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September 29, 2011

TO: Senator John Cornyn
U.S. Senate Committee on the Judiciary
Washington, D.C. 20510-6275

Attention: Stephen Tausend

FROM: Louis Fisher
Scholar in Residence
The Constitution Project

SUBJECT: Institutional Powers over Foreign Affairs

The purpose of this memorandum is to analyze the institutional powers of the President and Congress over foreign affairs, national security, and the war power. From 1789 to 1950, the two branches largely shared those constitutional duties. Beginning with the decision of President Harry Truman in 1950 to go to war against North Korea, without ever requesting or receiving authority from Congress, the balance of power has shifted substantially to the President and to executive officials. The result of this concentration of power in the executive branch has been a weakening of Congress, the system of checks and balances, and the aspiration of self-government. The balance can be restored whenever members of Congress decide to protect their institutional and constitutional powers. Protection requires lawmakers to understand and value those powers, respect their oath of office, and demonstrate a determination to both safeguard legislative powers and the people they represent.

1. The United States broke with the British Model.

The framers assigned to Congress many of the foreign affairs powers that had been vested in the English kings and the Executive. William Blackstone, the British eighteenth-century jurist, set forth those powers in Book 1 of his *Commentaries on the Laws of England* (1765). Some of the powers he called direct - that is, powers that are "rooted in and spring from the king's political person," including the right to send and receive ambassadors and the power of "making war or peace." 1 BLACKSTONE, COMMENTARIES 232-33. He recognized other exclusive

powers of the Executive over external affairs. The king could make “a treaty with a foreign state, which shall irrevocably bind the nation.” *Id.* at 244. He could issue letters of marque (authorizing private citizens to use their ships and other possessions to undertake military actions against another nation) and order acts of reprisal (military responses short of war). To Blackstone, that power was “nearly related to, and plainly derived from, that other of making war.” *Id.* at 250. Also, the king was “the generalissimo, or the first in military command,” and he had “the sole power of raising and regulating fleets and armies.” *Id.* at 254. The royal power over external affairs was complete and exclusive. The British parliament had no participation other than attempts to withhold funds or place conditions on them. Blackstone insisted that when the king exercises his external powers he “is and ought to be absolute; that is, so far absolute that there is no legal authority that can either delay or resist him.” *Id.* at 243.

2. The Framers Create a Republic.

Unlike England, with its tradition of monarchical powers, America as a national government started with a legislative branch (the Continental Congress) and no other. When it came time to replace the Continental Congress with a government of three separate branches, the rejection of Blackstone and monarchical government was complete. At the Philadelphia Convention, Charles Pinckney said he was for “a vigorous Executive but was afraid the Executive powers of <the existing> Congress might extend to peace & war which would render the Executive a Monarchy, of the worst kind, towit an elective one.” John Rutledge wanted the executive power placed in a single person, “tho’ he was not for giving him the power of war and peace.” James Wilson supported a single executive but “did not consider the Prerogatives of the British Monarch as a proper guide in defining the Executive powers. Some of these prerogatives were of a Legislative nature. Among others that of war & peace &c.” 1 *THE RECORDS OF THE FEDERAL CONVENTION OF 1787*, at 64-65 (Max Farrand ed. 1937, 4 vols.) (hereafter “Farrand”).

Edmund Randolph worried about executive power, calling it “the foetus of monarchy.” The delegates at the convention, he said, had “no motive to be governed by the British Governmt. as our prototype.” If the United States had no other choice it might accept the British model, but “the fixt genius of the people of America required a different form of Government.” Town hall meetings, broad public debate and participation, and years of community service were all directed toward self-government. Americans rejected the idea of being “subjects” under a central ruler. Wilson agreed that the British model “was inapplicable to the situation of this Country; the extent of which was so great, and the manners so republican, that nothing but a great confederated Republic would do for it.” 1 Farrand 64-66.

