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Balancing National Security Policy: Why Congress Must Assert its Constitutional Check on Executive Power

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BALANCING NATIONAL SECURITY POLICY: WHY CONGRESS MUST ASSERT ITS CONSTITUTIONAL CHECK ON EXECUTIVE POWER

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I. INTRODUCTION

A primary focus of American grand strategy in foreign affairs is to promote democratic, prosperous societies that are inhospitable to political extremism.¹ At the same time, the United States regularly sends unmanned aerial vehicles (UAVs, or “drones”) to kill suspected terrorists in multiple countries² and strictly enforces a statutory prohibition against providing terrorists with “material support.”³ In theory, these two approaches—one preventative and one reactive—should complement each other in the service of widely shared global interests. In practice, however, the increasingly dominant role of reactive, zero-tolerance antiterrorism policies is both crowding out preventative American public diplomacy and expanding the scope of the executive branch’s national security authority.

President Barack Obama kept his campaign promises to refocus American military power on al-Qaeda after the wars in Afghanistan

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1. See THE WHITE HOUSE, NATIONAL SECURITY STRATEGY 4-5 (2010), available at www.whitehouse.gov/sites/default/files/rss_viewer/national_security_strategy.pdf.

2. See Jonathan Masters, *Targeted Killings*, COUNCIL ON FOREIGN REL. (last updated May 23, 2013), www.cfr.org/counterterrorism/targeted-killings/p9627.

3. 18 U.S.C. § 2339B (2012).

and Iraq, but he has not rejected the “unchecked presidential power” for which he criticized his predecessor.⁴ Despite the ambiguous legal basis of targeted killing and its inevitable collateral damage, the Obama Administration has standardized the use of aerial drone strikes and dramatically increased the number of countries in which they occur.⁵ Meanwhile, executive agencies have interpreted the material support statutes so broadly that ordinary civilians and established charities are easily tainted by incidental interactions with such groups.⁶ Both drone strikes and the material support prohibitions share a failure to adequately distinguish terrorists from the communities in which they live and operate.

This Comment advances the premise that, when paired with the President’s political incentives, the executive’s constitutional duty to defend the United States from attack inevitably leads to an overbroad conception of self-defense and a maximalist approach to executive power. In a government of checks and balances, the corresponding duty of the other two branches is to prevent that result. But although Congress has explicit constitutional war powers and has expressed some intent to exercise them, the special threat of terrorism has inspired extreme legislative deference to the Commander-in-Chief. The judiciary, for its own part, has consistently denied its authority to properly balance national security interests against individual civil liberties.⁷ Evidence is mounting that this double deference is undermining the rule of law and harming long-term foreign policy objectives.

Instead of relying on executive restraint or stricter judicial review in this area, I suggest that those of us who are troubled by these trends must look primarily to Congress to reverse them. The legislature has clear constitutional authority to regulate the use of military force, to define the limits of military counterterrorism operations and set other foreign policy objectives, and to give courts better statutory parameters to increase their respective oversight of the executive in its pursuit of national security. Part II lays out the basic legal framework for initiating U.S. military action, tracing the roots of deference to the executive and describing current antiterrorism policies. Part III surveys some key consequences of antiterrorism absolutism and unchecked executive power for both domestic and foreign affairs. Finally, Part IV proposes that Congress should begin to assert its

4. See Senator Barack Obama, Address at the Woodrow Wilson International Center for Scholars: National Security (Aug. 1, 2007), available at <http://www.cfr.org/elections/obamas-speech-woodrow-wilson-center/p13974>.

5. See *infra* Part II.B.2.

6. See *infra* Part II.B.1.

7. See *infra* Part II.A.2.

check on national security policy by revisiting three statutes: the outdated Authorization for Use of Military Force,⁸ the prohibition on providing material support to terrorist groups,⁹ and the Foreign Assistance Act.¹⁰ Amending these laws would give the legislature more opportunities to balance executive power and develop better and more accountable policies.

II. THE BALANCE OF NATIONAL SECURITY AUTHORITY

Constitutional provisions relating to the use of military force offer minimal guidance as to the appropriate interbranch balance of power. This section contrasts the vague constitutional promise of a congressional check with the reality of its inadequacy, particularly for executive action where the threat of terrorism is apparent. It concludes that U.S. Presidents' expansive interpretations of executive war powers—including those of President Obama—should not be at all surprising, given the executive's vague legal parameters, political incentives, and lack of effective oversight.

A. *Constitutional Powers*

1. *Text and Early Debates*

When the delegates to the 1787 Constitutional Convention gathered in Philadelphia, the vesting of war-making authority outside of a sovereign executive was unprecedented; yet the drafters struggled to limit the American executive's ability to deploy military force.¹¹ The only constitutional provision explicitly granting such authority is Article II, section 2, which makes the President “the Commander-in-Chief of the Army and Navy of the United States”¹² Article II also gives the President influence over other foreign policy matters, such as the power to “receive [foreign] Ambassadors”¹³ and to make treaties and appoint American ambassadors, with the advice and consent of the Senate.¹⁴ Finally, the executive must “take Care that the Laws be faithfully executed”¹⁵

8. 50 U.S.C. § 1541 (2012).

9. 18 U.S.C. § 2339A (2012).

10. 22 U.S.C. § 2151 (2012).

11. Many were fearful of an executive with control of a standing army. *See, e.g.*, THE FEDERALIST NO. 26 (Alexander Hamilton).

12. U.S. CONST. art II, § 2.

13. *Id.* § 3.

14. *Id.* § 2, cl. 2.

15. *Id.* § 3.

