maintain peace, and to resist foreign invasion" are executive powers).

216 See, e.g., Mitchell, 488 F.2d at 613 (stating that the President has authority to "respond immediately without [congressional] approval to a belligerent attack, or in a grave emergency . . . without Congressional approval, take the initiative to wage war. . . . In such unusual situations necessity confers the requisite authority upon the President. Any other construction of the Constitution would make it self-destructive."); Memorandum Opinion by the Attorney General on the Authority of the President to Use United States Military Forces for the Protection of Relief Efforts in Somalia, 16 Op. O.L.C. 8, 12 (1992) [hereinafter Somalia Relief] (stating that if at all possible, the executive branch would not construe a statute to prevent the President from responding militarily to any sudden and serious threat to the nation's security or to "the vital interests of the United States" (internal quotation omitted)).

217 See, e.g., Mitchell, 488 F.2d at 616 (stating that even if Congress required withdrawal of troops from the Vietnam War, the President's duty would "not go beyond trying, in good faith and to the best of his ability, to bring the war to an end as promptly as was consistent with the safety of those fighting"); Somalia Relief, supra note 216, at 9 (declaring that the President has authority "to commit military forces of the United States to armed conflict . . . to protect the lives of American troops in the field" (internal quotation omitted)).

218 The label "operational control" is not meant to invoke any technical military term, but rather to encompass the entire range of military command decisions.

219 Ex parte Milligan, 71 U.S. (4 Wall.) 2, 139 (1866) (Chase, C.J.).
ent."  Many other judicial and executive branch opinions are to the same

effect. The exclusive character of the President's operational control over the
military rests on the assumption, embedded in the Constitution as it has been
interpreted, that military success can depend on a clear, unified chain of com-
mand. "[T]he object of the [Commander in Chief Clause] is evidently to vest
in the President the supreme command over all the military forces,—such
supreme and undivided command as would be necessary to the prosecution
of a successful war." Congress therefore has no power to direct the Presi-
dent in the planning or execution of lawful missions, and it may not lawfully
interfere with the President's decisions about which military units to employ:
"This power or right of command extends as much to one portion of the
Army as to any other, and includes the assignment of any portion thereof
to such duty as the Commander in Chief deems best." The power of opera-
tional control extends as well to choices about individual service members.
The executive therefore has consistently resisted congressional attempts to
superintend or constrict the President's discretion.

A recent executive branch opinion construed the power of operational
control and usefully considered the relationship between the President's mili-
tary role and his authority as constitutional representative of the United
States in external affairs. The opinion addressed the constitutionality of a bill
that would have forbidden the expenditure of funds to support United States
military units participating in United Nations peacekeeping operations under
the command of anyone other than an active-duty American officer. The
bill permitted the President to waive its prohibition upon a presidential cer-
tification that doing so would serve the national security interests of the
United States, but the Department of Justice nonetheless concluded that the
bill "unconstitutionally constrains the President's exercise of his constitu-

\[220\] British Flying Students, \textit{supra} note 204, at 61 (citation omitted).
\[221\] See, e.g., Youngstown Sheet \& Tube Co. v. Sawyer, 343 U.S. 579, 645 (1952) (Jackson, J.,
concurring) (stating that the commander-in-chief power vests in President the "exclusive func-
tion to command the instruments of national force"); Fleming v. Page, 50 U.S. (9 How.) 603, 615
(1850) ("As commander-in-chief, [the President] is authorized to direct the movements of
the naval and military forces . . . and to employ them in the manner he may deem most effectual.");
President—Power to Detail Officers of the Engineer Corps., 28 Op. Att'y Gen. 270, 275 (1910)
[hereinafter Engineer Detailing] (noting that the President has "the power to command the
Army and Navy . . . and as he [is] Commander in Chief he ha[s] no superior in that command,
nor could Congress deprive him of or curtail that power").
\[223\] Engineer Detailing, \textit{supra} note 221, at 276.
\[224\] Congress's authority over the government of the armed services, and over the creation
of offices, including commissioned ranks in the armed services, provides a constitutional basis for
statutes prescribing procedures for promotion to and within commissioned ranks in the military.
See, e.g., Power of the President to Create a Militia Bureau in the War Department, 10 Op. Att'y
Gen. 11, 15 (1861) [hereinafter Militia Bureau]. This legislative power, however, cannot be exer-
cised so as to eliminate the President's discretion in the selection of officers to perform particular
duties. See, e.g., Promotion of Marine Officer, \textit{supra} note 107, at 294 (declaring that in appropri-
ate circumstances, the President may "depart from the statutory procedures and . . . rely on
constitutional authority to appoint key military personnel to positions of high responsibility").
\[225\] See United Nations Control, \textit{supra} note 190. The bill contained various qualifications
that are not important for our purposes.
tional authority as Commander-in-Chief” and “undermines his constitutional role as the United States’ representative in foreign relations.” The bill’s intrusion into the power of operational control was obvious, of course, and the Justice Department viewed it as patently unconstitutional.