3. The Text of the Constitution.

In drafting the Constitution, the framers vested in Congress most of Blackstone’s royal prerogatives. The power of initiating war was not left to the solitary action of a single executive. To preserve the essential values of constitutional government, full

deliberation and authorization by Congress was required.¹ Pierce Butler wanted to give the President the power to go to war, arguing that he “will have all the requisite qualities, and will not make war but when the Nation will support it.”² Farrand 318. In that sentiment he stood alone. James Madison and Elbridge Gerry moved to change the draft language from “make war” to “declare war,” leaving to the President “the power to repel sudden attacks” but not to initiate war. Roger Sherman added: “The Executive shd. be able to repel and not to commence war.” Gerry expressed shock at Butler’s position. He “never expected to hear in a republic a motion to empower the Executive alone to declare war.” *Id.* George Mason “was agst giving the power of war to the Executive, because not <safely> to be trusted with it.” He was “for clogging rather than facilitating war” *Id.* at 319. The motion to insert “declare” in place of “make” was agreed to.

The framers placed in Congress the authority to initiate wars because they believed that Executives, in their search for fame and personal glory, have a natural appetite for war. Moreover, their military initiatives were destructive to the interests of the people.² If any framer could have been sympathetic to executive power it would be John Jay, whose duties during the Continental Congress gave him special insights into the need for executive discretion in carrying out foreign policy. But his essay in Federalist No. 4 spoke strongly against executive wars: “[A]bsolute monarchs will often make war when their nations are to get nothing by it, but for purposes and objects merely personal, such as a thirst for military glory, revenge for personal affronts, ambition, or private compacts to aggrandize or support their particular families or partisans. These, and a variety of other motives, which affect only the mind of the sovereign, often lead him to engage in wars not sanctified by justice or the voice and interests of his people.” THE FEDERALIST 101 (Benjamin F. Wright, ed., New York: Metro Books, 2002).

At the Pennsylvania ratifying convention, James Wilson expressed a prevailing sentiment that the system of checks and balances “will not hurry us into war; it is calculated to guard against it. It will not be in the power of a single man, or a single body of men, to involve us in such distress; for the important power of declaring war is vested in the legislature at large.”² THE DEBATES IN THE SEVERAL STATE CONVENTIONS, ON THE ADOPTION OF THE FEDERAL CONSTITUTION 528 (Jonathan Elliot, ed., 5 vols.).

Under the Constitution, the President has no exclusive authority to appoint ambassadors or make treaties. He needs the approval of the Senate. The power of issuing letters of marque and reprisal, placed by Blackstone in the king, is vested exclusively in Congress in Article I. Similarly, Congress - not the Executive - has authority to raise and regulate fleets and armies and maintain a navy. Article I empowers Congress to make regulations for the land and naval forces, call forth the militia, and provide for the organizing, arming, and disciplining of the militia. All of this is a far cry from the model of Executive authority promoted by Blackstone.

¹ For further details and analysis, see the report issued by The Constitution Project in 2005, DECIDING TO USE FORCE ABROAD: WAR POWERS IN A SYSTEM OF CHECKS AND BALANCES, <http://www.constitutionproject.org/pdf/28.pdf>.

² William Michael Treanor, *Fame, the Founding, and the Power to Declare War*, 82 CORN. L. REV. 695 (1997).

Article I empowers Congress “to define and punish Piracies and Felonies committed on the high Seas, and Offenses against the Law of Nations.” This language represented another rejection of Blackstone, who regarded the power to accept, reject, and propose modifications to the law of nations on behalf of Great Britain as part of the royal prerogative. To Blackstone, the laws of nations consisted of “mutual compacts, treaties, leagues, and agreements” between different countries. ¹ BLACKSTONE, COMMENTARIES, at 43. At the Philadelphia Convention, Madison explained why national legislation adopted by Congress was essential in enforcing the laws of nations. The Constitution would “prevent those violations of the law of nations & of Treaties which if not prevented must involve us in calamities of foreign wars.” ¹ Farrand 316. His statement underscored the rejection of Blackstone’s executive model and affirmed the model of republican government in America.