In contrast to Article II's unconditional grant of executive power, Article I limits congressional authority to the "legislative Powers herein granted."¹⁶ However, the powers enumerated in section 8 establish broad legislative control over military and foreign policy. Congress has the authority to "declare War, grant Letters of Marque and Reprisal, and make Rules concerning Captures on Land and Water."¹⁷ It can also "raise and support Armies," provided that "no Appropriation of Money to that Use shall be for a longer Term than two Years;" similarly, it can "provide and maintain a Navy."¹⁸ Related powers include: "To make Rules for the Government and Regulation of the land and naval Forces; To provide for calling forth the Militia to execute the Laws of the Union, suppress Insurrections and repel Invasions; [and] To provide for organizing, arming, and disciplining, the Militia."¹⁹ Section 8 also establishes significant legislative control over U.S. monetary policy and gives Congress the power "[t]o define and punish Piracies and Felonies committed on the high Seas, and Offences against the Law of Nations."²⁰ Finally, Congress can "make all Laws which shall be necessary and proper for carrying into Execution" its other powers.²¹

The inevitable tension between the legislative power to "declare war" and the executive's commander-in-chief power emerged early, when President Washington unilaterally declared American neutrality in the French Revolutionary Wars.²² James Madison protested that inherent in Congress's authority to declare war was the inverse power to declare that the United States was not at war, that is, that the United States was neutral.²³ But Alexander Hamilton defended Washington's declaration, invoking the unconditional and broadly defined vesting language of Article II.²⁴ Congress quickly mooted the

16. *Id.* § 1.

17. *Id.* § 8, cl. 11. The drafters at the Constitutional Convention argued as to whether Congress should have the power to "make" war or merely "declare" it, settling on the latter to avoid infringing on the Commander-in-Chief's authority. 3 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 318-19 (M. Farrand ed., 1911).

18. U.S. CONST. art. I, § 8, cl. 12-13.

19. *Id.* cl. 14-16.

20. *Id.* cl. 10.

21. *Id.* cl. 18.

22. See 32 THE WRITINGS OF GEORGE WASHINGTON 430-31 (John C. Fitzpatrick ed., 1939). Then Chief Justice John Jay refused to advise the President on the legality of his action. Although many praise this decision as a key foundation of an independent judiciary, the incident also marks the beginning of the courts' long tradition of avoiding questions related to foreign affairs and military policy in particular. *Id.*

23. See James Madison, *Helvidius No. 1*, (Aug. 24, 1793), reprinted in 15 PAPERS OF JAMES MADISON 66, 66-73 (Thomas A. Mason et al. eds., 1985).

24. See Alexander Hamilton, *Pacificus No. 1*, (June 29, 1793), reprinted in 15 PAPERS OF ALEXANDER HAMILTON 33, 33-43 (Harold C. Syrett ed., 1969).

controversy by passing its own declaration of neutrality,²⁵ but the episode revealed a deep and persistent uncertainty about the scope of executive power under Article II.

2. *Judicial Deference to the Executive*

Over the past century, the Supreme Court has effectively validated the Hamiltonian view of executive power. In its precedential analysis in *United States v. Curtiss-Wright Export Corp.*, the Court considered whether a Joint Resolution of Congress was sufficient to prohibit weapons sales to certain foreign countries if the President had withdrawn a proclamation to the same effect.²⁶ The Court first distinguished the federal government's "external" powers from its domestic powers: while federal authority over American citizens had been delegated by the states, its foreign relations power had been inherited from the previous sovereign, Great Britain.²⁷ Bracketing foreign relations authority in this way, the Court reasoned that such inherited authority was largely vested in the President:

[P]articipation in the exercise of the power is significantly limited. In this vast external realm, . . . the President alone has the power to speak or listen as a representative of the nation. . . . [H]e alone negotiates. Into the field of negotiation the Senate cannot intrude; and Congress itself is powerless to invade it. As Marshall said in his great argument of March 7, 1800, in the House of Representatives, "The President is the sole organ of the nation in its external relations, and its sole representative with foreign nations."²⁸

Citing a Senate Foreign Relations Committee report from 1816 that advocated presidential dominance in foreign relations, the Court further decided that the President's power in this area "does not require as a basis for its exercise an act of Congress."²⁹ Justice Sutherland's opinion in *Curtiss-Wright* emphasized the pragmatic need for unity of national representation in foreign relations and the President's superior informational resources.³⁰

The *Curtiss-Wright* analysis has been subject to thorough evisceration in the academy, with respect to both its extra-constitutional theory of federal foreign relations power and its expansive conception

25. See Act of June 5, 1794, ch. 50, 1 Stat. 381.

26. 299 U.S. 304 (1936).

27. *Id.* at 316.

28. *Id.* at 319.

29. *Id.* at 320.

30. *Id.*

of executive authority in that field.³¹ Nevertheless, courts still cite the decision whenever they defer to the executive in matters of foreign policy—which is to say, frequently.³² Even though Justice Sutherland's theory of executive dominance was dicta, other cases quickly reinforced it. Five months after *Curtiss-Wright*, Justice Sutherland expanded on the theory of executive dominance in *United States v. Belmont*, in which the Court held that “executive agreements”—negotiated with foreign entities without legislative approval—carry the same legal weight as Senate-approved treaties under the law.³³ Later, in *United States v. Pink*, the Court held that the President's constitutional authority to negotiate treaties, and the need for credibility in such interactions, justified the executive's power to unilaterally make foreign policy.³⁴ G. Edward White sees *Curtiss-Wright's* conclusions about executive power as a tipping point in what had been an “incremental” expansion of the President's authority.³⁵

In 1952, the Court temporarily halted the legal expansion of executive power with its decision in *Youngstown Sheet & Tube v. Sawyer*.³⁶ The case arose from President Harry Truman's Executive Order to seize steel mills, which were incapacitated by a labor strike, to maintain U.S. steel production.³⁷ Premising its decision on the then-ongoing Korean War, the Truman Administration argued that the seizure served the interests of national security and was authorized by the executive's commander-in-chief and implied emergency powers.³⁸ The Court rejected the seizure's constitutional legitimacy, expressing profound discomfort with the appropriation of private property in the name of national security.³⁹ Writing for the majority, Justice Black summarily concluded that the seizure was a legislative action; and as such, it was unavailable to the executive, even in times

31. See, e.g., David M. Levitan, *The Foreign Relations Power: An Analysis of Mr. Justice Sutherland's Theory*, 55 YALE L.J. 467, 494 (1946) (arguing that *Curtiss-Wright's* historical argument for an extra-constitutional foreign relations power was unfounded); G. Edward White, *The Transformation of the Constitutional Regime of Foreign Relations*, 85 VA. L. REV. 1, 98-110 (1999) (calling the *Curtiss-Wright* decision revisionist and radical due to its abandonment of constitutional limits).

