LEGISLATING MILITARY DOCTRINE: CONGRESSIONAL USURPING OF EXECUTIVE AUTHORITY THROUGH DETAINEE INTERROGATIONS

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I. Introduction

Congress must restrain itself from legislating military doctrine and permit the Executive to exercise its authority in control of military operations, including detainee interrogations. Recent passage of the Detainee Treatment Act of 2005 (DTA) signifies Congress's foray into the realm of legislating military doctrine and operations.[1] Congress's overreaching arm endangers the nation's military by restricting doctrinal development in the face of an ever-changing enemy. The President of the United States, as the head of the Executive branch of government that includes the Department of Defense (DOD) and its military forces, bears the responsibility for directing the manner in which military operations implement doctrine, including detainee interrogations.[2] The current U.S. Army Field Manual (FM) 2-22.3, *Human Intelligence Collector Operations*, states in its preface that the tactics, techniques, and procedures within the FM exist in accordance with the DTA.[3] Through

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[1] Detainee Treatment Act of 2005, 42 U.S.C.S. § 2200dd (LEXIS 2007) (to be codified at 42 U.S.C. § 2200dd).

[2] *Cf.* Dep't of State, International Information Programs, Outline of U.S. Government ch. 3, http://usinfo.state.gov/products/pubs/outusgov/ch3.htm [hereinafter Outline] (last visited Nov. 27, 2007).

[3] U.S. DEP'T OF ARMY, FIELD MANUAL 2-22.3, HUMAN INTELLIGENCE COLLECTOR OPERATIONS vi (6 Sept. 2006) [hereinafter FM 2-22.3]. The preface states:

> In accordance with the Detainee Treatment Act of 2005, the only interrogation approaches and techniques that are authorized for use against any detainee, regardless of status, characterization, are those authorized and listed in this Field Manual. Some of the approaches

this Act, Congress effectively stifled the creativity and adaptability of the military, in essence freezing interrogation techniques.[4]

The nation's military requires the ability to employ adaptable processes to overcome the challenges of the chaotic and unpredictable battlefield in the twenty-first century.[5] While the U.S. Armed Forces stand glued to their now-limited interrogation doctrine, a rapidly changing enemy modifies its behavior to thwart known tactics, techniques, and procedures that bind the operations of the military.[6] The DTA further compounds the disadvantage faced by the U.S. Armed Forces because many of its foes do not comply with international legal obligations under the law of armed conflict.[7] Enemies that fail to obey the rules of war, coupled with legislative restrictions on military operations, could lead to failure in the Global War on Terror (GWOT).[8]

The Executive must be able to rely on the office's decision-making powers to effectively and successfully wage war. While the political structure of the United States will always leave the Executive branch

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> and techniques authorized and listed in this Field Manual also require additional specified approval before implementation. This manual will be reviewed annually and may be amended or updated from time to time to account for changes in doctrine, policy, or law, and to address lessons learned.

Id.

[4] *See* 42 U.S.C.S. § 2200dd; Geoffrey S. Corn, *Legislating Law of War Compliance: A High Price to Pay*, JURIST, Sept. 19, 2006, *available at* http://jurist.law.pitt.edu/forumy/2006/09/legislating-law-of-war-compliance-high.php.

[5] LEONARD WONG, DEVELOPING ADAPTIVE LEADERS: THE CRUCIBLE EXPERIENCE OF OPERATION IRAQI FREEDOM v (2004), *available at* http://www.strategicstudiesinstitute.army.mil/pdffiles/PUB411.pdf.

[6] *Cf*. HEADQUARTERS, DEP'T OF ARMY, U.S. ARMY WHITE PAPER, CONCEPTS FOR THE OBJECTIVE FORCE 5 (2001) [hereinafter WHITE PAPER], http:/www.army.mil/features/WhitePaper/ObjectiveForceWhitePaper.pdf (stating the threat of a changing and adaptable enemy).

[7] *See, e.g.*, Hamdan v. Rumsfeld, 126 S. Ct. 2749, 2804 (2006) (Thomas, J., dissenting) (noting that Hamdan was an unlawful combatant), *superseded by statute*, Military Commissions Act of 2006, Pub. L. No. 109-366, 120 Stat. 2600, *as recognized in* Boumediene v. Bush, 2007 U.S. App. LEXIS 3682 (D.C. Cir. Feb. 20, 2007).

[8] Numerous decisions and articles touch upon the status of detainees and interrogation policies under international law; however, that topic is beyond the scope of this article. *Hamdan*, 126 S. Ct. at 2804; Hamdi v. Rumsfeld, 542 U.S. 507 (2004); Kenneth Anderson, *The Military Tribunal Order: What to Do with Bin Laden and al Qaeda Terrorists?: A Qualified Defense of Military Commissions and United States Policy on Detainees at Guantanamo Bay Naval Base*, 25 HARV. J.L. & PUB. POL'Y 591 (2002); Arsalan M. Suleman, *Recent Development: Detainee Treatment Act of 2005*, 19 HARV. HUM. RTS. J. 257 (2006).

subject to being second-guessed by Congress, and will always remain accountable to the people, the office's unitary decision-making power and expediency are tailor-made for military doctrine and interrogations.[9] When the policies and execution of the nation's laws and military operations do not exactly conform to the will of Congress, this does not mean that the Executive lacks power to implement the political decisions made.[10] Instead, the conflict raises the matter of separation of powers, a struggle existing since the nation's inception.[11] Discerning the superiority of power in governing military operations, particularly when the Executive's position is contrary to that of Congress, is neither clear nor easy.[12]

This article discusses the issue of control over the military and its operations between the Executive and Congress, an issue not new to American politics.[13] The study finds its base in Articles I and II of the Constitution,[14] and examines the historical precedence of congressional and Executive powers, including the Executive's inherent authority.[15] As expected, the Framers' construct creates an area of concurrent authority between the Executive and Congress with respect to governance of the U.S. Armed Forces, as both branches enjoy such enumerated powers.[16] The deductive exercise shows that the Supreme Court and history provide support for the Executive's superior authority in governing how the military conducts its operations, including development and implementation of its doctrine.[17] Consequently, this analysis concludes that the Executive possesses greater constitutional authority as the

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[9] *See* CASS R. SUNSTEIN, MINIMALISM AT WAR 17 (2004).

[10] *See, e.g.*, Youngstown Sheet & Tube Co. v. Sawyer (*Steel Seizure*), 343 U.S. 579, 635–38 (1952) (Jackson, J., concurring) (stating that the strength of executive authority relates to either constitutional authorization, congressional authorization, or to an absence of any express authorization or will).

[11] *See* THE FEDERALIST NOS. 47, 51 (James Madison).

[12] *Steel Seizure*, 343 U.S. at 635–38 (Jackson, J., concurring).

[13] *See* Richard Hartzmann, *Congressional Control of the Military in a Multilateral Context: A Constitutional Analysis of Congress's Power to Restrict the President's Authority to Place United States Armed Forces under Foreign Commanders in United Nations Peace Operations*, 162 MIL. L. REV. 50, 82–89 (1999).

[14] U.S. CONST. arts. I, II.

[15] *Contra* HAROLD H. HOH, THE NATIONAL SECURITY CONSTITUTION: SHARING POWER AFTER THE IRAN-CONTRA AFFAIR 45 (1990).

[16] *Id.*

[17] *See Steel Seizure*, 343 U.S. at 587 (Jackson, J., concurring) (stating that the Executive controls the day-to-day operations of the military); *Ex parte* Milligan, 71 U.S. (4 Wall.) 2, 29 (1866) (noting that Congress cannot interfere with the Executive's command of the military or its operations).

Commander in Chief and guardian of the Constitution than Congress regarding the control of military operations and its corresponding doctrine.[18]

II. The Role of Doctrine in Military Operations

The DOD defines military doctrine as "[f]undamental principles by which the military forces or elements thereof guide their actions in support of national objectives. It is authoritative but requires judgment in application."[19] Military commands establish these fundamental principles and procedures to ensure that units adhere to a common operating guide and operate efficiently.[20] Tactical operations and training produce lessons learned regarding successes and failures of operations.[21] Military leaders analyze and refine the lessons learned and then publish them for adoption by military units as doctrine.[22] While doctrine provides certain rules or methods by which to conduct operations, judgment and initiative remain a commander's responsibility and essential tool.[23] Military doctrine should be dynamic, reflecting

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[18] *Cf.* U.S. CONST. art. II, § 2.

[19] JOINT CHIEFS OF STAFF, JOINT PUB. 1-02, DOD DICTIONARY OF MILITARY AND ASSOCIATED TERMS (12 Apr. 2001, *as amended through* 17 Oct. 2007) [hereinafter JOINT PUB. 1-02]. The *American Heritage Dictionary of the English Language* further defines military doctrine as "a statement of official government policy, especially in foreign affairs and military strategy." AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE (4th ed. 2000).

[20] U.S. DEP'T OF ARMY, FIELD MANUAL 5-0, ARMY PLANNING AND ORDERS PRODUCTION v (20 Jan. 2005) [hereinafter FM 5-0].

[21] CHAIRMAN OF JOINT CHIEFS OF STAFF, INSTR. 5120.02A, JOINT DOCTRINE DEVELOPMENT A-6 (31 Mar. 2007) [hereinafter JCS INSTR. 5120.02A] ("A major influence on doctrine is lessons and observations from operations, exercises, and training. This review provides a standard from which to judge what works and what does not work. As a military institution, these lessons also consider changes in the threat and operational environment.").

[22] *See id.* at A-2 ("[D]octrine represents what is taught, believed, and advocated as what is right (i.e., what works best)"); Corn, *supra* note 4.

[23] JCS INSTR. 5120.02A, *supra* note 21, at A-2. The instruction states:

> [D]octrine is authoritative guidance and will be followed except when, in the judgment of the commander, exceptional circumstances dictate otherwise. . . . [I]t must be definitive enough to guide operations, while versatile enough to accommodate a wide variety of situations. . . . [D]octrine should foster initiative, creativity, and conditions that allow commanders the freedom to adapt to varying circumstances.

Id.

operational missions and necessities based on the various threats faced.[24] "History, training experiences, contemporary conflict, technological developments, and emerging threats to national security drive changes in doctrine."[25] Nowhere in this list of driving forces do we find Congress, and the basic tenets in development of military doctrine in the twenty-first century have not changed since the period of the great World Wars of the twentieth century.[26]

Doctrine drives the approach and methods of detainee interrogations.[27] It can range from broad military objectives and operations, such as joint warfare among the various U.S. military services,[28] to a narrow operation such as human intelligence collection.[29] Doctrine plays a role in planning military operations by guiding how the military will conduct the operation, e.g., how the military will fight or collect intelligence, in order to implement its strategy and achieve its objective.[30] It serves as the reference point for military servicemembers

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[24] *Id.*

[25] WILLIAM O. ODOM, AFTER THE TRENCHES: THE TRANSFORMATION OF ARMY DOCTRINE, 1918-1939, at 3–4 (1999).

[26] U.S. DEP'T OF ARMY, FIELD MANUAL 3-0, OPERATIONS 1–14 (14 June 2001) [hereinafter FM 3-0] ("[Army doctrine] is rooted in time-tested principles but is forward-looking and adaptable to changing technologies, threats, and missions.").

[27] FM 2-22.3, *supra* note 3.

[28] JCS INSTR. 5120.02A, *supra* note 21.

[29] FM 2-22.3, *supra* note 3, at vi.

[30] *See, e.g.*, Frederick Kagan, *Army Doctrine and Modern War: Notes Toward a New Edition of FM 100-5*, PARAMETERS, Spring 1997, at 134–51 ("[D]octrine outlines planning procedures down to such details as the advisability of conducting planning brief-backs over maps or terrain models, such critical operational issues as conducting and exploiting penetrations, defending against enemy attacks, and the use of reserves receive little or no attention."); JCS INSTR. 5120.02A, *supra* note 21, at A-5, 6. The instruction states:

> [D]octrine provides a basis for analysis of the mission, its objectives and tasks, and developing the commander's intent and associated planning guidance. . . . [D]octrine provides fundamental guidance on how operations are best conducted to accomplish the mission. . . . [P]lans are developed in conformance with the criteria of adequacy, feasibility, acceptability, completeness, and compliance with joint doctrine.

Id.

to begin planning and executing their operations, and Congress hindered its development with the DTA.[31]

During planning, doctrine incorporates "the principles of war, operational art, and elements of operational design for successful military action, as well as contemporary lessons that exploit US advantages against adversary vulnerabilities."[32] This incorporation should involve creative application of doctrine to the operation.[33] Once the operation is underway, servicemembers apply doctrine to the threats, obstacles, and circumstances encountered on the battlefield during mission execution to achieve success.[34]

Military doctrine generally guides, or even dictates, how a member of the armed forces will respond to a situation, such as interrogation of a detainee.[35] On a symmetric or static battlefield, servicemembers may focus on the doctrinal methods taught and implemented during their training to address the threat or objective.[36] However, when the situation becomes fluid or asymmetric, doctrine may not effectively address the issue or threat.[37] Congress's passage of the DTA in 2005 dictated a static response to a fluid situation, or implemented a symmetric approach for an asymmetric threat.[38] The doctrinal interrogation techniques that military members rely upon, now restricted in development by law, may not adequately address the threat or create the conditions for mission accomplishment.[39] Congress bound the entire spectrum of military interrogations into one paper volume of an Army FM. Rather than

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[31] JCS INSTR. 5120.02A, *supra* note 21, at A-2. The DTA hinders doctrine development by subjecting interrogation methods to Congressional oversight and compliance with an ineffective piece of legislation.

[32] *Id.*

[33] FM 5-0, *supra* note 20, at 3–9.

[34] JCS INSTR. 5120.02A, *supra* note 21, at A-3.