4. President as Commander in Chief.

Article II designates the President as Commander in Chief, but that title does not carry with it an independent authority to initiate war or to act free of legislative control. Article II provides that the President “shall be Commander in Chief of the Army and Navy of the United States, and of the Militia of the several States, when called into the actual Service of the United States.” Congress, not the President, does the calling. Article I grants Congress the power to provide “for calling forth the Militia to execute the laws of the Union, suppress Insurrections, and repel invasions.” Presidential use of the militia depends on policy enacted by Congress.

Congress passed legislation in 1792 to establish national policy for the militia. It provided that before the President could call up the militia, he would first have to be notified of a military threat “too powerful to be suppressed by the ordinary course of judicial proceeding.” Only after an Associate Justice or a federal district judge verified the President of those conditions could he call forth the militia to suppress an insurrection. The judicial check was removed three years later, but Congress can at any time determine by law how and when the President uses the militia.³

The Commander in Chief Clause is often misinterpreted to create an exclusive, plenary power of the President, free of legislative and judicial limitations. It is not. Instead, it offers several protections for republican, constitutional government. First, it preserves civilian supremacy over the military. The individual leading the armed forces is an elected civilian, not a general or admiral. Attorney General Edward Bates in 1861 explained that the President is Commander in Chief not because he is “skilled in the art of war and qualified to marshal a host in the field of battle.” He carries that title for a different reason. Whatever military officer leads U.S. armies against an enemy, “he is subject to the orders of the *civil magistrate*, and he and his army are always ‘subordinate to the civil power.’” 10 OP. ATT’Y GEN. 74, 79 (1861) (emphasis in original). Congress is an essential part of that civil power.

³ 1 Stat. 264, sec. 2 (1792); 1 Stat. 424 (1795). For further details on this period, see Louis Fisher, *Domestic Commander in Chief: Early Checks by Other Branches*, 29 CARDOZO L. REV. 961 (2008), <http://www.loufisher.org/docs/wp/418.pdf>.

5. Defensive and Offensive Actions.

The framers understood that the President may “repel sudden attacks,” especially when Congress is out of session and unable to assemble quickly. But this discretion to take defensive actions does not permit the President to initiate wars and exercise the constitutional authority of Congress. President George Washington instructed his military commanders that operations against Indians were to be limited to defensive actions. Any offensive action required authority from Congress. He wrote in 1793: “The Constitution vests the power of declaring war with Congress; therefore no offensive expedition of importance can be undertaken until after they have deliberated upon the subject, and authorized such a measure.” 33 THE WRITINGS OF GEORGE WASHINGTON 73 (John C. Fitzpatrick ed., 1939).

Military actions by President Thomas Jefferson in 1801 against the Barbary pirates are often cited to justify unilateral presidential authority to take the country to war. He made no such claim. After directing that a squadron be sent to the Mediterranean to safeguard American interests, he informed Congress of his actions and asked lawmakers for further guidance. He said he was “[u]nauthorized by the Constitution, without the sanction of Congress, to go beyond the line of defense.” It was up to Congress to authorize “measures of offense also.” 1 A COMPILATION OF THE MESSAGES AND PAPERS OF THE PRESIDENTS 315 (James D. Richardson, ed.) (hereafter “Richardson”). Congress proceeded to pass ten statutes authorizing Presidents Jefferson and Madison to use military force against the Barbary pirates. Louis Fisher, “The Barbary Wars: Legal Precedent for Invading Haiti?,” CRS Report 94-661 S, August 16, 1994, <http://loufisher.org/docs/wp/barbary.pdf>.