32. Anthony Simones, *The Reality of Curtiss-Wright*, 16 N. ILL. U. L. REV. 411, 419 (1996).

33. 301 U.S. 324, 331-32 (1937).

34. 315 U.S. 203, 228-30 (1942).

35. White, *supra* note 31, at 146.

36. 343 U.S. 579 (1952).

37. *Id.* at 582-83.

38. *Id.* at 583-84. President Truman immediately reported his action to Congress and sent another report twelve days later. After Congress did not respond, steel producers challenged the seizure in federal court. *Id.*

39. *Id.* at 587.

of war or emergency.⁴⁰ However, the complexity of the question inspired five concurrences, including one by Justice Jackson that eventually became the controlling opinion of the case.⁴¹

Justice Jackson thought that legitimate executive action could be conceptually organized around congressional approval, or lack thereof.⁴² When the President acts with the “express or implied authorization of Congress,” Justice Jackson wrote, “his authority is at its maximum.”⁴³ When the President acts against the will of Congress, he can rely only on his independent constitutional powers.⁴⁴ Between these two extremes,

there is a zone of twilight in which [the President] and Congress may have concurrent authority, or in which its distribution is uncertain. Therefore, congressional inertia, indifference or quiescence may sometimes, at least as a practical matter, enable, if not invite, measures on independent presidential responsibility. In this area, any actual test of power is likely to depend on the imperatives of events and contemporary imponderables rather than on abstract theories of law.⁴⁵

Justice Jackson concluded that even though Congress was silent after President Truman’s Order, its past history of strict regulation of private property seizures meant that the executive branch could only rely on its own constitutional authority for legitimacy in that case.⁴⁶ Justice Jackson took pains to encourage a “practical” assessment of the scope of the commander-in-chief power but emphasized the need to limit it:

[J]ust what authority goes with the name has plagued Presidential advisers who would not waive or narrow it by nonassertion yet cannot say where it begins or ends. It undoubtedly puts the Nation’s armed forces under Presidential command. . . . But no doctrine that the Court could promulgate would seem to me more sinister and alarming than that a President whose conduct of foreign affairs is so largely uncontrolled, and often even is unknown, can vastly enlarge his mastery over the internal affairs of the country by his own commitment of the Nation’s armed forces to some for-

40. *Id.* at 588.

41. *Id.* at 634 (Jackson, J., concurring); see Michael J. Turner, Comment, *Fade to Black: The Formalization of Jackson’s Youngstown Taxonomy* by Hamdan and Medellin, 58 AM. U. L. REV. 665, 674 (2009).

42. *Youngstown*, 343 U.S. at 654.

43. *Id.* at 635.

44. *Id.* at 637.

45. *Id.*

46. *Id.* at 640.

eign venture. . . . He has no monopoly of “war powers,” whatever they are.⁴⁷

Justice Jackson was even less amenable to the government’s implied emergency powers argument. The Framers, he wrote,

knew what emergencies were, knew the pressures they engender for authoritative action, knew, too, how they afford a ready pretext for usurpation. We may also suspect that they suspected that emergency powers would tend to kindle emergencies. Aside from suspension of the privilege of the writ of habeas corpus in time of rebellion or invasion, when the public safety may require it, they made no express provision for exercise of extraordinary authority because of a crisis. I do not think we rightfully may so amend their work.⁴⁸

Thus, *Youngstown* limited the scope of executive power and articulated an enduring analytical framework that demanded consideration of legislative intent. However, its opinions repeatedly highlighted the domestic character of the steel mills and, therefore, ultimately provided little insight into the content and reach of executive power in true matters of foreign policy. Had the Court accepted the Truman Administration’s framing of the seizures as a national security necessity, *Curtiss-Wright* and its progeny indicate that the government’s arguments would have inspired much more deference.

Tracing several cases through the twentieth century, Anthony Simones writes that

[b]y the 1970s, the specific facts that gave rise to *Curtiss-Wright* faded from the memory of many judges who sought to use it as a precedent for presidential domination of national security affairs. Largely forgotten was Justice Robert Jackson’s reminder that *Curtiss-Wright* “involved, not the question of the President’s power to act without congressional authority, but the question of his right to act under and in accord with an Act of Congress.”⁴⁹

Simones notes that no cases in this line seem to conceive of any limit on implied presidential powers in the realm of foreign relations,⁵⁰ a trend which contrasts sharply with Justice Jackson’s *Youngstown* concurrence.⁵¹ Thus, at least with respect to foreign affairs, the judi-

47. *Id.* at 641-42, 644.

48. *Id.* at 650.

49. Simones, *supra* note 32, at 419.

50. *Id.*

51. *But see* Roy E. Brownell II, *The Coexistence of United States v. Curtiss-Wright and Youngstown Sheet & Tube v. Sawyer in National Security Jurisprudence*, 16 J.L. & POL. 1, 64 (2000) (suggesting that Justice Jackson’s three zones must be slightly reconceived in a national security context to account for the executive’s increased discretion).

ciary effectively resolved in Hamilton's favor the early debate about the scope of executive war powers by the time global terrorism became a major security threat.

3. *The War Powers Resolution and Congressional Acquiescence*

With little help from the judiciary, Congress struggled for influence over American use of force as military operations became less conventional during the Cold War. In 1950, President Truman sent U.S. troops to the Korean peninsula, pursuant to a United Nations Security Council Resolution, without seeking congressional approval.⁵² He explained that this "police action" was an American obligation under the U.N. Charter.⁵³ Many legislators disputed Truman's authority to commit U.S. troops to the Korean conflict, and Congress never explicitly approved American participation.⁵⁴

The meaning of Congress' constitutional power to "declare" war was uncertain in the age of nuclear weapons, when such declarations became nonsensical. Did "declare" encompass authorizations for war, and if so, to what extent?⁵⁵ Protracted U.S. military operations in Vietnam raised the questions of whether implied authorization could be found in, for example, appropriation of funds for executive action,⁵⁶

52. See S.C. Res. 82, U.N. Doc. S/RES/82 (June 25, 1950).

53. See President Harry S. Truman, News Conference, Executive Office Building (June 29, 1950), available at www.trumanlibrary.org/publicpapers/index.php?pid=806st=st1. Shortly after the Senate consented to the U.N. Charter, Congress passed the United Nations Participation Act of 1945, ch. 583, 59 Stat. 619 (codified as amended at 22 U.S.C. § 287 (1949)), subjecting U.S. military commitments to the U.N. to legislative approval.