[35] *See* JOINT PUB. 1-02, *supra* note 19; JCS INSTR. 5120.02A, *supra* note 21.

[36] JCS INSTR. 5120.02A, *supra* note 21.

[37] *See* ARMY CENTRAL COMMAND, ARMY CENTRAL COMMAND COMBINED ARMS ASSESSMENT TEAM, INITIAL IMPRESSIONS REPORT 53 (Sept. 2002) [hereinafter ARCENT CAAT REPORT], http://action.aclu.org/torturefoia/released/050206.

[38] *See* Detainee Treatment Act of 2005, 42 U.S.C.S. § 2200dd (LEXIS 2007) (to be codified at 42 U.S.C. § 2200dd).

[39] *See* Luke M. Meriwether, Comment: *After Abu Ghraib: Does the McCain Amendment, as Part of the 2006 Defense Appropriations Act, Clarify U.S. Interrogation Policy or Tie the Hands of U.S. Interrogators?*, 14 TULSA J. COMP. & INT'L L. 155 (2006); *A Vietnam Moment: The McCain Amendment Would Hamstring U.S. Interrogators*, OPINION J., Oct. 30, 2005, http://www.opinionjournal.com/editorial/feature.html?id=110007477 [hereinafter *Vietnam Moment*].

allowing the Army's leaders and Soldiers to develop and implement necessary interrogation techniques and strategies, a bureaucratic body choked the development of doctrine by tying it to a document to which change generally occurs at a glacial pace. By the time the Army develops and vets a new interrogation procedure through the publication process of an FM subject to congressional intervention under the DTA, and then has it trained and implemented in real operations, the threat spurring that change will likely have already morphed.

Noting that the Army released a new FM on detainee interrogations after passage of the DTA without additional legislation, one may believe that the Army retains the ability to change doctrine as necessary.[40] However, the key issue remains that the military cannot develop and implement any doctrine outside the bounds of the DTA.[41] Even if the military proposed such changes, Congress must review and approve those changes, inevitably taking an extended period of time;[42] time that servicemembers on the battlefield may not be able to dedicate to seeking a change in the tactics, techniques, and procedures necessary to win the battle.

Doctrine is not strategy or policy, but it is closely related to these tenets as it "serves to make U.S. policy and strategy effective in the application of U.S. military power."[43] Military leaders apply doctrine to

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[40] *See* FM 2-22.3, *supra* note 3, at vi.
[41] *See* § 2200dd (to be codified at 42 U.S.C. § 2200dd).
[42] *See Ex parte* Milligan, 71 U.S. (4 Wall.) 2, 29 (1866) (noting the lack of timeliness for Congress's action) (citing Luther v. Borden, 48 U.S. (7 How.) 1, 42–45, THE FEDERALIST NO. 26 (Alexander Hamilton), and THE FEDERALIST NO. 41 (James Madison)).
[43] JCS INSTR. 5120.02A, *supra* note 21, at A-3, 4. The instruction states:

> Policy and doctrine are closely related, but they fundamentally fill separate requirements. Policy can direct, assign tasks, prescribe desired capabilities, and provide guidance for ensuring the Armed Forces of the United States is prepared to perform its assigned roles; implicitly policy can therefore create new roles and a requirement for new capabilities. Conversely, doctrine enhances the operational effectiveness of the Armed Forces by providing authoritative guidance and standardized terminology on topics of relevance to the employment of military forces. Most often, policy drives doctrine; however, on occasion, an extant capability will require policy to be created. . . . [D]octrine is inexorably linked to the development of national military strategy. In general terms, joint doctrine establishes a link between the "ends" (what must be accomplished) and the "means" (capabilities) by providing the "ways" (how) for joint forces to accomplish military strategic and operational objectives in support

operations while keeping national security strategy principles in mind.[44] International law also plays a significant part in the military doctrine of interrogations by setting the parameters for doctrine development and implementation.[45] The Geneva Conventions hold much of the international law forming the basis of doctrine.[46] Unfortunately, several decades have passed since the Geneva Conventions were signed. Looking at the nature of the GWOT, the U.S. Armed Forces currently conduct operations using tactics, techniques, and procedures that have outpaced the dated international laws as well as military doctrine.[47] Now, with Congress also placing itself in the process of doctrine development, military interrogation doctrine will likely continue to fall off the pace of the changing enemy.[48]

> of national strategic objectives. Joint doctrine also provides information to senior civilian leaders responsible for the development of national security strategy as to the core competencies, capabilities, and limitations of military forces.

Id. *See* DENNIS DREW & DON SNOW, MAKING STRATEGY: AN INTRODUCTION TO NATIONAL SECURITY PROCESSES AND PROBLEMS 163–74 (1988) ("In both peace and war, the influence of military doctrine can be negated, modified, or limited by any of the host of other factors that influence strategy decisions. The degree to which doctrine influences strategy depends on the relative importance of doctrine in the eyes of the decision-maker."); JACK D. KEM, CAMPAIGN PLANNING: TOOLS OF THE TRADE (2d ed. 2006), *available at* http://cgsc.cdmhost.com/cgi-bin/showfile.exe?CISOROOT=/p4013 coll11&CISOPTR=377.

[44] *See* National Security Council, *The National Security Strategy* (Mar. 2006), http://www.whitehouse.gov/nsc/nssall.html.

[45] Memorandum, Vice Admiral A.T. Church III, Director, Navy Staff, Dep't of the Navy, to Sec'y of Defense, subject: Report on DOD Detention Operations and Detainee Interrogation Techniques 2–3 (Mar. 7, 2005), *available at* http://www.aclu.org/images/ torture/asset_upload_file625_26068.pdf [hereinafter Church Report] ("Interrogation is constrained by legal limits. Interrogators are bound by U.S. laws, including U.S. treaty obligations, and Executive (including DoD) policy—all of which are intended to ensure humane treatment of detainees.").

[46] *See* Geneva Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135; Geneva Convention Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287.

[47] *See* WONG, *supra* note 5, at 15. The main body of international law governing interrogation and military doctrine, the Geneva Conventions, were constructed in 1949. While additional protocols were drafted in the 1970s, the enemies, threats, and battlefield operations have changed significantly during the intervening six decades. Notably, the United States' war on terror involves forces that are neither party to or in compliance with the Geneva Conventions, e.g. Al Qaeda. *See* Eric Posner, *Apply the Golden Rule to al Qaeda?*, WALL ST. J., July 15, 2006, at A9.

[48] *Cf.*, WHITE PAPER, *supra* note 6; WONG, *supra* note 5.

III. The Detainee Treatment Act

In response to dramatic reports of detainee abuse and a perception that the highest levels of the U.S. Executive branch of government authorized and promoted questionable interrogation techniques, Congress passed the DTA.[49] Fortunately, the interrogation practices that resulted in acts of inhumane treatment by military personnel had no basis in the doctrine or policies set forth by the Executive and military leadership for the U.S. Armed Forces.[50] In fact, in February of 2002, the President issued a memorandum directing that all detainees be treated humanely,[51] well before the media focus on alleged abuses. Further,

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[49] 151 CONG. REC. S14241 (daily ed. Dec. 21, 2005) (statement of Sen. Dodd); Emma V. Broomfield, Note: *A Failed Attempt to Circumvent the International Law on Torture: The Insignificance of Presidential Signing Statements Under the Paquete Habana*, 75 GEO. WASH. L. REV. 105, 106 (2006); Meriwether, *supra* note 39, at 171.

[50] FM 2-22.3, *supra* note 3; U.S. DEP'T OF ARMY, FIELD MANUAL 34-52, INTELLIGENCE OPERATIONS (Sept. 1992) [hereinafter FM 34-52] (superseded by FM 2-22.3); Church Report, *supra* note 45, at 2–3 (concluding that the DOD had not "[p]romulgated interrogation policies or guidance that directed, sanctioned, or encouraged the abuse of detainees."). The scope of this article is limited to U.S. Armed Forces interrogation doctrine and practices. The controversial interrogation method of waterboarding, as implemented by the Central Intelligence Agency and not practiced by the U.S. Armed Forces, lies beyond this scope. Neither FM 34-52 nor FM 2-22.3 contain waterboarding as a developed doctrine for interrogation. If waterboarding were to be deemed a legal method of interrogation for the military by appropriate authority, this analysis may be applied to the military's ability to develop the doctrine and implementation of the interrogation method in light of the restrictions of the Detainee Treatment Act. *See* John Diamond, *New Pentagon Rules Ban 'Abusive' Interrogation*, USA TODAY, Sept. 7, 2006, at 6A. *See* Memorandum from William J. Haynes II, General Counsel, to the Secretary of Defense, subject: Counter-Resistance Techniques (Nov. 27, 2002), *available at* http://www.gwu.edu/~nsarchiv/NSAEBB/NSAEBB127/02.12.02.pdf (providing the list of proposed interrogation techniques outside of FM 34-52).

[51] Memorandum from George W. Bush, President of the United States, to the Vice President et al., subject: Humane Treatment of al Qaeda and Taliban Detainees (Feb. 7, 2002), *available at* http://lawofwar.org/Bush_memo_Genevas.htm [hereinafter White House Memo] ("[R]equiring that the detainees be treated humanely and, to the extent appropriate and consistent with military necessity, in a manner consistent with the principles of Geneva."). The argument that "extent appropriate" and "consistent with military necessity" leaves open the opportunity for military forces to ignore the humane treatment standard should not be confused with the general obligations of the military with respect to application of the Geneva Conventions. It appears that President Bush uses these terms in reference to the status of detainee rather than a deviation from a treatment standard. The interpretation that U.S. Armed Forces may forego treating detainees humanely based upon military necessity to accomplish a mission is a misreading of the statement. The true debate within the Executive was whether the Geneva Convention applied at all to detainees, but this debate did not subsume the underlying DOD policy of treating all detainees humanely. *See* Draft Memorandum from

absent from both the previous and recently published field manuals on interrogation procedures are provisions deemed illegal under domestic or international law.[52] Rather, servicemembers who violated existing standards acted on personal choices, exhibiting a lack of discipline that amounted to general misconduct.[53] Therefore, the DTA exists as unnecessary legislation for the military because previous military doctrine regarding detainee interrogations implemented during GWOT operations complied with humane treatment standards.[54]

The finding that individual criminal acts resulted in detainee abuses, not the authorized interrogation methods,[55] highlights the DTA as a legislative knee-jerk response. All DOD tactics, techniques, and procedures comply with international law, particularly the law of armed conflict.[56] Under the DOD Law of War Program, "[i]t is DOD policy that [m]embers of the DOD Components comply with the law of war during all armed conflicts, however such conflicts are characterized, and in all other military operations."[57] The overwhelming majority of interrogation practices complied with legal constraints, and even the adaptations implemented by interrogators in the theater of operations fell within legal parameters.[58] Lack of oversight, training, and specific

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Alberto R. Gonzales, to the President, subject: Decision Re Application of the Geneva Convention on Prisoners of War to the Conflict with Al Qaeda and the Taliban (Jan. 25, 2002), *available at* http://www.msnbc.msn.com/id/4999148/site/newsweek/. *Cf.* David E. Graham, *The Treatment and Interrogation of Prisoners of War and Detainees*, 37 GEO. J. INT'L. L. 61, 71–82 (2005). *Contra* Srividhya Ragavan & Michael S. Mireless, Jr., *The Status of Detainees from the Iraq and Afghanistan Conflicts*, 2005 UTAH L. REV. 619, 665–70 (2005).

[52] *See* FM 2-22.3, *supra* note 3; FM 34-52, *supra* note 50.

[53] Church Report, *supra* note 45, at 2–3.

[54] *See* White House Memo, *supra* note 51. The focus of the paper remains on military doctrine and not any other federal agency. Criticism of military interrogations with respect to torture are misplaced. The Central Intelligence Agency's interrogation methods fall under separate authority and a different mission. The DTA's focus on military interrogations is also misplaced by focusing on an Army FM.

[55] *See* Church Report, *supra* note 45, at 7.

[56] U.S. DEP'T OF DEFENSE, DIR. 2311.01E, DOD LAW OF WAR PROGRAM 2 (9 May 2006) [hereinafter DOD DIR. 2311.01E].

[57] *Id.* The same policy was found in the previous version of the publication, indicating that the U.S. Armed Forces operated in accordance with the law of armed conflict prior to 2006, covering the military operations in both Iraq and Afghanistan. *See* U.S. DEP'T OF DEFENSE, DIR. 5500.77, DOD LAW OF WAR PROGRAM (9 Dec. 1998) (superseded by DOD DIR. 2311.01E).

[58] *See, e.g.*, Church Report, *supra* note 45, at 9. The Report concludes:

> Interrogation policies were effectively disseminated and interrogators

guidance regarding interrogation policy set the conditions for the relatively few acts of abuse.[59] Moreover, a servicemember's individual act of abuse already constituted a crime under domestic law such as the Uniform Code of Military Justice.[60] Therefore, the DTA added nothing to the international and criminal legal frameworks for U.S. military operations.[61]

The DTA does not list permissible interrogation techniques; rather, it limits the military's interrogation techniques and procedures to those

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> closely adhered to the policies, with minor exceptions. Some of these exceptions arose because interrogation policy did not always list every conceivable technique that an interrogator might use, and interrogators often employed techniques that were not specifically identified by policy but nevertheless arguably fell within the parameters of FM 34-52. This close compliance with interrogation policy was due to a number of factors, including strict command oversight and effective leadership, adequate detention and interrogation resources, and GTMO's [Guantanamo Bay, Cuba] secure location far from any combat zone.

Id.

[59] *Id.* at 13.