In 1805, after conflicts developed between the United States and Spain, Jefferson issued a public statement that identified basic constitutional principles: “Congress alone is constitutionally invested with the power of changing our condition from peace to war.” Richardson at 377. A year later, a federal circuit court stated that if a foreign nation invaded the United States, the President had an obligation to resist with force. But there was a “manifest distinction” between going to war with a nation at peace and responding to an actual invasion. “In the former case, it is the exclusive province of congress to change a state of peace into a state of war.” *United States v. Smith*, 27 Fed. Cas. 1192, 1230 (C.C.N.Y. 1806) (No. 16,342).

The Supreme Court’s decision in *The Prize Cases* (1863), upholding President Abraham Lincoln’s blockade on the South at the start of the Civil War, is frequently cited as recognition of a broad independent and inherent presidential power over national security.⁴ The Court did not make that argument. In upholding the blockade, Justice Robert Grier said that in the event of foreign invasion the President was not only authorized “but bound to resist force by force. He does not initiate the war, but is

⁴ In 2006, the Justice Department released its legal justification of warrantless surveillance by the National Security Agency. The Department referred to *The Prize Cases* as support for independent presidential authority to use military force to resist an invasion even in the absence of congressional approval. Memo from Attorney General Alberto R. Gonzales to the Majority Leader of the U.S. Senate, “Legal Authorities Supporting the Activities of the National Security Agency Described by the President,” at 9, January 19, 2006, <http://www.justice.gov/olc/nsa-white-paper.pdf>.

bound to accept the challenge without waiting for any special legislative authority.” *The Prize Cases*, 67 U.S. (2 Black) 635, 668 (1863). His observation merely restates the framers’ understanding that the President may “repel sudden attacks.”

The Prize Cases had nothing to do with a foreign nation invading the United States or any offensive action by the President against another country. The blockade was a domestic action in time of civil war. Justice Grier carefully limited the President’s power to defensive actions: “Congress alone has the power to declare a national or foreign war.” The President “has no power to initiate or declare a war against either a foreign nation or a domestic State.” *Id.* Richard Henry Dana, Jr., who argued the case for President Lincoln, took exactly the same position. The blockade had nothing to do with “the right to *initiate a war, as a voluntary act of sovereignty*. That is vested only in Congress.” *Id.* at 660 (emphasis in original).

6. Statutory Limits on Military Operations.

When Congress passes legislation to authorize presidential military action against another country, it may place restrictions and limitations. The first war authorized by Congress was the Quasi-War against France in 1798. The Supreme Court regarded the military conflict as “limited,” “partial,” and “imperfect,” in part because the war was authorized rather than declared. *Bas v. Tingy*, 4 U.S. (4 Dall.) 37, 40, 43 (1800). It was limited in a second respect. As Justice Samuel Chase noted, Congress had “authorized hostilities on the high seas by certain persons in certain cases. There is no authority given to commit hostilities on land; to capture unarmed *French* vessels, nor even to capture *French* armed vessels lying in a French port.” *Id.* at 43 (emphases in original). The President’s power as Commander in Chief was limited to the statutory purposes. A year later, the Court decided a second case involving the Quasi-War. In clear language, Chief Justice John Marshall underscored the primary role of Congress over war: “The whole powers of war being, by the constitution of the United States, vested in congress, the acts of that body can alone be resorted to as our guides in this enquiry.” *Talbot v. Seeman*, 1 Cr. (5 U.S.) 1, 28 (1801).

A third Quasi-War case emphasizes the dominance of statutory limits over presidential commands. Congress had authorized President John Adams to seize vessels sailing *to* French ports. He issued a proclamation directing American ships to capture vessels sailing *to or from* French ports. Could his powers as Commander in Chief supersede statutory limits? Writing for a unanimous Court, Chief Justice Marshall held that the proclamation by Adams “cannot change the nature of the transaction, or legalize an act which, without those instructions, would have been a plain trespass.” *Little v. Barreme*, 6 U.S. (2 Cr.) 170, 179 (1804). Statutory policy necessarily prevailed over conflicting presidential orders.