Whatever the scope of this authority in other contexts, there can be no room to doubt that the Commander-in-Chief Clause commits to the President alone the power to select the particular personnel who are to exercise tactical and operational control over U.S. forces. . . .

. . . . In the present context, the President may determine that the purposes of a particular U.N. operation in which U.S. Armed Forces participate would be best served if these forces were placed under the operational or tactical control of an agent of the U.N. . . . Congress may not prevent the President from acting on such a military judgment concerning the choice of the commanders under whom the U.S. forces engaged in the mission are to serve.227

The Justice Department also concluded that the bill was an invalid limitation on the President’s negotiation power: “U.N. peacekeeping missions involve multilateral arrangements that require delicate and complex accommodations of a variety of interests and concerns.” Although Congress could prohibit the deployment of United States military personnel in such UN operations, because it had not done so, “Congress would be acting unconstitutionally if it were to tie the President’s hands in negotiating agreements with respect to command structures for those operations.”229 Because both the negotiation power and the power of operational control are autonomous, the bill’s waiver provision did not render it constitutional. “Congress cannot . . . burden or infringe the President’s exercise of a core constitutional power by attaching conditions precedent to the exercise of that power.”230

c. Other Military Powers

The Supreme Court recently reaffirmed the longstanding view that the President has independent power “to take responsible and continuing action to superintend the military” by creating and administering rules governing military personnel despite Congress’s express textual power to “make Rules

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226 Id. at *2.
227 Id. at *2-3.
228 Id. at *4.
229 Id.
for the Government and Regulation of the land and naval Forces."\textsuperscript{231} The executive branch has made analogous arguments with respect to authority over the structure of the armed forces.\textsuperscript{232} In either case, Congress may displace presidential choices by exercising its powers.

2. Information Relating to National Security

Both the conduct of foreign policy and the protection of the national security are dependent on the executive branch’s ability to obtain, analyze, and safeguard many types of information. All three branches of the federal government have recognized that the President’s responsibilities with respect to national security therefore carry with them the authority to gather intelligence and to control access to national security information.\textsuperscript{233} This authority includes the discretion to use the most effective means of obtaining information, and to safeguard those means.\textsuperscript{234} There are few opinions bearing on the extent to which the President’s power in this area is subject to congressional control.\textsuperscript{235}

\textsuperscript{231} U.S. CONST. art. I, \S 8, cl. 14; see Loving v. United States, 517 U.S. 748, 772 (1996) (upholding Congress’s authority to delegate to the executive power to prescribe aggravating factors in capital cases in courts martial). The executive branch has long maintained that the President has “the unquestioned power to establish rules for the government of the army” in the absence of legislation. Militia Bureau, supra note 224, at 14; Brevet Pay of General Macomb, supra note 193, at 549 (asserting that regulations issued by the President remained in force although Congress had repealed the statute giving them legislative sanction “in all cases where they do not conflict with positive legislation”).