[60] MANUAL FOR COURTS-MARTIAL, UNITED STATES, pt. IV, ¶ 16 (2005). Several provisions of the Uniform Code of Military Justice provide punitive measures for members of the Armed Forces who overstep the boundaries of legal interrogation. For example, Article 92 covers a servicemember's failure to obey orders or regulations. Article 93 covers a servicemember who maltreats or is cruel toward any person who is subject to his or her orders or commands. Article 128 covers assaults. Article 134 potentially covers any conduct that is either prejudicial to the good order and discipline in the armed forces or is of a nature to bring discredit upon the Armed Forces. No doubt should exist that these punitive articles provide an opportunity for the government to respond to any servicemember who oversteps the implemented interrogation procedures or crosses the boundary of acceptable humane treatment of detainees. *See also* DOD DIR. 2311.01E, *supra* note 56, at 5 ("Where appropriate, provide for disposition, under Reference (g), of cases involving alleged violations of the law of war by members of their respective Military Departments who are subject to court-martial jurisdiction.").

[61] Congressional motivation for passage of the DTA appears political; however, an argument that passage of the DTA could ease allies' tension in turning over detainees to American custody bears mention, but little fruit. The DTA neither affords a greater standard of protection for detainees than previously existed, nor does it bolster the standards of conduct of the U.S. Armed Forces. Correspondingly, allies should not have any additional motivation to hand over detainees to American custody as a result of the DTA. *See* Ryan P. Logan, Note: *The Detainee Treatment Act of 2005: Embodying U.S. Values to Eliminate Detainee Abuse by Civilian Contractors and Bounty Hunters in Afghanistan and Iraq*, 39 VAND. J. TRANSNAT'L L. 1605, 1639–40 (2006); FM 34-52, *supra* note 50.

condoned by Congress and specified in FM 2-22.3.[62] Not only did Congress inject its rule into an area constitutionally and historically within the governance of the Executive branch,[63] it also perilously bound the flexibility of the armed forces to implement adaptive tactics, techniques, and procedures related to detainee interrogations.[64] The preface of FM 2-22.3 reflects the congressional handcuffing of military operations by stating that a military member cannot utilize any interrogation technique not contained in the field manual, and the field manual reflectively states that none of its provisions contradict the DTA.[65] This effectively freezes the development of interrogation practices for the military, or at a minimum, presents the Executive with the hurdle of congressional acquiescence to any new interrogation procedures.[66] Considerable debate exists over whether controversial interrogation methods lead to actionable or truthful intelligence,[67] but analysis of the veracity of intelligence gathered using controversial methods lies beyond the scope of this article.[68]

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[62] Detainee Treatment Act of 2005, 42 U.S.C.S. § 2200dd (LEXIS 2007) (to be codified at 42 U.S.C. § 2200dd). The statute dictates:

> In General—No person in the custody or under the effective control of the Department of Defense or under detention in a Department of Defense facility shall be subject to any treatment or technique of interrogation not authorized by and listed in the United States Army Field Manual on Intelligence Interrogation.

Id.

[63] *See* U.S. CONST. art. II, § 2; Hamilton v. Dillin, 88 U.S. (21 Wall.) 73 (1874) (considering the authority of the President to exercise war powers by restricting commerce with insurrectionary states); Fleming v. Page, 50 U.S. (9 How.) 603 (1850) (determining presidential exercise of control as military commander over foreign territory).

[64] *See* Meriwether, *supra* note 39; *Vietnam Moment*, *supra* note 39.

[65] 42 U.S.C.S. § 2200dd; FM 2-22.3, *supra* note 3, at vi.

[66] The restricting effect emanates from the fact that the only techniques that may be used are those contained in the FM, and the FM's provisions may not exceed the boundaries established by the DTA. 42 U.S.C.S. § 2200dd; FM 2-22.3, *supra* note 3, at vi.

[67] *See* Kim Lane Scheppele, *Symposium: Fighting Terrorism with Torture: Where to Draw the Line?: Hypothetical Torture in the "War on Terrorism"*, 1 J. NAT'L SECURITY L. & POL'Y 285, 335–37 (2006); John Diamond, *New Pentagon Rules Ban "Abusive" Interrogation*, USA TODAY, Sept. 7, 2006, at 6A ("No good intelligence is going to come from abusive practices." Lt. Gen. John Kimmons); Donna Miles, *GITMO Yielding Valuable Intelligence in a Safe, Disciplined Environment*, AM. FORCES PRESS SERV., June 3, 2004, http://www.defenselink.mil/news/newsarticle.aspx?id=26353.

[68] *See e.g.* Josh White, *Interrogation Research Is Lacking, Report Says*, WASH. POST, Jan. 16, 2007, at A15.

Perceptively, one may argue that Congress has not really frozen the interrogation methods because the FM leaves itself open to revision. However, that argument would result in the DTA becoming useless legislation because the DOD and the Department of Army could change FM 2-22.3 at its will, potentially implementing even more extreme doctrinal measures.[69] The DTA unduly burdens the U.S. military by forcing it to initiate the gnarly process of republishing an Army field manual under the meddlesome oversight of Congress should the military deem it necessary to implement a new interrogation technique not currently covered in the FM. Unnecessary congressional oversight and bureaucracy could result in a powerful deterrent to a change in interrogation doctrine. Inflexible implementation of interrogation techniques for the purpose of gathering intelligence results in one more advantage for the enemies of the United States.[70]

The President made the Executive's interpretations of the DTA clear in that it would not interfere with the office's constitutional authority as the unitary executive.[71] The DTA and the President's signing statement

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[69] As an alternative to legislating detainee interrogations and military doctrine, the DOD could have inserted its own punitive language in FM 2-22.3 stating that the use of techniques not approved in the manual may be punishable under the Uniform Code of Military Justice or federal law. This step may have eliminated, or at least mitigated, congressional concerns.

[70] Static military doctrine permits an enemy to train to defeat the tactics, techniques, and procedures used by the Armed Forces. Flexibility does not necessitate the implementation of illegal or "abusive" methods.

[71] *See* Statement on Signing The "Department of Defense, Emergency Supplemental Appropriations to Address Hurricanes in the Gulf of Mexico, and Pandemic Influenza Act, 2006," 41 WEEKLY COMP. PRES. DOC. 1918 (Dec. 30, 2005) [hereinafter Signing Statement], http://www.whitehouse.gov/news/releases/2005/12/print/200512308.html. The President noted that:

> The executive branch shall construe section 8104, relating to integration of foreign intelligence information, in a manner consistent with the President's constitutional authority as Commander in Chief, including for the conduct of intelligence operations, and to supervise the unitary executive branch. Also, the executive branch shall construe sections 8106 and 8119 of the Act, which purport to prohibit the President from altering command and control relationships within the Armed Forces, as advisory, as any other construction would be inconsistent with the constitutional grant to the President of the authority of Commander in Chief.

Id. But see Erin Louise Palmer, *Reinterpreting Torture: Presidential Signing Statements and the Circumvention of U.S. and International Law*, 14 HUM. RTS. BR. 21 (2006)

attached to the DTA reflect the tension between Congress and the Executive with respect to governance of military operations and its doctrine.[72] This tension requires resolution through application of the Constitution and interpretations of the traditional arbiter of disputes between Congress and the Executive, the Judiciary.

IV. Constitutional Authority to Govern the U.S. Armed Forces

"By the Constitution, as originally adopted, no limitations were put upon the war-making and war-conducting powers of Congress and the President; and after discussion, and after the attention of the country was called to the subject, no other limitation by subsequent amendment has been made . . . ."[73] The Court's comments hold true today as the branches of the U.S. government obtain their authority to take action with respect to the military based upon their enumerated powers in the Constitution.[74] The Constitution establishes a bifurcated framework regarding regulation of the armed forces between the Executive and Congress.[75] Although bifurcated, it appears that the Framers understood that there must be a unity of command that bears ultimate responsibility for the operations of the armed forces, and that is the Executive.[76] It was

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(stating that the President's signing statement should not have the effect of interpreting the law to circumvent existing legislation and international law).

[72] *See* Signing Statement, *supra* note 71; *see also* Broomfield, *supra* note 49, at 106.

[73] *Ex parte* Milligan, 71 U.S. (4 Wall.) 2, 32–33 (1866). The Court stated:

> Congress has the power not only to raise and support and govern armies but to declare war. It has, therefore, the power to provide by law for carrying on war. This power necessarily extends to all legislation essential to the prosecution of war with vigor and success, except such as interferes with the command of the forces and the conduct of campaigns. That power and duty belong to the President as commander in chief. Both these powers are derived from the Constitution, but neither is defined by that instrument. Their extent must be determined by their nature, and by the principles of our institutions.

Id. at 139–40.

[74] Robert S. Barker, *Government Accountability and Its Limits*, ISSUES OF DEMOCRACY (Aug. 2000), http://usinfo.state.gov/journals/itdhr/0800/ijde/barker.htm.

[75] *See* U.S. CONST. arts. I, II; *see also* Hartzmann, *supra* note 13, at 68–72 ("supporting Congress's authority to make rules for the government and regulate the land and naval forces").

[76] *See* U.S. CONST. art. II, § 2; *see also* Hartzmann, *supra* note 13, at 69 (noting "the application by the Framers of the fundamental constitutional principle of the separation of

in the Constitution that the Framers created the office of the Executive and bestowed within it the powers of Commander in Chief of the Armed Forces.[77] However, the power and authority of Commander in Chief does not necessarily act to the total exclusion of Congress; under optimal conditions, a mutual respect between the branches for exercising power over the military and its operations exists.[78]

The model of reciprocity has "come to be accepted as the appropriate way to approach questions of power."[79] Justice Jackson's opinion in *Youngstown Sheet & Tube Co. v. Sawyer* (*Youngstown*) highlights the model of reciprocity where he stated that "[w]hile 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 a separateness but interdependence, autonomy but reciprocity."[80] This interdependence among each branch, while struggling to maintain as much constitutional authority as possible, has created tensions within the federal government.[81] Unfortunately, as Justice Jackson admits, no clear answer on the delineation of constitutional authority exists, and the best that the third branch of

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powers, which in this instance was based on a concern for effective and efficient government.").

[77] *See* U.S. CONST. art. II, § 2; *see also* Hartzmann, *supra* note 13, at 74. Hartzmann writes:

> As finally drafted by the Framers, the new Constitution created the executive office of the President and transferred to that office certain military powers that had previously been assigned to the Congress under the Articles of Confederation. Instead of the commander in chief being an agent of the Congress serving at the order and direction of the Congress, the commander in chief function was incorporated independently into the office of the President, merging the military function of the supreme commander with the political function of the executive. Furthermore, the power to direct military operations was removed as one of Congress's named powers and not otherwise expressly mentioned in the new Constitution.

Hartzmann, *supra* note 13, at 74.

[78] *See* Hartzmann, *supra* note 13, at 121.

[79] Neil Kinkopf, *The Statutory Commander in Chief*, 81 IND. L.J. 1169, 1170 (2005).

[80] Youngstown Sheet & Tube Co. v. Sawyer (*Steel Seizure*), 343 U.S. 579, 635 (1952) (Jackson, J. concurring).

[81] *See* Hartzmann, *supra* note 13, at 106–09 (citing BRIGADIER GENERAL G. NORMAN LIEBER, REMARKS ON THE ARMY REGULATIONS (1898)).

government, the Judiciary, can add to a potential solution is a framework for analysis.[82]

A. Congressional Authority to Regulate the Armed Forces of the United States

Congress finds its authority for regulating the Armed Forces of the United States in Article I, Section 8, of the Constitution, primarily to raise, support, and regulate the armed forces, and make any other laws necessary to give effect to those charges. [83] While there is no point in arguing that Congress has no place in regulating the military, there are competing commentaries and support for both a narrow and expansive interpretation of Congress's "make rules" and "make all Laws" authorities.[84]

Brigadier General G. Norman Lieber argued in 1898 as The Judge Advocate General of the Army that Congress, without a doubt, held primacy over the Executive with respect to control over the military.[85] He extended his primacy theory by stating that the Executive could not encroach upon Congress's constitutional authority when exercising

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[82] *See id.* at 637.

[83] U.S. CONST. art. I, § 8. Congress's powers are:

> To raise and support armies . . . [t]o provide and maintain a Navy . . . [t]o make Rules for the Government and Regulation of the land and naval Forces . . . and . . . [t]o make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States or in any Department or Officer thereof.

Id.

[84] *See* Hartzmann, *supra* note 13, at 82–89; Memorandum, Office of the Assistant Attorney General, Office of Legal Counsel, Department of Justice, to Alberto R. Gonzales, Counsel to the President, subject: Standards of Conduct for Interrogation under 18 U.S.C. §§ 2340–2340A (Aug. 1, 2002) [hereinafter Interrogation Memorandum], *available at* http://www.washingtonpost.com/wp-srv/national/documents/dojinterrogationmemo20020801.pdf, *superseded by* Memorandum, Daniel Levin, Acting Assistant Attorney General, Office of Legal Counsel, Department of Justice, to Deputy Attorney General (Dec. 30, 2004), *available at* http://www.usdoj.gov/olc/18usc23402340a2.htm ("Congress may no more regulate the President's ability to detain and interrogate enemy combatants than it may regulate his ability to direct troop movements on the battlefield.").