7. Contemporary Statutory Limits.

Over a period of two hundred years, Congress has repeatedly placed statutory limits on the President’s power as Commander in Chief. According to the argument advanced by some officials in the Reagan administration, if Congress prohibits the use of appropriations for foreign policy objectives - as it did with the Boland amendment restrictions on the Contras in Central America - the President was at liberty to pursue

his goals by soliciting funds from the private sector and from foreign countries. The result of that theory led to the Iran-Contra affair and the prosecution and conviction of many public officials and private citizens. For reasons that have both constitutional and practical dimensions, U.S. foreign policy must be conducted only with funds appropriated by Congress.⁵

In 1986, in a further effort to limit the U.S. military role in Central America, Congress passed legislation stipulating that U.S. personnel “may not provide any training or other service, or otherwise participate directly or indirectly in the provision of any assistance, to the Nicaraguan democratic resistance pursuant to this title within those land areas of Honduras and Costa Rica which are within 20 miles of the border with Nicaragua.” 100 Stat. 3341-307, § 216(a) (1986). The statute defined U.S. personnel to mean “any member of the United States Armed Forces who is on active duty or is performing inactive duty training” and any employee of any department, agency, or other component of the executive branch. *Id.* at § 216(b). The clear purpose was to prevent military activities from spilling across borders. The Reagan administration never objected that this statutory restriction posed any constitutional challenge to the Commander in Chief Clause.⁶

The American Law Division of Congressional Research Service has recently issued a report called “Congressional Authority to Limit Military Operations,” September 8, 2011, R41989, authored by Jennifer K. Elsea, Michael John Garcia, and Thomas J. Nicola. The report analyzes a number of statutory limitations on the Commander in Chief power and relevant court cases. It concludes that at this point in time “no court has invalidated a statute passed by Congress on the basis that it impinges the constitutional authority of the Commander in Chief, whether directly or indirectly through appropriations. In contrast, presidential assertions of authority based on the Commander-in-Chief Clause, in excess of or contrary to congressional authority, have been struck down by the courts.” *Id.* at 37-38.

8. The “Sole Organ” Doctrine.

Administrations frequently object that statutory limitations interfere impermissibly with the President’s power under the “sole organ” doctrine. During hearings in 1987 on the Iran-Contra affair, opponents of congressional restrictions argued that the President possesses “plenary and exclusive power as sole organ” of the national government in the field of international relations, “a power which does not require as a basis for its exercise an act of Congress.” In defending warrantless surveillance by the Bush administration after 9/11, the Justice Department relied in part on the sole-organ doctrine to claim an “inherent” presidential power that could not be limited by Congress or the courts. LOUIS FISHER, *DEFENDING CONGRESS AND THE CONSTITUTION* 251-52 (2011).

The sole-organ doctrine was popularized by Justice George Sutherland in his decision in *United States v. Curtiss-Wright Export Corp.* (1936). In arguing for

⁵ Louis Fisher, *How Tightly Can Congress Draw the Purse Strings?*, 83 AM. J. INT’L L. 758 (1989).

⁶ Louis Fisher, *Congressional Checks on Military Initiatives*, 109 POL. SCI. Q. 739, 758 (1994-95).

independent and exclusive presidential powers in the field of foreign affairs, he relied on a speech by John Marshall in 1800 during his service with the U.S. House of Representatives. Marshall referred to the President as “the sole organ of the nation in its external relations, and its sole representative with foreign nations.” 10 ANNALS OF CONG. 613 (1800).