\textsuperscript{232} See British Flying Students, supra note 204, at 62 (noting that the President may order preparation of fortifications); Brevets’ Pay and Rations, 2 Op. Att’y Gen. 223, 232 (1829) (noting that the President may “designate posts or stations among which the army should be distributed”).

\textsuperscript{233} See, e.g., 18 U.S.C. \S 2511(3) (1976) (repealed 1978) (referring to “the constitutional power of the President . . . to obtain foreign intelligence information deemed essential to the security of the United States [and] to protect national security information against foreign intelligence activities”); New York Times Co. v. United States, 403 U.S. 713, 728-29 (1971) (Stewart, J., concurring); Totten v. United States, 92 U.S. 105, 106 (1876) (noting that the President “was undoubtedly authorized during the [Civil] war, as commander-in-chief of the armies . . . to employ secret agents to enter the rebel lines and obtain information respecting the strength, resources, and movements of the enemy”); Warrantless Foreign Intelligence Surveillance—Use of Television—Beepers, 2 Op. O.L.C. 14, 15 (1978) [hereinafter Warrantless Foreign Surveillance] (discussing the President’s “constitutional power to gather foreign intelligence”).

\textsuperscript{234} See Presidential Discretion to Delay Making Determinations Under the Chemical and Biological Weapons Control and Warfare Elimination Act of 1991, Op. O.L.C. (Nov. 16, 1995), available in 1995 WL 917142, at *11 (“As a constitutional matter, the President, as Commander in Chief, has the inherent authority to employ sources for gathering intelligence needed to protect the national security of the United States [and] the related authority to protect the sources and methods used for gathering it.”); Warrantless Foreign Surveillance, supra note 233, at 15 (asserting that the President “has the power to authorize the warrantless installation and use of electronic surveillance devices for the purpose of gathering foreign intelligence [or counterintelligence] in a proper case,” even within the United States). The President’s powers are limited, of course, by constitutional provisions such as the Fourth Amendment.

\textsuperscript{235} A 1986 executive branch opinion suggested that because “legislation authorizing extraterritorial . . . intelligence activities is superfluous,” legislation regulating such activities would be invalid; with this constitutional backdrop, the opinion construed a statutory requirement that the executive provide prior or “timely” subsequent notice of covert actions to certain congressional committees as permitting the President “virtually unfettered discretion to choose the right mo-
It is well settled that the President must have the power to control the disclosure of information that in his or her judgment would be damaging to national security, and in order to render that authority practically useful, the President’s power has long been recognized as extending to the creation of an executive branch system for classifying and safeguarding national security information.

The President’s authority to classify and control access to information bearing on national security and to determine whether an individual is sufficiently trustworthy to occupy a position in the Executive Branch that will give that person access to such information . . . exists quite apart from any explicit congressional grant . . . The authority to protect such information falls on the President as head of the Executive Branch and as Commander in Chief.236

The close parallel between this power and the President’s authority to control disclosure of diplomatic information suggests that it is an autonomous power that Congress cannot lawfully circumscribe or control.

Conclusion

The executive branch’s perspective on the constitutional law of foreign affairs is one approach to the difficult task of working out the implications of the text, structure, and history of the Constitution as the Constitution bears on the conduct of foreign affairs. This perspective generates a substantive account of the Constitution that accords the President primary responsibility for the conduct of United States foreign policy and the preservation of United States national security. But it does so without denying that Congress possesses very broad powers that can or do relate to foreign affairs and national security matters. The coherence of the executive primacy interpretation of authority over foreign affairs, and the respect it embodies not just for the presidency but also for Congress and for the constitutional system of separated but interlocking powers, are important aspects of the argument that the executive primacy position is, in this area, the best reading of the Constitution.

236 Department of the Navy v. Egan, 484 U.S. 518, 527 (1988); see also New York Times, 403 U.S. at 728-30 (Stewart, J., concurring) (“[T]he constitutional duty of the Executive . . . through the promulgation and enforcement of executive regulations, to protect the confidentiality necessary to carry out its responsibilities.”).