[85] *See* Hartzmann, *supra* note 13, at 106–09 (citing BRIGADIER GENERAL G. NORMAN LIEBER, REMARKS ON THE ARMY REGULATIONS (1898)).

control of the military.[86] General Lieber used the constitutional context of express grants of authority for Congress compared to construction of Executive powers within the Constitution to support his argument.[87]

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[86] *Id.*

[87] *Id.* General Lieber argues:

> As to the subject matter of regulations for the government of the Army, no distinct line can be drawn separating the President's constitutional power to make them from the constitutional power of Congress "to make rules for the government and regulation" of the land forces. Regulations are, when they relate to subjects within the constitutional jurisdiction of Congress, unquestionably of a legislative character, and if it were practicable for Congress completely to regulate the methods of military administration, it might, under the Constitution do so. But it is entirely impracticable, and therefore it is in a great measure left to the President to do it. So far as Congress chooses to exercise its jurisdiction in this respect it occupies the field, and the President can not encroach on it. But when it does not do so, the President's power is of necessity called into action. It is, indeed, of the commonest occurrence for Congress to regulate a subject in part and for the Executive to regulate some remaining part, and this without any pretense of statutory authority, but upon the broad basis of constitutional power. We thus have a legislative jurisdiction and, subject to it, an executive jurisdiction extending over the same matter." He goes on to say "When Congress fails to make regulations with reference to a matter of military administration, but either expressly or silently leaves it to the President to do it, it does not delegate its own legislative power to him, because that would be unconstitutional, but expressly or silently gives him the opportunity to call his executive power into play. It is perhaps not easy to explain why, if regulations may, under the Constitution, be made both by the legislative and executive branches, one should have precedence over the other; but it is to be noticed that the power of Congress is the express one "to make rules for the government and regulation of the land and naval forces," whereas the power of the President is a construction of his position as Executive and commander in chief. The legislative power, by the words quoted, covers the whole field of military administration, but it is not always certain how far the executive power may go. It is not as well defined as the legislative power, but it is undoubtedly limited to so much of the subject as is not already controlled by the latter. The jurisdiction of the executive power is not, however, within this limit coextensive with that of the legislative power, because the legislative branch of the government has a constitutional field of operation peculiar to itself, and yet there are army regulations which seem to be of a legislative character. It is because of this that difficulty sometimes occurs—a difficulty which has in the past quite often taken the form of a difference of views between the War Department and the accounting officers of the Treasury.

General Lieber's argument exhibits flaws as he explains the basis for his theory. General Lieber relies on the fact that Congress is just too busy to become involved in the day-to-day regulation of the military and leaves the matter for the Executive to handle.[88] However, he argues that Congress can take back the reins of authority at any time.[89] Congress's "plate is too full" is a poor constitutional argument for the allocation or interpretation of authority for control of the armed forces. General Lieber also too easily dismisses the clear Commander in Chief powers bestowed upon the Executive under Article II by presuming that Congress always possesses a superior authority regarding the military and the Executive only exercises power in the absence of congressional action.[90] Congress's explicit power to regulate the armed forces actually focuses on its physical make-up, and not its operations other than the actual declaration of war.[91]

Congress's power to establish rules within the military does not lack for foundation, as seen in Article I of the Constitution.[92] In fact, scholars have noted that Congress's rulemaking power is plenary when applied to administration of the military, but cannot make the same finding regarding military operations.[93] Alexander Hamilton listed with precise clarity the powers reserved to Congress as declaration of war and raising and regulating the armed forces.[94] The Framers granted powers to Congress only to fund and fiscally restrain the military, as well as regulate its size.[95] The trap lies in ceding too much power to Congress under the fiscal and regulatory umbrellas, as warned by Alexander Hamilton and James Madison. The legislature has a "propensity . . . to intrude upon the rights, and to absorb the powers, of the other departments" and no department should be left at the mercy of another.[96] To posit that Congress can dictate to the Executive the manner in which Executive authority may be wielded is to make Congress the arbiter of

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Id.

[88] *Id.*

[89] *Id.*

[90] *Id. See* U.S. CONST. art. II, § 2.

[91] *See* U.S. CONST. art. I, § 8.

[92] *Id.*

[93] *See* Hartzmann, *supra* note 13, at 117.

[94] THE FEDERALIST NO. 74, at 447 (Alexander Hamilton) (Clinton Rossier ed., 1961).

[95] U.S. CONST. art. I, § 8.

[96] THE FEDERALIST NO. 73, at 418 (Alexander Hamilton) (Clinton Rossier ed., 1961), NO. 48, at 309 (James Madison) (Penguin ed., 1987) (warning of legislative usurpations that may lead to tyranny); ANDREW C. MCCARTHY ET AL., NSA'S WARRANTLESS SURVEILLANCE PROGRAM: LEGAL, CONSTITUTIONAL, AND NECESSARY 43 (2006).

power, and not the Constitution.[97] Correspondingly, Article I, Section 8, should not be interpreted as the definitive declaration of authority over the military, when in fact it is only an implementing measure to ensure that the other branches have the requisite authority to carry out their powers.[98]

Another element of congressional authority lies in its control of the purse pursuant to Article I, Section 8, of the Constitution.[99] Wielding the power of the purse to promote or defeat political goals is a key and accepted strategy of politicians, but a grasp at straws for opponents and critics of the current administration to support Congress's involvement in military affairs.[100] Beyond politics, there exists a real constitutional threat by Congress's utilizing the power of the purse regarding military operations to the Executive's ability to carry out the office's obligations to protect and defend the nation.[101]

1. Judicial Support for Congressional Regulation of Military Operations

Promoters of legislative superiority in the realm of military operations cite the case of *Little v. Barreme*.[102] In 1799, President John Adams extended legislation passed by Congress for the seizure of American ships heading for a French port to include seizure of American ships emanating from French ports during the short war between the United States and France.[103] Subsequently, the Supreme Court held that

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[97] *See* MCCARTHY ET AL., *supra* note 96, at 49.

[98] U.S. CONST. art. I, § 8 ("To make all laws which shall be necessary and proper for carrying into execution the foregoing powers, and all other powers vested by this Constitution in the government of the United States, or in any department or officer thereof.").

[99] *Id.*

[100] Congress should use the power of the purse to regulate the size of the military and its expenditures for facilities, equipment, salary, and supplies, but it should not use the same power to inject itself into the actual operations of the Armed Forces. C*ontra* Russ R. Feingold, *On Opposing the President's Iraq Escalation Policy and Using the Power of the Purse to End Our Military Involvement in Iraq*, Feb. 16, 2007, http://feingold.senate.gov/~feingold/statements/07/02/20070216.htm.

[101] Patty Waldmeier, *Bush Vows to Defy Congress on Iraq plan*, FIN. TIMES, Jan. 15, 2007, http://www.ft.com/cms/s/294c7bf2-a427-11db-bec4-0000779e2340.html.

[102] Little v. Barreme, 6 U.S. (2 Cranch) 70 (1804) (holding that the President could not expand his authority to capture vessels conducting commerce not of a category identified by legislation).

[103] *Id.*

the President could not authorize seizure of American ships emanating from a French port, when Congress had only authorized seizure of American ships going to a French port.[104]

This case developed as a champion for congressional authority exceeding the Executive's in the arena of military affairs. However, the Department of Justice (DOJ) wisely highlights two critical differences in the *Little v. Barreme* case when comparing Congress's power to the Executive's: first, the 1799 law only applied to American ships and did not purport to direct any action by the Executive or the military with respect to engaging enemy ships or forces, and second, the specific law passed by Congress most likely fits well within an enumerated power of Congress with respect to regulating foreign commerce under Article I, Section 8, of the Constitution.[105] These represent marked differences from governing the conduct of military forces in prosecuting a war.[106] The Executive generally directs military powers toward foreign threats and lands. Further, rarely do Executive war power acts contain a primary focus on commercial activities, which naturally fit under express congressional authority.[107] These limiting factors undermine the application of *Little v. Barreme* to an argument supporting congressional legislation of military doctrine.

Proponents of congressional authority also highlight the Supreme Court decision in *Youngstown*, as the Court looked at whether the President's seizure of the nation's steel mills overstepped his authority in light of the Labor Management Relations Act (LMRA) of 1947.[108] President Harry S. Truman, embroiled in the Korean War, feared that a possible strike by steelworkers would result in a national catastrophe, cutting off the supply of steel and its byproducts to the U.S. Armed Forces.[109] However, the LMRA contained a specific framework for the seizure of private property by the Executive in case of a national

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[104] *Id.*

[105] Memorandum, Alberto R. Gonzales, Attorney Gen., Dep't of Justice, to The Honorable William H. Frist, Majority Leader, United States Senate, subject: Legal Authorities Supporting the Activities of the National Security Agency Described by the President 33 (Jan. 19, 2006) [hereinafter NSA Memo], *available at* http://www.fas.org/irp/nsa/doj011906.pdf.

[106] *See id.* at 33.

[107] *See* U.S. CONST. art. I, § 8.

[108] *Id.*; Labor Management Relations Act of 1947, 61 Stat. 136 (codified as amended at 29 U.S.C. §§ 141–197 (2000)).

[109] Youngstown Sheet & Tube Co. v. Sawyer (*Steel Seizure*), 343 U.S. 579, 582 (1952).

emergency.[110] President Truman did not follow this framework in the steel mill dispute when he ordered the seizure of the mills.[111] The steel mills brought suit, arguing that the President's seizure was an unlawful taking and lawmaking in violation of the LMRA and Constitution.[112] The President posited that he could execute the seizure because he possessed the authority to protect the nation in an extraordinary circumstance, a time of war, pursuant to Article II of the Constitution.[113] Finally, the Court held that the Executive's constitutional commander in chief powers were limited to the day-to-day fighting in a theater of war, and did not extend to taking possession of private property to alleviate a labor dispute.[114]

While championed for congressional authority, this case is easily distinguishable from the issue of military doctrine, and military interrogations in particular. The seizure of steel mills or private property falls within a traditional and enumerated area of congressional power: regulating commerce among the States in Article I, Section 8, of the Constitution.[115] Military doctrine and interrogations fit under the category of day-to-day operations of the military, specifically identified by the Court as being within the authority of the Executive to control.[116] The holding in *Youngstown* fails to provide a solid base for support of congressional control of the military; in fact, it reinforces the authority of the Executive with respect to military doctrine.[117]

2. Legislative Support for Congressional Regulation of Military Operations

The War Powers Resolution (WPR) also fails to bolster the constitutional basis for Congress's control of military operations.[118] During the era of the Vietnam conflict, Congress attempted to limit the

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[110] *Id.* at 586.
[111] *Id.*
[112] *Id.* at 582–86; *see* 61 Stat. 136 (codified as amended at 29 U.S.C. §§ 141–197).
[113] *Steel Seizure*, 343 U.S. at 587.
[114] *Id.* at 587–89.
[115] U.S. CONST. art. I, § 8.
[116] *Steel Seizure*, 343 U.S. at 587.
[117] *See id.*
[118] War Powers Resolution, 50 U.S.C. §§ 1541–1548 (2000).

power of the Executive regarding the use of troops in armed conflict.[119] The WPR specifically applies to the introduction of troops into a conflict, but not how the troops wage the war once involved.[120] Congress entered the realm of governing military operations with some trepidation, as the WPR goes further to ensure that it has not encroached upon the constitutional authority of the Executive by mentioning that no provision in the law infringes upon Executive authority.[121] Congress even hedged its involvement further by noting that if any provision were found to be invalid (presumably by the Judiciary), that the remaining provisions of the law shall remain in effect.[122] This evasive language demonstrates the lack of solid foundation for Congress to exert authority over military operations in place of the Executive.

B. Executive Authority to Regulate the U.S. Armed Forces

The Constitution charges the Executive with protecting and defending the very same document and its ideals,[123] in addition to protecting the nation.[124] Holding true to the Constitution's intent,

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[119] Mark T. Uyeda, Note, *Presidential Prerogative Under the Constitution to Deploy U.S. Military Forces in Low-Intensity Conflict*, 44 DUKE L.J. 777, 828 (1995); *see, e.g.*, 50 U.S.C. §§ 1541–1542 (2000):

> [The purpose is to] insure that the collective judgment of both the Congress and the President will apply to the introduction of United States Armed Forces into hostilities . . . . The President in every possible instance shall consult with Congress before introducing United States Armed Forces into hostilities or into situation where imminent involvement in hostilities is clearly indicated by the circumstances, and after every such introduction shall consult regularly with the Congress until United States Armed Forces are no longer engaged in hostilities or have been removed from such situations.

Id.

[120] 50 U.S.C. § 1547 ("Authority to introduce United States Armed Forces into hostilities or into situations wherein involvement in hostilities is clearly indicated by the circumstances shall not be inferred- from any provision of law . . . or from any treaty.").

[121] *Id.*; Uyeda, *supra* note 119, at 798–99.

[122] 50 U.S.C. § 1547.

[123] U.S. CONST. art. II, § 2.

[124] Protection of the Constitution relates more to freedom interests and structure rather than security of the nation's property. For example, the Executive possesses the authority to make treaties with foreign states with the advice and consent of the Senate. The United States has entered into treaties that govern some areas of military doctrine,

President Theodore Roosevelt believed that he was a steward of the people and should exert all power not specifically prohibited by the Constitution or Congress.[125] The Framers described the President's obligation to protect the Constitution as obliging the Executive to prevent outside intrusions, whether from Congress, the Judiciary, or a foreign state.[126] The Executive must protect the Constitution, the nation's territory and citizens, as well as the office's authority. All of these protections relate to the control and direction of the U.S. Armed Forces, its doctrine and operations.[127]

1. Executive Authority as Commander in Chief

Article II, Section 2, of the Constitution grants the President the title of Commander in Chief of the Army and Navy of the United States.[128] The Constitution lacks additional definitions of the roles and responsibilities of the Commander in Chief, but the Framers surely understood that the grant of authority covered the operational direction of the U.S. military.[129] Alexander Hamilton wrote that the only powers

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including the area of interrogations, such as Geneva Convention III and Geneva Convention IV Relating to Prisoners of War and Civilians, respectively. These treaties do not necessarily touch upon the national security interests of the United States, as they do not offer protections to our citizens and military personnel within the borders of our country during the current conflict (the Geneva Conventions would offer protections to citizens in the United States if the conflict were to occur on United States soil). The treaties do offer protections for our citizens and military personnel when they find themselves in foreign areas during time of war or occupation, thereby protecting a freedom interest. *See* U.S. CONST. art. II; Geneva Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135; Geneva Convention Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287.