There are two central problems with Sutherland’s argument. First, his references to “sole organ” and to Marshall come not in the decision of the Court, which upheld the delegation of statutory authority to the President, but in dicta that were wholly irrelevant to the issue presented to the Court. Second, Sutherland completely misread the speech by Marshall. When one reads what Marshall said, it is clear that he was not making a case for inherent, plenary, or independent powers for the President in foreign affairs. Marshall merely argued that the legislative effort to censure or impeach President John Adams for handing over to a Great Britain a British subject charged with murder was groundless. Adams was carrying out an extradition provision in the Jay Treaty. He was not invoking plenary or inherent power. He was implementing a treaty, which he was charged to do under the Constitution. He acted on the basis of authority granted to him by law.⁷

9. Negotiation of Treaties.

Another serious misconception in *Curtiss-Wright* is Justice Sutherland’s claim that the President “*makes* treaties with the advice and consent of the Senate; but he alone negotiates. In the field of negotiation the Senate cannot intrude; and Congress itself is powerless to invade it.” *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304, 319 (1936) (emphasis in original). In fact, Senators (and members of the House of Representatives) had repeatedly been involved in the negotiation of treaties at the invitation of the President. Even Sutherland, in a book published earlier when he was a U.S. Senator from Utah, recognized that Senators participate in the negotiation phase of treaties and that Presidents often acceded to this “practical construction.” GEORGE SUTHERLAND, *CONSTITUTIONAL POWER AND WORLD AFFAIRS* 123 (1919).⁸

10. Circumventing Congress.

This memo began by flagging the precedent set by President Truman in 1950 when he went to war against North Korea without ever seeking or obtaining authority from Congress. Previously, all Presidents who engaged in major wars sought statutory action by Congress, either by authorization or by declaration. In June 1950, Truman ordered U.S. troops to Korea without coming to Congress for authority. Instead,

⁷ For Marshall’s speech in 1800, see <http://loufisher.org/docs/pip/444.pdf>. For further analysis of the misconceptions of the sole-organ doctrine, see Louis Fisher, The Law Library of Congress, “The ‘Sole Organ’ Doctrine,” August 2006, <http://www.loufisher.org/docs/pip/441.pdf>, and Louis Fisher, *Presidential Inherent Power: The ‘Sole Organ’ Doctrine*, 37 PRES. STUD. Q. 139 (2007), <http://loufisher.org/docs/pip/439.pdf>.

⁸ For details on the involvement of Senators and Representatives in the negotiation of treaties, see Louis Fisher, *Congressional Participation in the Treaty Process*, 137 U. PA. L. REV. 1511 (1989), <http://loufisher.org/docs/pip/442.pdf>.

Truman cited what he considered to be treaty commitments reflected in resolutions passed by the U.N. Security Council. PUBLIC PAPERS OF THE PRESIDENTS, 1950, at 491-92.

U.N. resolutions are not a constitutional or legal substitute for congressional authority. They cannot be. If they were, the President and the Senate through the treaty process could strip Article I powers from the House of Representatives and the Senate and transfer that authority to outside bodies. Such a step would violate the Constitution and its commitment to a republic, self-government, public participation, Congress as a coequal branch, and the system of checks and balances. The Constitution Project released a study in 2005 that explains why actions by regional and international organizations (like the U.N. and NATO) are not a constitutional substitute for express congressional approval.⁹

The history of the U.N. Charter makes it very clear that all parties in the legislative and executive branches understood that the decision to use military force through the U.N. required prior approval from both houses of Congress. Under Chapter VII of the Charter, U.N. members would make available to the Security Council, “in accordance with a special agreement or agreements,” armed forces and other assistance for the purpose of maintaining international peace and security. When the Senate debated the Charter, President Truman wired a cable from Potsdam to Senator Kenneth McKellar on July 27, 1945, making this pledge: “When any such agreement or agreements are negotiated it will be my purpose to ask the Congress for appropriate legislation to approve them.” 91 CONG. REC. 8185 (1945).