54. See Louis Fisher, *The Korean War: On What Legal Basis Did Truman Act?*, 89 AM. J. INT'L L. 21 (1995). A legislative minority protested that the U.N. Participation Act required separate approval for each military agreement, that the Security Council had no authority to enforce military obligations, and that such military actions left the House of Representatives completely out of war-making decisions. The Department of Defense reports 33,686 American battle deaths as a result of the Korean Conflict. See Kathleen T. Rehm, *Korean War Death Stats Highlight Modern DoD Safety Record*, U.S. DEP'T OF DEF. NEWS, AM. FORCES PRESS SERV. (June 8, 2000), www.defense.gov/news/newsarticle.aspx?id=45275.

55. Most scholars believe that an originalist constitutional analysis of the "declare war" power either yields a broad interpretation of legislative authority or is indeterminate. See, e.g., Matthew Fleischman, *A Functional Distribution of War Powers*, 13 N.Y.U. J. LEGIS. & PUB. POL'Y 137 (2010); Harold Hongju Koh, Comment, *The Coase Theorem and the War Power: A Response*, 41 DUKE L.J. 122 (1991); Michael D. Ramsey, *Text and History in the War Powers Debate: A Reply to Professor Yoo*, 69 U. CHI. L. REV. 1685 (2002); but see John C. Yoo, *The Continuation of Politics by Other Means: The Original Understanding of War Powers*, 84 CALIF. L. REV. 167 (1996).

56. See *Orlando v. Laird*, 443 F.2d 1039, 1043 (2d Cir. 1971), cert. denied, 404 U.S. 869 (1971) (holding that Congress' appropriation of funds for the Vietnam Conflict constituted sufficient indication of its approval). In its power of the purse, Congress faces a political dilemma: it has constitutional authority to express disapproval by withholding appropriations for military operations, but this measure potentially turns deployed U.S. service

and under what circumstances the executive could proceed even in the case of unequivocal legislative disapproval.⁵⁷

The debacle of Vietnam led Congress to pass the War Powers Resolution of 1973 over presidential veto. The most assertive exercise of its constitutional war powers to date provides:

(a) Congressional declaration. It is the purpose of this chapter to fulfill the intent of the framers of the Constitution of the United States and insure that the collective judgment of both the Congress and the President will apply to the introduction of United States Armed Forces into hostilities, or into situations where imminent involvement in hostilities is clearly indicated by the circumstances, and to the continued use of such forces in hostilities or in such situations.

....

(c) Presidential executive power as Commander-in-Chief; limitation. The constitutional powers of the President as Commander-in-Chief to introduce United States Armed Forces into hostilities, or into situations where imminent involvement in hostilities is clearly indicated by the circumstances, are exercised only pursuant to (1) a declaration of war, (2) specific statutory authorization, or (3) a national emergency created by attack upon the United States, its territories or possessions, or its armed forces.⁵⁸

The Resolution also requires the President to report to Congress within forty-eight hours upon introducing military forces to hostilities without prior legislative approval.⁵⁹ It also requires the President to remove those forces within sixty days, unless Congress specifically authorizes continued involvement.⁶⁰ Finally, it explicitly rejects the use of American military force with no legal authorization other than an international treaty, even a treaty approved by the Senate.⁶¹

Despite these directives, the four decades following the Resolution's passage have proven the law to be toothless.⁶² No President has

members into hostages in a battle between the political branches' competing foreign policy objectives.

57. *Id.* at 1040.

58. 50 U.S.C. § 1541 (2012).

59. *Id.* § 1543(a)(3).

60. *Id.* § 1544(b).

61. *Id.* § 1547(a).

62. However, there is no shortage of academic suggestions for improving the Resolution. See, e.g., Geoffrey Corn, *Triggering Congressional War Powers Notification: A Proposal to Reconcile Constitutional Practice with Operational Reality*, 14 LEWIS & CLARK L. REV. 687, 692 (2010); Jonathan T. Menitove, Note, *Once More Unto the Breach: American War Power and a Second Legislative Attempt to Ensure Congressional Input*, 43 U. MICH. J.L. REFORM 773, 791 (2010).

acknowledged the statute's validity or any obligation to comply with it. Its language essentially allows a President to make war for two months without legislative approval—a generous timeframe for many potential military objectives, considering the power and precision of modern weaponry. In the sixteen major deployments of American military force since the Resolution became law, only five received explicit congressional approval.⁶³

The executive branch did not publicly interpret its constitutional war powers until 2011, when the U.S. Department of Justice released a memorandum in anticipation of the Obama Administration's intervention in Libya.⁶⁴ It asserted the President's independent authority and obligation to determine and pursue American national security interests, derived from the executive's commander-in-chief power and Supreme Court precedent since *Curtiss-Wright*.⁶⁵ It also recognized a need for legislative authorization but only in the case of "prolonged and substantial military engagements, typically involving exposure of U.S. military personnel to significant risk over a substantial period."⁶⁶ The memo concluded that the Libyan operation did not rise to a level requiring approval from Congress.⁶⁷ The United States' intervention in Libya ultimately exceeded the War Powers Resolution's sixty-day benchmark without a formal challenge.⁶⁸

In essence, then, the executive's current position is that limits on its own military powers are to be primarily self-imposed. Congress has not effectively challenged that assertion, although it has the constitutional authority to do so.

63. The two conflicts in Iraq and the war in Afghanistan were preceded by explicit approval; whereas Lebanon and Somalia received approval after the fact. CURTIS A. BRADLEY & JACK L. GOLDSMITH, *FOREIGN RELATIONS LAW: CASES AND MATERIALS* 268 (4th ed. 2011).

64. Caroline D. Krass, *Authority to Use Military Force in Libya*, DEP'T OF JUSTICE (Apr. 1, 2011), <http://www.justice.gov/sites/default/files/olc/opinions/2011/04/31/authority-military-use-in-libya.pdf>.