[125] Youngstown Sheet & Tube Co. v. Sawyer (*Steel Seizure*), 343 U.S. 579, 662 (1952).

[126] THE FEDERALIST NO. 49 (James Madison), NO. 70 (Alexander Hamilton).

[127] *Contra* Henry P. Monaghan, *The Protective Power of the Presidency*, 93 COLUM. L. REV. 1, 32 (1993) (recognizing the Executive's authority to utilize the office's protective powers, he cannot concede that the President may use military forces at his will to the contrary of congressional wishes).

[128] U.S. CONST. art. II, § 2.

[129] THE FEDERALIST NO. 74, at 447 (Alexander Hamilton) (Clinton Rossier ed., 1961) (comparing the power over the military and the ability to declare war to that of the King of Britain, but dissecting the two authorities among the Executive and Congress); THE FEDERALIST NO. 69, at 417–18 (Alexander Hamilton) (Clinton Rossier ed., 1961). Hamilton writes:

> *First*. The President will have only the occasional command of such

reserved from the President with respect to the military were those already laid out in the Constitution as expressly granted to Congress.[130] Consequently, the Executive holds a better position than the legislature or Judiciary to control the U.S. Armed Forces.[131] A single individual with the assistance of advisors can more efficiently control and direct the military than an unwieldy group debating to reach a consensus for action such as within the Congress.[132] Hamilton penned that "unity is conducive to energy," and "[d]ecision, activity, secrecy, and dispatch will generally characterize the proceedings of one man in a much more eminent degree than the proceedings of any greater number; and in proportion as the number is increased, these qualities will be diminished."[133] The energy of the Executive was sought by the Framers and vested as the unitary power over military operations.[134] Moreover,

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> part of the militia of the nation as by legislative provision may be called into the actual service of the Union. The king of Great Britain and governor of New York have at all times the entire command of all the militia within their several jurisdictions. In this article, therefore, the power of the President would be inferior to that of either the monarch or the governor. *Second*. The President is to be commander in chief of the army and navy of the United States. In this respect, his authority would be nominally the same with that of the king of Great Britain, but in substance much inferior to it. It would amount to nothing more than the supreme command and direction of the military and naval forces, as first general and admiral of the Confederacy; while that of the British king extends to the *declaring* of war and to the *raising* and *regulating* of fleets and armies—all which, by the Constitution under consideration, would appertain to the legislature.

Id.

[130] THE FEDERALIST NO. 74, at 447 (Alexander Hamilton) (Clinton Rossier ed., 1961).

[131] THE FEDERALIST NO. 70 (Alexander Hamilton).

[132] *Id.* at 424 (Alexander Hamilton).

[133] *Id.* The Executive holds a position that may respond more quickly than Congress when a need arises to change military interrogation doctrine and practices. While it took years to finalize FM 2-22.3 in light of the interrogation controversies that began in 2002, the DTA acts as an additional hurdle by including congressional concurrence in the doctrine and implementation of interrogation. The DTA effectively means that servicemembers may not employ interrogation methods not contained in the current version of FM 2-22.3. Congress thereby inserted its oversight into the development of doctrine, and added an additional hurdle of supposed approval of to-be-developed interrogation techniques. *See* Detainee Treatment Act of 2005, 42 U.S.C.S. § 2200dd (LEXIS 2007) (to be codified at 42 U.S.C. § 2200dd).

[134] Hartzmann, *supra* note 13, at 76–77. *But see* Youngstown Sheet & Tube Co. v. Sawyer (*Steel Seizure*), 343 U.S. 579, 644 (1952) (Jackson, J., concurring) (stating that the Executive does not have a monopoly with respect to war powers). Justice Jackson's statement should be read in consideration of Congress's authority to declare war, as well as to regulate the military by size and funding.

the holdings of the Supreme Court support the Executive's power to direct military campaigns under the Commander in Chief authority of the Constitution.[135] Much of this authority lies in the interpretive powers of the Executive as the Commander in Chief.[136]

2. Foreign Affairs and National Security Powers of the Commander in Chief

The Founders vested the responsibility and authority necessary to conduct the nation's foreign affairs and preserve the country's security within the Executive as Commander in Chief.[137] The Executive holds exclusive power when establishing foreign affairs, and the Executive promotes the foreign affairs objectives through the Commander in Chief powers when using military operations and tactics to support its policies.[138] As a limiting factor upon this power, the President cannot transcend the bounds of existing law, including international legal norms.[139] Military interrogations fall within this exclusive power as matters of foreign affairs and national security.[140] By design, military interrogations take place on foreign soil and subject foreign citizens to their means and methods; these facets sufficiently relate detainee interrogations to foreign affairs.[141]

The President also possesses powers to defend and protect the nation through Article II, Section 1, of the Constitution, known as the "Vesting

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[135] *See* Hamilton v. Dillin, 88 U.S. (21 Wall.) 73, 7 (1874) (stating that the President is "constitutionally invested with the entire charge of hostile operations"); Fleming v. Page, 50 U.S. (9 How.) 603, 615 (1850) (holding that the President possessed the power to "employ [the military] in the manner he may deem most effectual to harass and conquer and subdue the enemy"); The Brig Amy Warwick (The Prize Cases), 67 U.S. (2 Black) 635, 688 (1862) (stating that the President was obliged to resist attack against the United States with all appropriate measures).

[136] *See* CHRISTOPHER S. KELLEY, RETHINKING PRESIDENTIAL POWER—THE UNITARY EXECUTIVE AND THE GEORGE W. BUSH PRESIDENCY 4–10 (2005). *Contra* KOH, *supra* note 15, at 45.

[137] THE FEDERALIST NO. 70 at 471–72 (Alexander Hamilton) (Clinton Rossier ed., 1961). *But see* Monaghan, *supra* note 127, at 52–53 (arguing that Congress delegated foreign affairs powers to the President).

[138] *Cf.* Hartzmann, *supra* note 13, at 77. *Contra* KOH, *supra* note 15, at 45.

[139] *See Ex parte* Milligan, 71 U.S. (4 Wall.) 2, 175 (1866).

[140] Military operations are an extension of national security through the use of military forces to combat terrorism and national threats on territory other than United States.

[141] Deborah N. Pearlstein, *Finding Effective Constraints on Executive Power: Interrogation, Detention, and Torture*, 81 IND. L.J. 1255, 1262 (2005).

Clause."[142] The Vesting Clause grants the President plenary authority to direct the United States' interests outside the borders of this country, limited only by the Constitution itself and those restraints set by Congress in accordance with its enumerated powers.[143] In support of this vesting, James Madison wrote, "[t]he several departments being perfectly co-ordinate by the terms of their common commission, none of them, it is evident, can pretend to an exclusive or superior right of settling the boundaries between their respective powers."[144]

The Court has weighed in on several occasions regarding the Executive's authority in foreign affairs: "The powers of the President in the conduct of foreign relations include the power, without consent of the Senate, to determine the public policy of the United States."[145] Foreign policy authority rests with the Executive by constitutional direction,

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[142] U.S. CONST. art. II, § 1 ("The executive Power shall be vested in a President of the United States of America.").

[143] *The President's Compliance with the "Timely Notification Requirement" of Section 501(b) of the National Security Act*, 10 Op. O.L.C. 159, 160–1 (1986); *see also* Interrogation Memorandum, *supra* note 84. The opinion reveals:

> Any effort by Congress to regulate the interrogation of battlefield combatants would violate the Constitution's sole vesting of the Commander in Chief authority in the President. There can be little doubt that intelligence operations, such as the detention and interrogation of enemy combatants and leaders, are both necessary and proper for the effective conduct of a military campaign. Indeed, such operations may be of more importance in a war with an international terrorist organization than one with the conventional armed forces of a nation-state, due to the former's emphasis on secret operations and surprise attacks against civilians. It may be the case that only successful interrogations can provide the information necessary to prevent the success of covert terrorist attacks upon the United States and its citizens. Congress can no more interfere with the Presidents' conduct of the interrogation of enemy combatants than it can dictate strategic or tactical decisions on the battlefield. Just as statutes that order the President to conduct warfare in a certain manner or for specific goals would be unconstitutional, so too are laws that seek to prevent the President from gaining the intelligence he believes necessary to prevent attacks upon the United States.

Id.

[144] THE FEDERALIST NO. 49 (James Madison).

[145] United States v. Pink, 315 U.S. 203, 229 (1942) (deciding whether the United States was entitled under an executive agreement to recover the assets of a Russian insurance company located in New York).

judicial interpretation, and the inherent powers of the office.[146] Further, because the entire nation elects the President, whereas specific voting districts select their congressional representatives, the President holds a better position as head of the diplomatic, military, and intelligence agencies to determine foreign policy.[147] Congress comprises far too unwieldy a body to effectively engage in foreign affairs, and the Judiciary by its nature plays no role. Military doctrine with respect to detainee interrogations supports not only national security, but foreign policy, both within the governing authority of the Executive.[148]

Utilizing a recent Supreme Court case analysis in *Hamdi v. Rumsfeld*, Justice Thomas' dissent promotes viewing national security and foreign affairs in a strict and simple constitutional framework.[149] Principally, according to Justice Thomas, the President has "primary responsibility . . . to protect the national security and to conduct the nation's foreign relations. . . . [I]t is crucial to recognize that judicial interference in these domains destroys the purpose of vesting primary responsibility in a unitary Executive."[150] The power to direct a military campaign in the interests of national security fits most justly within the Executive because servicemembers sacrifice themselves and conduct their operations at the direction of their commander.[151]

The Supreme Court provides further support for the Executive's constitutional authority being at its highest in the realm of national security.[152] The dissent in *Youngstown* remarked that the Executive has a "grave constitutional duty to act for the national protection in situations not covered by the acts of Congress."[153] The Executive should not act

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[146] Uyeda, *supra* note 119, at 812.
[147] *Id.*
[148] *See* Church Report, *supra* note 45.
[149] Hamdi v. Rumsfeld, 542 U.S. 507, 580–82 (2004).
[150] *Id.* at 580–82.
[151] Hamdi v. Rumsfeld, 316 F.3d. 450, 463 (4th Cir. 2003), *rev'd*, 542 U.S. 507 (2004) ("The Constitutional allocation of the warmaking powers reflects not only the expertise and experience lodged within the executive, but also the more fundamental truth that those branches most accountable to the people should be the ones to undertake the ultimate protection and to ask the ultimate sacrifice from them.").
[152] Even in a case of military administration, the Court held that the Executive's national security powers hold more weight than Congress's regulatory authority. Dep't of the Navy v. Egan, 484 U.S. 518, 527–30 (1988) (considering whether a civilian employee who had been denied a security clearance required a hearing before such denial, and holding that the Executive or Agency is left to determine the appropriate process).
[153] Youngstown Sheet & Tube Co. v. Sawyer (*Steel Seizure*), 343 U.S. 579, 691 (1952) (Vinson, J., dissenting).

contrary to the laws passed by Congress, but it certainly can act for the benefit of the public when necessary, particularly in those instances where the authority is not clearly found in the Constitution or in previous legislation.[154] The President's national security powers, including detainee interrogations, should be generally permissive unless expressly restricted by the Constitution, international law, or upon command of Congress or the Supreme Court.[155] Accordingly, Congress and the courts should only make such a command upon the Executive when the conduct of military operations results in a clear contradiction of existing laws. Moreover, the Executive possesses a great advantage over Congress when faced with threats to the national security and application to military operations: the Executive has a direct link to information about current threats and control over several agencies that can respond to the threat.[156] The Executive must be able to act swiftly without compromising its sources, rely on its accumulated experience, and issue orders that will be obeyed without pause.[157]

3. Executive Powers in Emergency

The twenty-first century brought a period of national urgency, if not emergency, to the United States with respect to the GWOT. The Supreme Court has recognized over time that the Executive's power exhibits elasticity in times of national emergency or strife.[158] Those who believe that the Bush Administration pushed the boundary of torture should recognize that this Executive is not the only President to push the limits of Executive authority.[159] President Howard Taft, a conservator of

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[154] *See id.* at 691–92.

[155] *Cf.* Meriwether, *supra* note 39, at 167 ("The government's reluctance to release information about the exact interrogation techniques used on detainees is obviously rooted in the need for operational security.").

[156] *See* Pearlstein, *supra* note 141; Outline, *supra* note 2.

[157] Eric A. Posner & Adrian Vermeule, *Accommodating Emergencies*, 56 STAN. L. REV. 605, 644 (2003).

[158] *See, e.g.*, *Steel Seizure*, 343 U.S. at 691 (holding that the President did not have the authority to circumvent legislation and seize the nation's steel mills in anticipation of a workers strike when federal legislation laid out a specific procedure); s*ee also* Home Bldg. & Loan Ass'n v. Blaisdell, 290 U.S. 398, 425–26 (1934) ("While emergency does not create power, emergency may furnish the occasion for the exercise of power."). *But see* Monaghan, *supra* note 127, at 32–33 (stating that the Constitution contains no provision for the suspension of laws or extension of powers in time of emergency).

[159] For an argument that a President stretched his authority too far, s*ee* Monaghan, *supra* note 127, at 6 (crediting Theodore Draper argument that "much of the wrong-doing in the Iran-Contra episode flowed directly from the constitutionally impermissible conception

Executive authority, believed that the presidential duty to take care that the laws of the nation be faithfully executed went beyond "express Congressional statutes."[160] President Woodrow Wilson censored cables, telegraphs and telephones at the onset of World War I pursuant to executive order[161] and President Franklin D. Roosevelt directed the Federal Bureau of Investigation to exercise censorship of news media and telecommunications after the attack on Pearl Harbor.[162] Additionally, President Abraham Lincoln wrote "that measures otherwise unconstitutional might become lawful by becoming indispensable to the preservation of the Constitution through the preservation of the nation."[163] He then asked Congress to get involved in his actions such as suspension of habeas corpus, arrests, and conscription.[164] The Executive has the requisite authority, just as exercised by these past Presidents, to interpret laws and obligations and formulate policy to preserve the nation in times of emergency.[165] A key difference between past Presidents and the twenty-first century lies in the ability of the media to inundate the public with both fact and opinion regarding the President's actions—making the issues much more divisive. Meanwhile, the country's citizenry cannot agree on whether the nation is experiencing a national emergency.[166] Like President George W. Bush, historically-respected

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of presidential power . . . ."). Stretching the boundaries of executive authority in times of emergency does not necessarily equate to a morally correct course of action, but acceptance may be required in light of the Executive's constitutional mandate to preserve the security of the nation, particularly when the constitutional limits to that authority are not clearly defined.