Congress did not depend on the Potsdam cable to protect its constitutional interests. It passed the U.N. Participation Act of 1945, stating clearly that the agreements “shall be subject to the approval of the Congress by appropriate Act or joint resolution.” 59 Stat. 621, sec. 6 (1945). The President gained some flexibility with legislation in 1949, but the discretion to deploy military forces was subject to stringent conditions: they could serve only as observers and guards, could perform only in a noncombatant capacity, and could not exceed 1,000 in number. 63 Stat. 735-36, sec. 5 (1949). Nothing in the Constitution, the U.N. Charter, or the participation statutes provided any legality to what Truman did in unilaterally sending U.S. troops to war in Korea.¹⁰ Yet many Presidents have relied on Truman’s precedent to seek authority for military force against other nations not from Congress but from the Security Council. When they could not secure support from the Security Council, they turned to NATO. Such efforts are similarly unconstitutional because NATO is a treaty and treaties cannot shift Article I power to outside bodies.¹¹

⁹ The Constitution Project, DECIDING TO USE FORCE ABROAD, *supra* note 1, at 21-23.

¹⁰ Louis Fisher, *The Korean War: On What Legal Basis Did Truman Act?*, 89 AM. J. INT’L L. 21 (1995), <http://www.loufisher.org/docs/wp/425.pdf>.

¹¹ Louis Fisher, *Sidestepping Congress: Presidents Acting Under the U.N. and NATO*, 47 CASE W. RES. L. REV. 1237 (1997), <http://www.loufisher.org/docs/wp/424.pdf>.

11. Current Military Operations in Libya.

For the reasons stated above, there is no constitutional or legal basis for President Barack Obama to claim that he received “authorization” from the Security Council and NATO allies for military action against Libya. As explained by two former members of Congress, Mickey Edwards (R-Okla.) and David Skaggs (D-Colo.), the Constitution could be protected only if the military action received statutory support from Congress.¹² Additional details on this unconstitutional action are provided in my testimony to the Senate Foreign Relations Committee on June 28, 2011, and in an earlier article for *National Law Journal*.¹³ Taking the country from a state of peace to a state of war against a country that did not threaten or harm the United States is the type of decision that the Constitution confides in Congress, not in the President.

In the matter of Libya and other unilateral presidential actions to take the country to war, Congress has been inattentive and ineffective in protecting its institutional and constitutional interests. The damage to self-government and checks and balances has been profound. In the Steel Seizure Case of 1952, Justice Robert Jackson said in a concurrence: “. . . I have no illusion that any decision by this Court can keep power in the hands of Congress if it is not wise and timely in meeting its problems. . . . We may say that power to legislate for emergencies belongs in the hands of Congress, but only Congress itself can prevent power from slipping through its fingers.” *Youngstown Co. v. Sawyer*, 343 U.S. 579, 654 (1952).

12. State Secrets Privilege.

The capacity of the executive branch to violate law and the Constitution in the field of national security expanded markedly as a result of a misguided Supreme Court decision in 1953, *United States v. Reynolds*. A federal torts lawsuit by the widows of three civilian engineers who died while aboard a B-29 that exploded over Waycross, Georgia, was blocked when the Court accepted the argument of the executive branch that access by plaintiffs to the official accident report would risk disclosure of sensitive information about secret electronic equipment. 345 U.S. 1, 10. Not only could the widows and their attorneys not read the accident report, but neither did the Court. The Justices accepted the assertions of the executive branch. When the report was later declassified and the three families gained access to it, it was clear that nothing in the report contained any information relating to the secret electronic equipment.¹⁴ The families filed a *coram nobis* suit, arguing that the executive branch had committed fraud on the court by misleading it about the contents of the report, but a district

¹² Mickey Edwards and David Skaggs, “Constitution Requires Congress Vote on War,” *Roll Call*, April 18, 2011, at 15, http://www.rollcall.com/issues/56_112/-205023-1.html.