65. *Id.*

66. *Id.* at 8. Similarly, State Department Legal Adviser, Harold Koh, testified before Congress that the Obama Administration interpreted the War Powers Resolution to apply to expansive conflicts, such as the one in Vietnam, not to smaller operations like Libya that were comparatively limited in means, objectives, risk to service members, and potential for escalation. *Libya and War Powers: Hearing Before the S. Foreign Relations Comm.*, 112th Cong. (2011) (statement of Harold Hongju Koh, Legal Advisor, U.S. Dep't of State), available at www.state.gov/s/l/releases/remarks/167250.htm.

67. Krass, *supra* note 64, at 14.

68. David A. Fahrenthold, *Obama Misses Deadline for Congressional Approval of Libya Operations*, WASH. POST (May 20, 2011), http://www.washingtonpost.com/politics/obama-likely-to-miss-deadline-for-congressional-approval-of-libya-operations/2011/05/19/AFFLKn7G_story.html.

B. *The War on Terrorism*

The interbranch dynamic described thus far provides an essential backdrop for the focus of modern national security policy on combating terrorism. Initial counterterrorism efforts in the 1980s consisted of intelligence operations that targeted specific terrorist groups and undermined their political goals through infiltration and misinformation.⁶⁹ This approach proved well-suited to groups with specific political agendas, but it was a much less effective strategy against al-Qaeda, which emerged as a threat during the 1990s.⁷⁰ The scale of the attacks on September 11, 2001, the repeated targeting of United States' military resources and financial center, and al-Qaeda's declarations of holy war against Western civilization led President George W. Bush to conclude that America had been attacked, not by a fringe criminal group, but by a military enemy.⁷¹ Not surprisingly, the war paradigm that subsequently dominated anti-terrorism policies engendered an absolutist approach to terrorism that is now perpetuated by all three branches of government.

1. *Statutory Authority for Absolutist Antiterrorism Policies*

The first major sign of the absolutist approach is evident, not in executive action, but in the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), a response to recent acts of international and domestic terrorism, including the 1993 World Trade Center bombing and the Oklahoma City bombing. Title III of AEDPA aims to maximize the financial isolation of terrorist groups and is based, in part, on the finding that "foreign organizations that engage in terrorist activity are so tainted by their criminal conduct that any contribution to such an organization facilitates that conduct."⁷² Due to concerns about terrorist groups raising money in the United States "under the cloak of a humanitarian or charitable exercise,"⁷³ AEDPA makes it a criminal offense to provide "material support" to

69. *Interview: Bob Woodward, Target America*, FRONTLINE, www.pbs.org/wgbh/pages/frontline/shows/target/interviews/woodward.html (last visited Feb. 11 2015); see also Timothy Naftali, *U.S. Counterterrorism before Bin Laden*, 60 INT'L J. 25 (2004-05); *Lessons Learned from the 1980s, Target America*, FRONTLINE, www.pbs.org/wgbh/pages/frontline/shows/target/etc/lessons.html (last visited Feb. 11 2015); *Terrorist Attacks on Americans, 1979-1988, Target America*, FRONTLINE, www.pbs.org/wgbh/pages/frontline/shows/target/etc/cron.html (last visited Feb. 11 2015).

70. Naftali, *supra* note 69.

71. Interviews show that the administration understood the United States to be at war before the last of the four planes, Flight 93, had crashed in Pennsylvania. See generally BOB WOODWARD, *BUSH AT WAR 15-18* (2002).

72. Antiterrorism and Effective Death Penalty Act, Pub. L. No. 104-32, 110 Stat. 1247 (1996) (codified as amended in scattered sections of 18 U.S.C.).

73. H.R. REP. NO. 104-383, at 43 (1995).

a designated foreign terrorist organization. The current statutory language reads:

Whoever knowingly provides material support or resources to a foreign terrorist organization, or attempts or conspires to do so, shall be fined under this title or imprisoned not more than 15 years, or both, and, if the death of any person results, shall be imprisoned for any term of years or for life. To violate this paragraph, the person must have knowledge that the organization is a designated terrorist organization . . . , that the organization has engaged or engages in terrorist activity . . . , or that the organization has engaged or engages in terrorism.⁷⁴

Some commentators believe the material support offense is a “catch-all” way to give the government room to adapt its terror prosecutions to new iterations of the threat as they emerge.⁷⁵ If so, then its inclusion was prescient in light of the attack on September 11, 2001, after which the little-utilized provision quickly became “the centerpiece of the Justice Department’s criminal war on terrorism,” despite targeting non-violent activities.⁷⁶ The statutory terms not only allow for a broad reading of “material assistance,” but also give a central and nearly unimpeachable role to the State Department’s expansive definition of terrorism.⁷⁷ The ability to bring a legal challenge to a terrorist designation is quite circumscribed under this statute, and the parties that have done so have been “almost uniformly unsuccessful.”⁷⁸

In 2010, the Supreme Court upheld the broadest possible interpretation of the “material support” offense in *Holder v. Humanitarian Law Project*.⁷⁹ In that case, plaintiffs were individuals and groups whose work involved teaching and advocating the use of international law and other nonviolent means to reduce conflict, advance human rights, and promote peace.⁸⁰ They raised two First Amendment chal-

74. 18 U.S.C. § 2339B (2012).

75. Norman Abrams, *The Material Support Terrorism Offenses: Perspectives Derived from the (Early) Model Penal Code*, 1 J. NAT’L SEC. L. & POL’Y 5, 7 (2005).

76. DAVID COLE, ENEMY ALIENS: DOUBLE STANDARDS AND CONSTITUTIONAL FREEDOMS IN THE WAR ON TERRORISM 75-76 (2003).

77. Being a non-state actor who engages in political violence is sufficient. See *In re S-K*, 23 I. & N. Dec. 936, 948 (BIA 2006) (“Any group that has used a weapon for any purpose other than for personal monetary gain can, under this statute, be labeled a terrorist organization.”).