[160] *Steel Seizure*, 343 U.S. at 689 (Vinson, J., dissenting) (pointing out that even President Taft, known for critiquing the Executive exercise of authority by President Theodore Roosevelt, himself admitted in his book, *Our Chief Magistrate and His Powers* 139–47 (1916), that Executive authority reached beyond a congressional statute).

[161] Exec. Order No. 2604 (Apr. 28, 1917).

[162] Jack A. Gottschalk, *Consistent with Security: A History of American Military Press Censorship*, 5 COMM. & L. 35, 39 (1983).

[163] Monaghan, *supra* note 127, at 27–28 (citing Abraham Lincoln, Letter of April 4, 1864, to A.G. Hodges, 10 COMPLETE WORKS OF ABRAHAM LINCOLN 66 (Nicolay and Hay ed. 1894)).

[164] *Id.*

[165] *Contra id.* at 30 (arguing that no President can disregard applicable legislation, even in an emergency).

[166] Whether or not one agrees that the current state of national security constitutes an emergency, citizens who fear that the use of emergency executive authority threatens their personal liberties are not necessarily justified in their fear. *See* Posner et al., *supra* note 157, at 626. Posner argues:

> The panic thesis argues that because fear causes decisionmakers to exaggerate threats and neglect civil liberties and similar values,

Presidents stood even more firmly in the belief that the duty to protect the nation exceeded the actual text of the Constitution,[167] moving from an emergency power to the inherent authority of the Executive.

4. Executive Inherent Authority

While debatable and inscrutable, the Executive possesses the inherent authority to solely regulate military doctrine.[168] The Constitution's enumerated powers do not comprise the complete foundation for authority among the branches of the federal government. Implied and inherent authorities permeate the stances of both the Executive and Congress, although neither implied or inherent authorities appear in the Constitution itself.[169] The judicial branch as well as scholars have looked beyond the text of the Constitution in light of the issue or problem at hand and applied practice and precedent to exert or categorize powers.[170] Justice Scalia summarized inherent authority best

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> expanding decisionmakers' constitutional powers will result in bad policy. Any gains to national security would be minimal, and the losses to civil liberties would be great. Thus, enforcing the Constitution to the same extent as during periods of normalcy would protect civil liberties at little cost. We argue that this panic thesis is wrong and does not support the strict enforcement position.

Id. Contra American Civil Liberties Union, *FBI E-Mail Refers to Presidential Order Authorizing Inhumane Interrogation Techniques* (Dec. 20, 2004), *available at* http://www.aclu.org/safefree/general/18769prs20041220.html.

[167] *See* Youngstown Sheet & Tube Co. v. Sawyer (*Steel Seizure*), 343 U.S. 579, 689 (1952); Exec. Order No. 2604 (Apr. 28, 1917); Gottschalk, *supra* note 162, at 139; Monaghan, *supra* note 127, at 6, 27–28.

[168] *See Steel Seizure*, 343 U.S. at 634 (Jackson, J., concurring) (gleaning the Framers' visions under modern conditions must be "divined from materials almost as enigmatic as the dreams Joseph was called upon to interpret for Pharaoh."). *But see* Broomfield, *supra* note 49, at 128–29 (by signing the Detainee Treatment Act and invoking inherent authority to interpret by carrying out Executive duties, the President needed constitutional authority to make such invocation, and this argument states that there is no constitutional authority present post-passage of the Act, along with no court having determined that the inherent authority includes authority to legislate); KOH, *supra* note 15, at 45 ("The vast majority of foreign affairs power the President exercises daily are not inherent constitutional powers, but rather powers that Congress has expressly or implicitly delegated to him by statute.").

[169] SUNSTEIN, *supra* note 9, at 49.

[170] *See, e.g.*, *Steel Seizure*, 343 U.S. at 610–11 ("It is an inadmissibly narrow conception of American constitutional law to confine it to the words of the Constitution and to disregard the gloss of which life has written upon them."); *see also* Uyeda, *supra* note

when he wrote that it was "not simply enough to repose the power to execute the laws (or to appoint) in the President; it was also necessary to provide him with the means to resist legislative encroachment upon that power. . . . [E]ven to disregard them when they are unconstitutional."[171]

The interpretive power of the Executive led to the moniker of unitary executive.[172] The unitary executive depends upon departmentalism to exercise interpretive power.[173] Instances such as Watergate and the Vietnam War stressed the faith and trust in the office of the President, and since those times, the Executive has postured itself on issues to solidify its authority and fend off attempts to strip the office of its powers.[174] After these disparaging events, the Presidency has sought to accomplish through administrative agencies what it could not accomplish through legislation, thereby pushing the bounds of presidential constitutional powers.[175]

The Executive's inherent authority emanates from the practical interpretations of the branch's authority under the Constitution,[176] applicable to military operations and doctrine. As aptly put by Justice Robert H. Jackson: "To be sure, the President has inherent authority to

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119, at 802–10 (arguing that the President holds the authority to deploy military forces of the United States to foreign low-intensity conflicts without congressional authorization).

[171] Freytag v. Comm'r, 501 U.S. 868, 906 (1991).

[172] *Cf.* KELLEY, *supra* note 136, at 4.

[173] *Id.* This article utilizes the unitary executive theory in that the powers of the Executive are focused and centralized in the President.

[174] *Id.* at 9–10.

[175] *Id.* at 10.

[176] Youngstown Sheet & Tube Co. v. Sawyer (*Steel Seizure*), 343 U.S. 579, 640, 653 (1952). The Court stated:

> [C]lauses could be made almost unworkable, as well as immutable, by refusal to indulge in some latitude of interpretation for changing times . . . and . . . give to the enumerated powers the scope and elasticity afforded by what seem to be reasonable, practical implications instead of the rigidity dictated by a doctrinaire textualism. . . . As to whether there is imperative necessity for such powers, it is relevant to note the gap that exists between the President's paper powers and his real powers. The Constitution does not disclose the measure of the actual controls wielded by the modern presidential office. That instrument must be understood as an Eighteenth-Century sketch of a government hoped for, not a blueprint of the government that is.

Id.

oversee battlefield operations, and Congress has limited power to control such operations."[177] The weight of the two Justice's comments lends sufficient credibility to the inherent powers of the Executive to control military doctrine without congressional interference. Nevertheless, should one still believe that the area of military doctrine at least lends itself to concurrent authority, we can look to the decisions of the Judiciary beyond just the statements of Justices Jackson and Scalia.

C. The Supreme Court as Arbiter of Authority between Congress and the Executive

Often a zone of concurrent authority between the Executive and Congress exists in the area of regulating the activities of U.S. Armed Forces due to the constitutional structure of enumerated powers.[178] To mediate a power struggle between Congress and the Executive, the Framers also created the third branch of government, the Judiciary.[179] The Judiciary exists as the primary interpreter of the Constitution and the enumerated and inherent authorities of the federal government.[180] The time-tested and oft cited case of *Youngstown* provides a framework for sorting out the military authority disagreements among the Executive and Congress.[181]

1. Youngstown *and Military Doctrine*

While the holding in *Youngstown* cut against the authority of the Executive, the majority's opinion is easily distinguishable from application to the matter of control over military doctrine.[182] Congress had specifically laid out a process for the Executive and others to follow should the need ever arise to confiscate the private property of the labor industry.[183] The Executive only contradicted a congressional grant of authority through procedural noncompliance.[184] *Youngstown* also focused on domestic industries, only tangentially relating to the war

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[177] *Id.*
[178] *Id.* at 638.
[179] THE FEDERALIST NO. 78 (Alexander Hamilton).
[180] *Id.*
[181] *Steel Seizure*, 343 U.S. 579.
[182] *See supra* sec. IV.A.1.
[183] *See Steel Seizure*, 343 U.S. at 582–84.
[184] *See id.*

efforts and war regulating authority of the Executive overseas.[185] Further, *Youngstown*'s issues did not involve military members' actions.[186] Lastly, the Court may very well have made a different ruling had President Truman issued an executive order directly related to military operations during the Korean War. Justice Jackson noted that it was not a claim of the Government that the seizure of the steel mills was in the nature of a military command.[187] Application of military doctrine to detainee interrogations bears a direct relation to a military command function. Unless the Executive's practices violate international law, Congress should restrain its ability to create laws with respect to the constitutional authority of the Executive in the matter of military operations.[188] *Youngstown*'s usefulness in its application to military doctrine rests more in the parallels of Justice Jackson's concurring opinion rather than in the holding of the Court itself.

The most useful part of the case for military doctrine application lies in Justice Jackson's test for measuring the weight of power exercised by the Executive in relation to congressional action.[189] Justice Jackson wrote that the President's powers strengthen or weaken based upon the actions taken by Congress, developing a three-part analysis:

> (1) when the Executive acts based upon express or implied congressional authorization, his power is at its zenith; (2) when the Executive exerts authority in an area shared with Congress without specific legislative action, then the authority is in a "zone of twilight" indicating the existence of authority, but weakened authority, and (3) when the Executive acts contrary to express or implied Congressional will, then the authority of the office is at its "lowest ebb."[190]

The issue of control over the military doctrine of detainee interrogations does not fit neatly into one of Justice Jackson's categories. Rather, it is useful to consider a spectrum from explicit congressional authorization

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[185] *See id.*
[186] *See id.*
[187] *Id.* at 659 (Burton, J. concurring).
[188] *But see Ex parte* Milligan, 71 U.S. (4 Wall.) 2, 139–40 (1866) ("But this government of ours has power to defend itself without violating its own laws; it does not carry the seeds of destruction in its own bosom.").
[189] *Steel Seizure*, 343 U.S. at 634–40 (Jackson, J., concurring).
[190] *Id.* at 635–38; Uyeda, *supra* note 119, at 792.

to explicit congressional prohibition with respect to Executive action.[191] Therefore, for the proponent of legislative control, the issue of controlling military doctrine would fall on the spectrum of Executive authority at its "lowest ebb."[192] However, Justice Jackson, like several Bush Administration legal counselors, is not persuaded that the Executive can wield only those delegated powers in the Constitution.[193] Surely, Congress does not possess the impenetrable power to dictate the actions of Executive.[194]

Justice Jackson penned an additional explanation of his analysis by stating, "[w]hen 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 distribution is uncertain."[195] To further explain the "zone of twilight" that may exist in the area of military doctrine and control, Justice Jackson comments, "[w]hen 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."[196] It would be inappropriate to interpret Justice Jackson's analysis to find that the President has no authority when at its lowest ebb, but rather using Justice Jackson's own words that the President would then be relying on his own constitutional powers in the matter despite the direct contradiction to Congress's will as expressed in the DTA.[197] The Executive possesses the Constitutional powers necessary to establish military doctrine and interrogation policies utilizing the Commander in Chief powers, along with the inherent

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[191] Dames & Moore v. Regan, 453 U.S. 654 (1981); MCCARTHY ET AL., *supra* note 96, at 51.
[192] *But see Steel Seizure*, 343 U.S. at 587 (controlling day-to-day theater of operations performed by the Commander in Chief through the military services as Executive branch agencies).
[193] *Id.* at 640; Interrogation Memorandum, *supra* note 84.
[194] *But see Steel Seizure*, 343 U.S. at 643–44 (stating that the President is not the Commander in Chief of the entire country).
[195] *Id.* at 637.
[196] *Id.* at 637–38.
[197] *Cf.* MCCARTHY ET AL., *supra* note 96, at 51; Detainee Treatment Act of 2005, 42 U.S.C.S. § 2200dd (LEXIS 2007) (to be codified at 42 U.S.C. § 2200dd).

authorities to promote national security and protect the nation, while satisfying Justice Jackson's test.[198]

2. Judicial Interpretation of Control of the Military Beyond Youngstown

An absence of Executive authority to regulate the U.S. Armed Forces would paralyze the military and the nation.[199] Justice Chase's concurring opinion in *Ex parte Milligan* highlights the Executive's exclusive authority to act within a military operational setting.[200] Congress has no power to interfere with the Executive's "command of the forces and the conduct of campaigns. That power and duty belong to the President as commander in chief."[201] At other points in history, the Court recognized congressional involvement in military operations as permissible under the Constitution, sometimes acknowledging Executive request for involvement.[202] A key distinction to these cases lies in the absence of congressional involvement in the means and methods of war operation.[203] Both the Framers of the Constitution and the Court intended and viewed the President as possessing concurrent authority to regulate the military, but retaining sole responsibility for governing military operations.[204]

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[198] *Contra* Hamdan v. Rumsfeld*: Establishing a Constitutional Process, Hearing Before the S. Comm. on the Judiciary*, July 11, 2006 (testimony of Harold H. Koh, Dean, Yale Law School), *available at* http://Judiciary.senate.gov/testimony.cfm?id=1986&wit_id =5508 [hereinafter Koh Testimony] (relating that Congress has implemented myriad laws and regulations that enable the Executive and the military to engage the enemy, and that without such enabling legislations, the Executive would not be empowered to engage them in manner of unilateral decision).

[199] *See* United States v. Eliason, 16 U.S. 291 (1842) (holding that "the power of the executive to establish rules and regulations for the government of the army, is undoubted," and if there were not such power, the military could be paralyzed absent some other congressional action).