¹³ Statement before the Senate Foreign Relations Committee, “Libya and War Powers,” June 28, 2011, <http://loufisher.org/docs/wplibya/libyasenfr.pdf>; Louis Fisher, “Obama’s U.N. Authority?,” *National Law Journal*, April 18, 2011, <http://www.loufisher.org/docs/wplibya/authority.pdf>.

¹⁴ LOUIS FISHER, *IN THE NAME OF NATIONAL SECURITY: UNCHECKED PRESIDENTIAL POWER AND THE REYNOLDS CASE* 110-18, 165-76 (2006).

court and the Third Circuit decided in favor of the executive branch. The Supreme Court, on May 1, 2006, denied cert.¹⁵

Following 9/11, a number of lawsuits were filed in federal court challenging various actions by the executive branch with regard to warrantless surveillance by the National Security Agency, the rendition of suspected terrorists to other countries for interrogation and torture, and other actions taken by the Bush administration. In case after case, federal courts relied on *Reynolds* and agreed with the administration that allowing the litigation to proceed toward discovery would jeopardize national security.¹⁶ Both houses of Congress held hearings and reported legislation to strengthen judicial independence by giving judges and plaintiffs greater access to documents.¹⁷ Congress has yet to consider those bills on the floor. Other than a change in Justice Department procedures in reviewing agency claims about state secrets, the policy of the Obama administration in court on state secrets is identical to that of the George W. Bush administration.¹⁸ Enactment of this legislation would protect the integrity and reputation of federal courts and put a necessary check on the present opportunity of the executive branch to violate law and the Constitution with little scrutiny.

13. Conclusions.

There is little doubt that the pendulum of power over foreign affairs, national security, and war has swung toward the executive branch, especially after 1950. Those who champion this change in constitutional government emphasize the supposed virtues of executive energy and unity of purpose.¹⁹ That model of government minimizes the power of members of Congress and diminishes the role of voters who put them in office. We have also witnessed the damage done to constitutional rights and liberties by various administrations - of both parties - who demonstrated a capacity not only for dishonesty and deception but also for incompetence. Careful analysis documents the pattern of grave errors and misconceptions by Presidents in both domestic and foreign policy. There is no basis to assume that Presidents possess some kind of natural expertise and capacity to determine what is in the "national interest."²⁰ Instead, Presidents have a record of engaging in actions that have done great harm to the nation and to other countries. Presidents frequently sidestep legal and constitutional

¹⁵ Id. at 176-211.

¹⁶ In one of these cases, *Jeppesen Dataplan*, The Constitution Project urged the Supreme Court to accept review; <http://www.constitutionproject.org/pdf/JeppesenAmicusBrief.pdf>.

¹⁷ The Constitution Project issued a report, "Reforming the State Secrets Privilege," that analyzed the lack of judicial independence following the 1953 *Reynolds* decision; <http://www.constitutionproject.org/pdf/52.pdf>. Former House member Asa Hutchinson (R-Ark.) testified in favor of the legislation and referred to the Project's report; <http://www.constitutionproject.org/pdf/157.pdf>.

¹⁸ FISHER, DEFENDING CONGRESS AND THE CONSTITUTION, at 272-75.

¹⁹ E.g., ERIC A. POSNER AND ADRIAN VERMEULE, THE EXECUTIVE UNBOUND: AFTER THE MADISONIAN REPUBLIC (2010).

²⁰ RICHARD M. PIOUS, WHY PRESIDENTS FAIL: WHITE HOUSE DECISION MAKING FROM EISENHOWER TO BUSH II (2008).

challenges by insisting that what they did is the “right thing to do.”²¹ More important than doing the right thing is doing things the right way: following constitutional procedures, developing a national consensus and public support, working with the legislative branch instead of circumventing it, and understanding that the structural system of checks and balances adopted by the framers applies equally well, if not more so, to the twenty-first century.

²¹ E.g., comments by President Bill Clinton regarding his decision to use military force in Bosnia; PUBLIC PAPERS OF THE PRESIDENTS, 1995, II, at 1784.