78. Wadie E. Said, *The Material Support Prosecution and Foreign Policy*, 86 IND. L.J. 543, 558-60 (2011). A terrorist group does not receive notice of its designation and has thirty days to challenge it in court subsequent to publication in the Federal Register; it will only be reversed on a judicial finding that it was arbitrary, capricious, or an abuse of discretion. *Id.*

79. 561 U.S. 1 (2010).

80. See *id.* at 10.

lenges to the government's interpretation of the material support prohibition, which criminalized their activities.⁸¹ Noting that the statute defines "material support" to include "training," "expert advice or assistance," "service," and "personnel," the Court rejected their claims.⁸² Writing for the majority, Chief Justice Roberts acknowledged congressional and executive findings and also independently endorsed the view that even support not related to violence "helps lend legitimacy to foreign terrorist groups—legitimacy that makes it easier for those groups to persist, to recruit members, and to raise funds—all of which facilitate more terrorist attacks."⁸³

The other key piece of legislation in the U.S. legal framework for antiterrorism is the Authorization of Military Force (AUMF), passed on September 18, 2001, which gave legislative endorsement to the American military operations in Afghanistan that would begin the following month. The authorization provides:

[T]he 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 11th, 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.⁸⁴

This language gave the Bush Administration wide latitude to adapt traditional conventions of war conduct to an unconventional adversary. By now, the implications are familiar: framing U.S. military action against al-Qaeda as a war allowed the United States to treat members of the group as enemy combatants under international humanitarian law. Whereas criminals are entitled to due process and cannot be killed by law enforcement unless they pose an imminent threat of death or serious bodily injury, active militants in a violent conflict can be killed without warning or detained without charge while hostilities continue.⁸⁵

81. *Id.* at 10-11.

82. *Id.* at 14.

83. *Holder*, 561 U.S. at 30. The Chief Justice did not mention *Brandenburg v. Ohio*, 395 U.S. 444 (1969), which ordinarily sets an extremely high standard for government infringement on the freedom of speech. See also *Hedges v. Obama*, 890 F. Supp. 2d 424 (S.D.N.Y. 2012), *cert. denied*, 136 S. Ct. 1936 (2014) (American journalists and activists sued to enjoin the government from detaining them as enemy combatants in the event that their work would bring them into contact with designated terrorists).

84. Authorization for Use of Military Force, Pub. L. No. 107-40, 115 Stat. 224 (2001) (codified as amended at 50 U.S.C. § 1541 (2012)).

85. See U.N. Charter art. 51; Protocol Additional to the Geneva Conventions of 12 August 1949, June 8, 1977, 1125 U.N.T.S. 3; Hague Convention with Respect to the Laws and Customs of War on Land, art. 26, July 29, 1899, 32 Stat. 1803.

2. *Targeted Killing*

The Obama Administration has expanded the legal principles described above to make targeted killing the foundation of U.S. antiterrorism.⁸⁶ Drone strikes increased sixfold after 2009.⁸⁷ Though the strikes mostly targeted Taliban fighters in Pakistan,⁸⁸ the focus has recently shifted toward Yemen and (again) Iraq, with Somalia, Mali, and other weak African states on the horizon.⁸⁹ The withdrawal of U.S. ground troops from Iraq and Afghanistan indicates that America's various national security agencies are institutionalizing targeted killing policies for long-term use.⁹⁰

President Obama has attempted to provide transparency regarding the process that his Administration uses to "nominate" drone targets. A diverse group of national security officials coordinated to create a "disposition matrix" that contains information about targets and the feasibility of killing them by drone strikes or other methods.⁹¹ When the matrix suggests a good candidate for a drone strike, the group passes that information up through the President's National Security Council.⁹² President Obama personally approves every name and about one-third of the total strikes.⁹³ But not every strike targets particular individuals. Drone operations also include "signature strikes" on targets whose identities are unknown, but who intelligence shows engaging in "suspicious behavior."⁹⁴

86. See Scott Shane, *Targeted Killing Comes to Define War on Terror*, N.Y. TIMES (Apr. 7, 2013), www.nytimes.com/2013/04/08/world/targeted-killing-comes-to-define-war-on-terror.html.

87. See Peter Bergen & Megan Braun, *Drone is Obama's Weapon of Choice*, CNN (Sept. 19, 2012), <http://www.cnn.com/2012/09/05/opinion/bergen-obama-drone/>.

88. *Id.*

89. See *Tracking America's Drone War*, WASH. POST, <http://apps.washingtonpost.com/foreign/drones/> (last visited Feb. 11 2015) [hereinafter *Tracking America's Drone War*]; Jeffrey Gettleman, Mark Mazzetti & Eric Schmitt, *U.S. Relies on Contractors in Somalia Conflict*, N.Y. TIMES (Aug. 10, 2011), www.nytimes.com/2011/08/11/world/africa/11-somalia.html.

90. See Greg Miller, *Plan for Hunting Terrorists Signals U.S. Intends to Keep Adding Names to Kill Lists*, WASH. POST (Oct. 23, 2012), http://www.washingtonpost.com/world/national-security/plan-for-hunting-terrorists-signals-us-intends-to-keep-adding-names-to-kill-lists/2012/10/23/4789b2ae-18b3-11e2-a55c-39408f6e6a4b_story.html.

91. *Id.*

92. *The Process Behind Targeted Killing*, WASH. POST (Oct. 23, 2012), www.washingtonpost.com/world/national-security/the-process-behind-targeted-killing/2012/10/23/4420644c-1d26-11e2-ba31-3083ca97c314_graphic.html.

93. Jo Becker & Scott Shane, *Secret 'Kill List' Proves a Test of Obama's Principles and Will*, N.Y. TIMES (May 29, 2012), <http://www.nytimes.com/2012/05/29/world/obamas-leadership-in-war-on-al-qaeda.html?pagewanted=all&r=0>.

94. Miller, *supra* note 90; Greg Miller, *CIA Seeks New Authority to Expand Yemen Drone Campaign*, WASH. POST (Apr. 18, 2012), <http://www.washingtonpost.com/>

By all accounts, the drones have been extremely successful at killing individuals who the government believes are associated with terrorist organizations, and more precise targeting appears to have dramatically reduced collateral damage under the Obama Administration.⁹⁵ This success has had two positive effects: (1) overwhelming domestic, public approval of the drone campaign, and (2) a significant reduction in the number of strikes.⁹⁶ But despite its apparent effectiveness, the legal foundations of this counterterrorism strategy impose few, if any, requirements of transparency and accountability on the executive branch.