[200] *Ex parte Milligan*, 71 U.S. (4 Wall.) at 139–40.

[201] *Id.*

[202] *See* Hartzmann, *supra* note 13, at 99–101 (noting the request of the Executive for Congress to become involved in command relationships and organizational structure).

[203] Interrogation Memorandum, *supra* note 84.

[204] *See Ex parte Milligan*, 71 U.S. (4 Wall.) 2; THE FEDERALIST NOS. 26, 69, 74 (Alexander Hamilton).

3. Deference to the Executive

The Supreme Court has also shown a significant measure of deference to the Executive when interpreting authority and implementation of laws regarding national security[205] and Article II duties.[206] Justice Jackson aptly wrote in *Youngstown*, "I should indulge the widest latitude of interpretation to sustain his exclusive function to command the instruments of national force, at least when turned against the outside world for the security of our society."[207] Hence, courts hesitate to intrude upon the authority of the Executive in military and national security affairs.[208] This measure of deference offers an additional pillar of support for sole governance of military doctrine and operations within the Executive. The Executive's implementation of detainee interrogation techniques deserves deference from both the Judiciary and legislature.[209]

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[205] Hamdi v. Rumsfeld, 316 F3d. 450, 463 (4th Cir. 2003), *rev'd*, 542 U.S. 507 (2004); SUNSTEIN, *supra* note 9, at 17.

[206] *See* United States v. Nixon, 418 U.S. 683, 710 (1970).

[207] Youngstown Sheet & Tube Co. v. Sawyer (*Steel Seizure*), 343 U.S. 579, 645 (1952) (Jackson, J., concurring).

[208] Dep't of the Navy v. Egan, 484 U.S. 518, 530 (1988); *see also* Orloff v. Willoughby, 345 U.S. 83, 93–94 (1953); Burns v. Wilson, 346 U.S. 137, 142, 144 (1953); Gilligan v. Morgan, 413 U.S. 1, 10 (1973); Schlesinger v. Councilman, 420 U.S. 738, 757–758 (1975); Chappell v. Wallace, 462 U.S. 296 (1983). *But see* SUNSTEIN, *supra* note 9, at 7. Sunstein writes that

> Courts should require clear congressional authorization before the executive intrudes on interests that have a strong claim to constitutional protection. . . . As a general rule, the executive should not be permitted to act on its own. The underlying ideas here are twofold: a requirement of congressional authorization provides a check on unjustified intrusions on liberty, and such authorization is likely to be forthcoming when there is good argument for it. A requirement of clear authorization therefore promotes liberty without compromising legitimate security interests.

Id.

[209] There may be an emerging consensus that the Executive should be granted *Chevron* deference except where individual rights are at issue. Accordingly, if the President is accused of exceeding his power while the authority is not clearly identified in the Constitution or statutory law, he should enjoy deference to the extent that his power-grab does not infringe upon individual rights deserving of more scrutiny. The Executive deserves deference in light of detainee interrogation decisions because the effects of such decisions do not touch upon the individual liberties of persons protected by the Constitution. *See* Curtis A. Bradley & Jack L. Goldsmith, *Congressional Authorization and the War on Terrorism*, 118 HARV. L. REV. 2047 (2005); Cass R. Sunstein,

Some fear the Executive wielding authority for the purpose of political gain or supremacy, or to quash political opposition.[210] The fear holds that if the courts deferred to the Executive on those matters, then democratic protections would fail under an aggressive Executive.[211] However, the fact that the Executive is subject to the political will of the citizenry, and that the Judiciary remains somewhat buffered from the tide of the will of the people, mitigates the potential threat to democracy.[212] The degree of deference can also vary depending upon how far removed the Executive practice is from its enumerated powers and the ability of the Judiciary to apply its expertise.[213] The closer the Executive can link its policies to the express language of the Constitution or statute, the greater deference it deserves.

The Executive's interpretation of international law and its limits and subsequent implementation of military doctrine to detainee interrogations also deserves deference.[214] Courts use international law to understand the scope of Executive powers as well as to decide whether statutory law or policies conform to international law.[215] The Executive, in presumed good faith, determines what laws apply to military operations, and implements them.[216] The Executive is undoubtedly bound by the prohibition against torture, and implements those detention interrogation

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Administrative Law Goes to War, 118 HARV. L. REV. 2663 (2005); *see also* Chevron U.S.A., Inc. v. Natural Res. Defense Council, Inc., 467 U.S. 837 (1984) (holding that the Environmental Protection Agency's (an executive agency) interpretation of a statutory definition was entitled to deference when the decision represented a "reasonable accommodation of manifestly competing interests."). *But see* Kinkopf, *supra* note 79, at 1177 (attacking the application of *Chevron* deference by attempting to show that the distinction applied to individual rights could fail resulting in an unbalancing of power if the President enjoys deference in all areas—shows that if the President exercises authority under the Authorization to Use Military Force, it could infringe upon Congress's sole authority to declare war, an area that does not affect individual rights, but is still undeserving of deference. This is followed by a recommendation to apply the avoidance canon, in that the Court interprets statutes, when unclear, in a manner to avoid constitutional controversies.).

[210] Posner & Vermeule, *supra* note 157, at 644.

[211] *Id.* (commenting that this may be the price to pay for a democratic system of government).

[212] *Id.*

[213] *Id.*

[214] Bradley et al., *supra* note 209, at 2096.

[215] Kinkopf, *supra* note 79, at 1193.

[216] *See* DOD DIR. 2311.01E, *supra* note 56.

policies that reflect the nation's legal obligations.[217] Arguing that little or no deference should relate to the Executive's decisions would strip the office of any decision-making authority necessary to faithfully execute the laws of the nation.[218] Only when presented with severe ambiguity with respect to legal obligations or constitutional authority should another branch of government even consider becoming involved.

Scholars may debate the application of the Geneva Conventions to modern era conflicts and specifically terrorism, but there is no doubt that the administration has chosen the preservation of national security and flexibility over the aged conventions drafted to cover conventional warfare.[219] Now the argument may swing to whether Congress can dictate to the Executive that the nation's international legal interests trump the national security interest chosen by the President.[220] Consequently, even if one believes that the Executive is violating the law through the application of military doctrine to modern operations, there may be a higher calling to preserve the nation above obedience to the law. This would require an extension of deference by the other branches of government toward the Executive.[221]

D. Additional Checks and Balances on Executive Power

The Framers did not necessarily design the federal government to operate along clear lines of authority.[222] Beyond the traditional checks and balances of Congress and the Judiciary upon the Executive, other

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[217] 18 U.S.C. §§ 2340–2340A (2000). *Contra* American Civil Liberties Union, *FBI E-Mail Refers to Presidential Order Authorizing Inhumane Interrogation Techniques* (Dec. 20, 2004), *available at* http://www.aclu.org/safefree/general/18769prs20041220.html.

[218] *Cf.* Hamdan v. Rumsfeld, 126 S. Ct. 2749, 2804 (2006) (Kennedy, J., concurring) (noting along with the majority that the level of deference, if any, for Executive decisions depends on the direct action of the Executive and language of legislation), *superseded by statute*, Military Commissions Act of 2006, Pub. L. No. 109-366, 120 Stat. 2600, *as recognized in* Boumediene v. Bush, 2007 U.S. App. LEXIS 3682 (D.C. Cir. Feb. 20, 2007).

[219] *See* Graham, *supra* note 51; Derek Jinks & David Sloss, *Is the President Bound by the Geneva Conventions?*, 90 CORNELL L. REV. 97 (2004).

[220] A topic beyond the scope of this article. For a discussion on the interaction of international legal obligations and national security interests, *see* Jinks & Sloss, *supra* note 219.

[221] Monaghan, *supra* note 127, at 24 (citing Thomas Jefferson, Letter to John B. Colvin (Sept. 10, 1810), THOMAS JEFFERSON, PROPOSED CONSTITUTION FOR VIRGINIA, *reprinted in* 9 THE WRITINGS OF THOMAS JEFFERSON (Paul L. Ford ed., 1894)).

[222] *See* THE FEDERALIST NOS. 26, 69, 74 (Alexander Hamilton).

checks and balances on the power of the Executive have developed within the American political system. [223] The professional military and intelligence communities advise the Executive on means and methods of warfare and operations, as well as legal obligations understood by the military.[224] Considering that the President has the most direct link to the officials responsible for carrying out the defense of the nation, and the President is undoubtedly viewed as the key protector of the nation, it should follow that the Executive is in the best position to make policy decisions on military doctrine and implementation of these policies when prosecuting a war.[225] Congress may establish committees and call upon these same advisers to share their knowledge with the legislators, but the military and intelligence communities work for the Executive, giving the President the most expedient and unfettered access to this knowledge base.[226]

The media and nongovernmental organizations also provide public attention to the actions of the Executive and its agencies.[227] The political pressures of media exposure and corresponding public opinion can have profound effects upon the decisions of the Executive and Congress. Furthermore, the American public holds possibly the strongest check and

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[223] MCCARTHY ET AL., *supra* note 96, at 25. McCarthy notes:

> Presidential power is a matter of objective constitutional fact. It is inevitable that this power should collide and compete with the power of Congress. That, indeed, is the nature of the system based on divided authority. If, however, the powers of any of the three branches came to be defined, rather than checked and balanced, by one of the others, that constitutional system, the basis of both our liberty and our security, would collapse.

Id.

[224] Pearlstein, *supra* note 141, at 1274 ("Both military doctrine and U.S. law have recognized for the past fifty years that commanders play a pivotal role in checking the appropriate use of military power."). Military leaders act as a check and balance on the Executive by providing military analysis to the civilian leadership of the military, who may, or may not be, trained and experienced in military operations. This provides a check and balance by way of providing information and input to the military decision-making process.

[225] *But see* SUNSTEIN, *supra* note 9, at 6 (arguing in support of minimalism approaches to Executive authority and providing a counter-argument to a sensible check and balance stemming from advice within the Executive, stating that these internal deliberations will only aggravate problems of potentially excessive wielding of power).

[226] Outline, *supra* note 2.

[227] Pearlstein, *supra* note 141, at 1257.

balance upon the Executive.[228] American citizens bear intolerance for governmental overreach, a typical form of political restraint and a check on power.[229] The political process of elections keeps the citizenry focused on the Executive office. Since the President is the lone leader of the Executive and key figurehead in American politics, his office is the target of the most centralized scrutiny.[230] The intense scrutiny bears an immeasurable check on the Executive when wielding authority and interpreting legal obligations, particularly in light of the transparency brought by the media and information age.[231] While all Presidential administrations resist transparency of the government in some way, particularly countermeasures to threats to national security, the trend giving public access to the governmental functions continues to grow.[232] These checks and balances may play an effective role in keeping the Executive's military measures within the scope of American acceptance without necessitating congressional legislation.

E. Congressional Grant of Authority

In passing the DTA, Congress should not have rebuked the very powers it condoned under the Authorization to Use Military Force (AUMF).[233] After September 11, 2001, Congress gave the Executive full authority to conduct military operations and apply military doctrine as necessary to defeat the enemies of the United States.[234] Then, Congress reversed its course by limiting the Executive's ability to develop

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[228] *See* Robert V. Percival, *Presidential Management of the Administrative State: The Not-so-unitary Executive*, 51 DUKE L.J. 963, 963 (2001).
[229] *See* MCCARTHY ET AL., *supra* note 96, at 51.
[230] *Id.*
[231] Pearlstein, *supra* note 141, at 1257.
[232] *Id.*
[233] Authorization for Use of Military Force, Pub. L. No. 107-40, 115 Stat. 224 (2001).
[234] *Id.* The AUMF states:

> That the President is authorized to use all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001, or harbored such organizations or persons, in order to prevent any future acts of international terrorism against the United States by such nations, organizations or persons.

Id.

interrogation techniques in prosecuting military operations.[235] If Congress desired to be a consultant or advisor to the Executive in the conduct of military operations, it emasculated this goal by abandoning its vote of confidence in the Executive.[236] If the President sought congressional approval of a military venture and implementation of key doctrine, and Congress consented only to rescind its approval before the mission was accomplished, this would undoubtedly discourage the Executive from seeking that approval in the future.[237] This process would then undermine the political process within the federal government.[238]

The intention of detainee interrogations is to obtain actionable intelligence to promote the national security of the United States and the protection of its military forces,[239] precisely as authorized by the AUMF.[240] Once the President obtains authorization, he must be able to

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[235] Detainee Treatment Act of 2005, 42 U.S.C.S. § 2200dd (LEXIS 2007) (to be codified at 42 U.S.C. § 2200dd).

[236] MCCARTHY ET AL., *supra* note 96, at 92. McCarthy argues,

> Congressional unwillingness to remain faithful to the letter and spirit of previous legislative actions fundamentally undermines the most compelling rationale often advanced for a prominent congressional role in decisionmaking: viz., the idea that if a president expends the effort to get Congress's support at the front end of some major and risky foreign policy venture, Congress will stay with the venture through thick and thin.

Id. Moreover, the President has previously exercised national security prerogatives and engaged in military actions without congressional authorization under Article I of the Constitution, and would not need to seek concurrence. *See* SUNSTEIN, *supra* note 9, at 21; Gregory Sidak, *To Declare War*, 41 DUKE L. J. 29 (1991) (President George H.W. Bush in Operation Desert Shield); Harold Koh, *The Coase Theorem and the War Power: A Response*, 41 DUKE L. J. 122 (1991) (commenting on Gregory Sidak's remarks on Operation Desert Shield).