The Obama Administration's position is that targeted killing is legal under three conditions: (1) the target poses an imminent threat of violent attack against the United States, (2) capture is not feasible, and (3) the operation is conducted in accordance with applicable laws of war.⁹⁷ According to former Attorney General Eric Holder, if the executive concludes that these three conditions are met, then the executive's deliberations will be enough to satisfy due process rights of suspected terrorists.⁹⁸ There is no obligation to prove or defend the conclusion in a judicial proceeding.⁹⁹ Accordingly, the government has not explained, for example, the risk assessments that determine whether capture is feasible,¹⁰⁰ or how an apparently exhaustive administrative deliberation can be squared with the concept of an "imminent" threat. News reports indicate that abuses of this discretion-

world/national-security/cia-seeks-new-authority-to-expand-yemen-drone-campaign/2012/04/18/gIQAsaumRT_story.html.

95. The drone strikes have reportedly "decimated the ranks of low-level combatants," killing as many as 2,300 suspected terrorists. Civilian casualty estimates report a drop from thirty-three percent of the total during the Bush Administration, to ten percent or less of the total casualties in 2012. Bergen & Braun, *supra* note 87; *Drone Wars Pakistan: Analysis*, INT'L SEC., <http://securitydata.newamerica.net/drones/pakistan/analysis> (last visited Feb. 11 2015).

96. Micah Zenko, *U.S. Public Opinion on Drone Strikes*, COUNCIL ON FOREIGN REL. (Mar. 18, 2013), <http://blogs.cfr.org/zenko/2013/03/18/u-s-public-opinion-on-drone-strikes/>; *Tracking America's Drone War*, *supra* note 89.

97. The applicable laws of war require necessity, proportionality, distinction of militants from non-militants, and principles of humanity. Eric Holder, U.S. Attorney Gen., Remarks at Northwestern University School of Law (Mar. 5, 2012), www.justice.gov/iso/opa/ag/speeches/2012/ag-speech-1203051.html; see also Harold Hongju Koh, Legal Adviser, U.S. Dep't of State, Remarks at the Proceedings of the 104th Annual Meeting of the American Society of International Law: The Obama Administration and International Law (Mar. 25, 2010), in 104 AM. SOC'Y INT'L L. PROC. 207 (2010).

98. Holder, *supra* note 97.

99. *Id.* "[D]ue process does not necessarily mean judicial process." *Id.*

100. For example, the United States' contention that it was not feasible to capture, rather than assassinate, Osama bin Laden does not seem to be verifiable. See Alan Silverleib, *The Killing of bin Laden: Was It Legal?*, CNN (May 6, 2011), www.cnn.com/2011/WORLD/asiapcf/05/04/bin.laden.legal/index.html.

ary power are already taking place, such as a presumption that all military-aged men in the vicinity of known terrorist activities are enemy combatants.¹⁰¹

Both the Obama Administration and Congress seem to realize that targeted killing, without effective oversight, lays a foundation for abuse of executive power—if not by the Obama Administration itself, then by its successors. As the 2012 election drew near, the Obama Administration’s officials hurried to assemble a rulebook articulating legal standards for targeted killings in the event that a new President will control those operations.¹⁰² In addition, members of the Senate Foreign Relations Committee have tried to exercise more oversight over drone strikes. At the Committee’s insistence, each month, the Central Intelligence Agency privately screens videos of its recent drone strikes with its members (or, more commonly, their high-level aides), and it also shares a summary of the intelligence that motivated the attacks.¹⁰³

However, as of early 2013, some members of the Committee still reported having only limited access to classified information about the strikes and their legal bases. In February, Senator Dianne Feinstein (D-CA) said that “[r]ight now it is very hard [to oversee] because it is regarded as a covert activity, so when you see something that is wrong and you ask to be able to address it, you are told no.”¹⁰⁴ In March, Senator Ron Wyden (D-OR) said that he was still unable to provide adequate legal oversight of drone strikes, because he still had not been given—presumably by the Obama Administration—manageable legal standards for evaluating their legitimacy.¹⁰⁵

C. The Inevitable Absolutism of the Executive’s Duty to Defend

The proposition that executives are likely to take an expansive view of their own legal authority was the primary fear that motivated the constitutional Framers to devise a government constrained by

101. Becker & Shane, *supra* note 93.

102. In an interview, President Obama also explicitly acknowledged the need for such rules and a willingness to work with Congress to develop them. Scott Shane, *Election Spurred a Move to Codify U.S. Drone Policy*, N.Y. TIMES (Nov. 24, 2012), www.nytimes.com/2012/11/25/world/white-house-presses-for-drone-rule-book.html.

103. Ken Dilanian, *Congress Zooms in on Drone Killings*, L.A. TIMES (June 25, 2012), <http://articles.latimes.com/2012/jun/25/nation/la-na-drone-oversight-20120625>.

104. Carlo Muñoz, *Sens. Feinstein, Leahy Push for Court Oversight of Armed Drone Strikes*, THE HILL (Feb. 10, 2013, 11:00 AM), thehill.com/blogs/defcon-hill/policy-and-strategy/282033-feinstein-leahy-push-for-court-oversight-of-armed-drone-strikes- (alteration in original).