[237] *See* MCCARTHY ET AL., *supra* note 96, at 92. While the DTA does not rescind Congress's approval to conduct military operations, the current debate in the federal government focuses on revoking congressional approval of the use of force. *See generally* To Repeal the Authorization for Use of Military Force Against Iraq Resolution of 2002 (Pub. L. No. 107-243) and to require the withdrawal of United States Armed Forces from Iraq, H.R. 413, 110th Cong. (2007), *available at* http://www.govtrack.us/congress/bill.xpd?tab=speeches&bill=h110-413.

[238] *See* MCCARTHY ET AL., *supra* note 96, at 92.

[239] Church Report, *supra* note 45, at 1.

[240] Authorization for Use of Military Force, Pub. L. No. 107-40, 115 Stat. 224 (2001).

solely exercise the authority to prosecute the military operation.[241] Even though Justice O'Connor rightly wrote that a "state of war is not a blank check for the President,"[242] Congress nonetheless gave President Bush a powerful legal tool to wage the GWOT.[243] According to the DOJ, the AUMF falls within the first category of Justice Jackson's three-prong Executive authority analysis—acting within a congressional authorization with respect to measures taken to prosecute the war on terrorism and defend the nation.[244] Under the DOJ line of reasoning, the Executive is acting at the zenith of the office's powers, seldom to be overruled or contradicted.[245] The congressional authorization remains intact; therefore, the Executive's power pertaining to military operations in carrying out that authorization remains at its zenith.[246]

V. Necessity for Adaptability and Flexibility in Developing Military Doctrine

All branches of the military, particularly the Army, emphasize the process of creating future leaders who are self-aware and adaptable.[247] There should be no doubt that the enemy will train to endure and

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[241] *Ex parte* Milligan, 71 U.S. (4 Wall.) 2, 29 (1866) (citing Luther v. Borden, 48 U.S. (7 How.) 1 (1849), THE FEDERALIST NO. 26, (Alexander Hamilton), and THE FEDERALIST NO. 41 (James Madison)). The Court wrote:

> After war is originated, whether by declaration, invasion, or insurrection, the whole power of conducting it, as to manner, and as to all the means and appliances by which war is carried on by civilized nations, is given to the President. He is the sole judge of the exigencies, necessities, and duties of the occasion, their extent and duration. During the war his powers must be without limit, because, if defending, the means of offence may be nearly illimitable; or, if acting offensively, his resources must be proportionate to the end in view—"to conquer a peace." New difficulties are constantly arising, and new combinations are at once to be thwarted, which the slow movement of legislative action cannot meet.

Id.

[242] Hamdi v. Rumsfeld, 542 U.S. 507, 536 (2004).

[243] Reference to the GWOT includes Afghanistan and Iraq.

[244] NSA Memo, *supra* note 105, at 2.

[245] *See id.*

[246] *See* Youngstown Sheet & Tube Co. v. Sawyer (*Steel Seizure*), 343 U.S. 579 (1952).

[247] WHITE PAPER, *supra* note 6, at 5 (Early in the twenty-first century, the Army made a cognizant change to develop leaders who are "adaptive and self-aware—able to master transitions in the diversity of 21st century military operations.").

eventually defeat stagnant military doctrine, including interrogations.[248] Unfortunately, the U.S. Armed Forces experienced the consequences of the static application of doctrine to a fluid battlefield.[249] Moreover, the fluid battlefield coupled with congressional strangulation of interrogation development places the nation and its servicemembers at risk.[250]

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[248] Church Report, *supra* note 45, at 1–5; *see also* WHITE PAPER, *supra* note 6, at 5 (remarking that because the enemy faced is adaptive, "[i]t's a constant struggle of one-upmanship. . . . [i]t's a constant competition to gain the upper hand." Many officers have remarked that the missions they were given or encountered were not addressed by military doctrine trained.). The White Paper also highlights that:

> In the Global War on Terror, the circumstances are different in that those we have faced in previous conflicts. Human intelligence, or HUMINT—of which interrogation is an indispensable component—has taken on increased importance as we face an enemy that blends in with the civilian population and operates in the shadows. And as interrogation has taken on increased importance, eliciting useful information has become more challenging, as terrorists and insurgents are frequently trained to resist traditional U.S. interrogation methods that are designed for EPWs. Such methods—outlined in Army Field Manual (FM) 34-52, *Intelligence Interrogation*, which was last revised in 1992—have at times proven inadequate in the Global War on Terror; and this has led to commanders, working with policy makers, to search for new interrogation techniques to obtain critical intelligence. . . . The initial push for interrogation techniques beyond those found in FM 34-52 came in October 2002 from the JTF-170 Commander, who, based on experiences to that point, believed that counter resistance techniques were needed in order to obtain actionable intelligence from detainees who were trained to oppose U.S. interrogation methods.

WHITE PAPER, *supra* note 6, at 5.

[249] ARCENT CAAT REPORT, *supra* note 37, at 13,243. The Report comments that:

> [D]octrinal approaches to "EPW" or "Detainee" operations initially utilized by CFLCC [Coalition Forces Land Component Command] did not take full advantage of the various policies adopted by civilian leadership to deal with the unique nature of this unconventional operation. The laws and policies regarding the war against terrorism must be used to the maximum extent possible and support flexibility for commanders instead of acting as restrictive barriers. The law permits greater latitude than what is exercised in conventional operations.

Id; see also Pearlstein, *supra* note 141, at 1264 n.38 ("Detainee doctrinal operations did not take full advantage of the policies adopted by the administration to deal with the unconventional operation. Doctrine interpretations support flexibility instead of acting as restrictive barriers.").

[250] *Cf.* ODOM, *supra* note 25, at 4. Odom argues:

The Framers intended the Executive to possess the power to defend the nation as the single branch of government that can act "quickly, decisively, and flexibly as needed."[251] There is a "fundamental need for flexibility in the conduct of foreign affairs and diplomacy," much like in the actual conduct of military operations.[252] "As the nature of threats to America evolves, along with the means of carrying those threats out, the nature of enemy combatants may change also. In the face of such change, separation of powers does not deny the executive branch the essential tool of adaptability."[253] Legislation can take the guesswork out of the equation for the military to ensure that its doctrine and practices comply with domestic and international law.[254] However, the DTA itself did not remove any questions or doubt regarding detainee interrogations. Military interrogation procedures already generally complied with existing laws.[255] Instead, the DTA cemented military doctrine making it that much more difficult to develop and implement on a changing battlefield.

> Impetus to change doctrine in peacetime originates from a change of mission or capabilities. Mission changes usually reflect shifts in threats to national security. New missions redefine army roles in support of a national strategy to counter a particular threat. Radical change to doctrine may be necessary if the new threat is considerably different from the old one. Doctrine appropriate for the small, frontier constabulary army found slight application in the war waged by the million-man American Expeditionary Force (AEF) in World War I. Similarly, doctrine for combating the insurgency could draw little from the U.S. experience in World War II or Korea. In both cases, the army revised doctrine to guide combat against a different foe.

Id.

[251] NSA Memo, *supra* note 105, at 24–25.

[252] Hartzmann, *supra* note 13, at 120.

[253] Hamdi v. Rumsfeld, 316 F3d. 450, 466 (4th Cir. 2003), *rev'd*, 542 U.S. 507 (2004).

[254] *See* Meriwether, *supra* note 39, at 185–86 (noting that Senator McCain acknowledged that there could be a scenario where human rights violations may be necessary to save many lives, but he did not want an exception in the DTA to swallow the rule; instead, those authorities who would adjudicate such violations could consider the circumstances accordingly). This type of reasoning, leaving it subject to the next person's adjudication, poses a danger to the servicemember; part of the purpose of interrogation military doctrine is to prevent an interrogator from being forced into making a Hobson's choice (an apparently free choice that offers only one real option).

[255] *See* Church Report, *supra* note 45.

Scholars state that broad policy decisions implemented by the Executive changed decades of settled practice.[256] The decades of settled practice are exactly what the agencies of the Executive can no longer implement on the battlefield and expect success, because the threats faced by the United States have drastically changed.[257] The United States may be said to have failed in its military operations in Vietnam because it applied conventional warfare methods to an unconventional war.[258] Similarly, a military or intelligence community that cannot adapt to or adopt new methods to defeat an ever-changing, twenty-first century enemy will experience failure. A lack of doctrinal development already played a part in the detainee abuses, because the U.S. military failed to adapt to the changing battlefield and tried to implement outdated techniques.[259] "These types of operations require a non-doctrinal approach to interrogation operations and innovative or 'outside the box' methods to interdiction operations."[260] To the contrary, congressional action is anything but swift, and the necessity of the military to respond to a changing threat is often imminent or immediate.[261] Consulting Congress on matters of military doctrine may be advisable, or even desirable, [262] but Congress's establishment of doctrine in legislation presents dangers because the U.S. Armed Forces will undoubtedly lose a tactical advantage if it must wait for Congress to act.[263] When Congress

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[256] Pearlstein, *supra* note 141, at 1260.

[257] *See id.* (remarking that noncommissioned officers making statements regarding the abuses that took place in Iraq during interrogations complained that new interrogators were trained and stuck in Cold War-era techniques.).

[258] Major Matthew Kee Yeow Chye, *Victory in Low-intensity Conflicts*, POINTER (Oct.–Dec. 2000), *available at* http://www.mindef.gov.sg/safti/pointer/back/journals/2000/Vol26_4/4.htm.

[259] Church Report, *supra* note 45, at 2–3; ARCENT CAAT REPORT, *supra* note 37.

[260] ARCENT CAAT REPORT, *supra* note 37, at 53.

[261] *See Ex parte* Milligan, 71 U.S. (4 Wall.) 2, 29 (1866) (citing Luther v. Borden, 48 U.S. (7 How.) (1849), THE FEDERALIST NO. 26 (Alexander Hamilton), and THE FEDERALIST NO. 41 (James Madison)). Congress could change the law to adapt to the new threat if the perceived legal methods do not adequately address the threat or problem, but this process takes time, leaving those who need the change in law to succeed awaiting the discussion and decision of hundreds of politicians.

[262] *See, e.g.*, Pearlstein, *supra* note 141, at 1281 (commenting on Congress's ability to bring in expert advice and hold hearings on a wide range of matters; however, intelligence matters present difficult challenges for Congress in the area of both obtaining and disseminating advice). Additionally, no requirement exists directing the Executive to seek congressional input in military operations. *See* NSA Memo, *supra* note 105, at 32 n.15.

[263] MCCARTHY ET AL., *supra* note 96, at 64 (stating that the goal of war is to defeat the enemy: "[t]hat objective would be undermined by a system that impelled the President to return to Congress every time battlefield developments warranted new tactics. It would

morphs military doctrine into a legal obligation, the resulting lack of creative ability on the part of the military and the Executive reduces the tools at their disposal to protect themselves and the nation.

VI. Conclusion

"It seems squarely in the political interest of both branches to leave the details of war fighting—of which detention and interrogation policy are part—to the Executive alone."[264] Even if one disagrees and sides with Congress in determining that governance of military doctrine is not outside the limits of legislative authority, one should examine the wisdom of such practice. Congressional restraint of Executive power in matters that receive great international attention might be viewed as a weakening or discrediting of the Executive, placing at peril all foreign policy objectives of the Executive.[265] The Executive could no longer lobby or persuade foreign allies to adopt innovative tactics, techniques, and procedures to combat the war on terrorism because the Executive could not do it.[266] Additionally, over time, a constant feud between Congress and the Executive can undermine the working relationship of the co-equal branches of government, and degrade their ability to promote progress in matters of substance.[267]

Opponents of this article would say that governance of the military is parceled out between Congress and the Executive, and that if either has a dominant role it would be the national lawmaker.[268] A compounding argument would point out that Executive authority is subject to legislative constraint lodged in the powers of the purse and declaration of war.[269] If Congress refuses to either fund the armed forces or declare

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not only impossibly hamper military advance; it would inescapably educate the enemy about tactics and strategy.").

[264] Pearlstein, *supra* note 141, at 1274.

[265] *See generally* Hartzmann, *supra* note 13, at 120 (arguing that the Executive may be viewed as weak if Congress limits the President's authority to place U.S. troops under foreign command).

[266] Waging the war on terrorism involves a coalition of states, and success can be highly dependent upon the success of other state practices as well.

[267] *See* Hartzmann, *supra* note 13, at 121.

[268] *See, e.g.*, Koh Testimony, *supra* note 198 (relating that Congress has implemented a myriad of laws and regulations that enable the Executive and military to engage the enemy, and without such enabling legislations, would not be empowered to engage them in manner of unilateral decision).

[269] U.S. CONST. arts. I, II.

war, then the President lacks recourse to conduct military operations.[270] This would lead one to believe that the controlling share of power lies with Congress. However, this nation will experience greater success in the GWOT by empowering the more efficient, expedient, and energetic Executive branch to control military operations and doctrine.[271] Therefore, the superior authority with respect to military operations and doctrine should lie within the Executive.

"It's extremely difficult to second guess the American Navy, because the Americans rarely read their doctrine, and don't feel compelled to follow it."[272] It is precisely the innovative adaptations of Americans that led to the American military victories in the twentieth century, and the same flexibility needs to be in the tool kit of the American military in the twenty-first century. "In War, as in art, we find no universal forms; in neither can a rule take the place of talent. . . . Universal rules and the systems built upon them therefore can have no practical value."[273] Congress must restrain its appetite for legislating military affairs to enable the success of the United States and its Executive, and move away from those universal rules that do not effectively confront the twenty-first century's emerging threats.

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[270] Jeffrey Rosen, *In Wartime, Who Has the Power?*, N.Y. TIMES, Mar. 4, 2007, at 1.
[271] *See* THE FEDERALIST NO. 70 (Alexander Hamilton).
[272] Sergei Gorshkov, Admiral of the Soviet Fleet, http://www.thedeckplate.com/quotes.htm.
[273] BARRY R. POSEN, THE SOURCE OF MILITARY DOCTRINE 21 (1984) (quoting General Helmuth von Moltke, Prussian Army).