105. Tal Kopan, *Wyden: Still ‘Long Way to Go’ Getting Answers on Drone Memos*, POLITICO (Mar. 13, 2013), www.politico.com/blogs/under-the-radar/2013/03/wyden-still-long-way-to-go-getting-answers-on-drone-159211.html.

checks and balances. Before Harold Koh became the State Department's Legal Adviser under President Obama, he was a law professor known for advocating a "new national security charter."¹⁰⁶ Years before Americans heard of al-Qaeda, Koh advocated for "attacking the institutional sources of congressional acquiescence and judicial tolerance that have contributed equally to recent executive excesses."¹⁰⁷ In a 1991 panel discussion, he noted, "Each of the three branches has an incentive to behave in a way which makes the system as a whole work poorly. The Executive Branch has an incentive to act or to overreach; Congress has an incentive to defer; the courts have an incentive to duck the hard cases."¹⁰⁸

Similarly addressing executive overreach, Henry P. Monaghan noted the enormous public expectations that have developed around the Office of the President, pointing to the vast number of legal areas for which Americans hold presidents responsible and the speed with which they must deal with issues of law enforcement.¹⁰⁹ Executives recognize that they, not members of Congress, will be held accountable for successful terrorist attacks. Under such pressures, Monaghan explains, "it is not surprising that 'law' of any kind (the Constitution included) can easily become merely one more factor to be considered, or even an obstacle to be overcome."¹¹⁰

Legal tolerance for executive dominance may also be perpetuated by a common perception that presidents and other executive officials have other, less formal incentives to exercise restraint on their own power; in the context of counterterrorism, these might include the costs and risks of military operations and the desire for professional advancement.¹¹¹ President Obama portrays his own philosophical values and governing objectives as limits on his actions, and he fre-

106. See HAROLD HONGJU KOH, *THE NATIONAL SECURITY CONSTITUTION: SHARING POWER AFTER THE IRAN-CONTRA AFFAIR* 3 (1990).

107. Harold Hongju Koh, *Why the President (Almost) Always Wins in Foreign Affairs: Lessons of the Iran-Contra Affair*, 97 *YALE L.J.* 1255, 1258 (1988).

108. Harold Hongju Koh, Yale Law School, Remarks at the Proceedings of the Eighty-Fifth Annual Meeting of the American Society of International Law: Plenary Session: The U.S. Constitution in its Third Century: Foreign Affairs (Apr. 18, 1991), in 85 *AM. SOC'Y INT'L L. PROC.* 191, 203 (1991).

109. Henry P. Monaghan, *The Protective Power of the Presidency*, 93 *COLUM. L. REV.* 1, 8 (1993). Monaghan argues that although presidents cannot claim any law-making authority, the executive power implies "a general authority to protect and defend the personnel, property, and instrumentalities of the United States from harm." *Id.* at 11.

110. *Id.* at 9.

111. Nathan Alexander Sales, *Self-Restraint and National Security*, 6 *J. NAT'L SEC. L. & POL'Y* 227 (2012).

quently acknowledges the need for oversight.¹¹² If the executive appears to be limited in practice, then the need for formal constraints may not seem particularly pressing.

In light of the permissive attitude of Congress and the courts, the demands of the presidency, and institutional executive advantages in the realm of foreign policy, it should come as no surprise that presidents from both parties have responded to the unprecedented and difficult threat of global terrorism by invoking the most deferential legal standards possible: those that apply in times of war.¹¹³ But once adopted, the war paradigm, with its life-or-death stakes, is inherently absolutist. In addition, terrorists, by specifically targeting civilians, are especially likely to inspire extremely risk-averse policies that crowd out more nuanced alternatives.

Nevertheless, most academic work in the context of terrorism concludes that even if Congress can escape political responsibility for failing to address the threat, there is no compelling legal justification for its abdication of oversight in this area.¹¹⁴ Robert Bejesky characterizes the judiciary's reluctance to arbitrate competing views of war-making authority—despite relative academic consensus on a shared-power model—as a legal void, naturally filled by the executive's expansive understanding of its own power.¹¹⁵ Congress has likewise left its policy void with respect to the broad American objective of reducing global terrorism, as members of Congress look to the Obama Administration to tell *them* the legal basis for drone attacks, rather than vice versa.

III. THE COSTS OF ABSOLUTIST ANTITERRORISM POLICIES

The previous section established that current antiterrorism policies are subject to disturbingly few formal legal constraints and argued that this permissive framework inevitably leads to an absolutist view of terrorism. While only a minority of Americans may currently

112. See, e.g., President Barack Obama, Remarks at the National Defense University (May 23, 2013), available at www.whitehouse.gov/the-press-office/2013/05/23/remarks-president-barack-obama.

113. See *supra* Part II.B.2.

114. See David J. Barron & Martin S. Lederman, *The Commander in Chief at the Lowest Ebb—Framing the Problem, Doctrine, and Original Understanding*, 121 HARV. L. REV. 691, 696 (2008) (rejecting the contention that legislatures cannot control military campaigns); Jonathan F. Mitchell, *Legislating Clear-Statement Regimes in National-Security Law*, 43 GA. L. REV. 1059, 1066 (2009) (arguing that the blame for executive overreach lies with legislative vagueness and acquiescence); Robert J. Reinstein, *The Limits of Executive Power*, 59 AM. U. L. REV. 259, 263 (2009) (asserting that congressional statutes always trump executive-made policy).

115. Robert Bejesky, *War Powers Pursuant to False Perceptions and Asymmetric Information in the "Zone of Twilight,"* 44 ST. MARY'S L.J. 1, 67 (2012).

perceive the consequences of executive dominance in this area, the following discussion offers a broad sample of the consequences of absolutism and explains why legislative checks are needed.

A. *Contraction of Domestic Civil Liberties*

Executive dominance in the realm of national security has encroached on individual rights to due process, counsel, and privacy against unreasonable searches. First, the Obama Administration has claimed the authority to target American citizens with drone strikes if they pose an imminent threat to the United States.¹¹⁶ When the father of such an American target, Anwar Al-Aulaqi, sued the Obama Administration on his son's behalf for injunctive relief from assassination, a federal court held that the question of whether the government could kill Al-Aulaqi "without charge, trial, or conviction" was a "political question" and, thus, was non-justiciable.¹¹⁷ The court reasoned that deciding the issue would bleed into foreign policymaking for which the court had neither the authority nor the expertise.¹¹⁸ Al-Aulaqi was killed by drone in Yemen the following year.¹¹⁹ Responding to congressional requests to explain to Americans the circumstances under which "their government believes that it is allowed to kill them,"¹²⁰ President Obama said that targeted killing is a tactic for U.S. military operations against al-Qaeda authorized by the AUMF, regardless of the target's nationality.¹²¹

Second, the war on terrorism has involved extensive use of "indefinite detention." In *Hamdi v. Rumsfeld*, a plurality of the Supreme Court held that some process is still due to Americans whom the

116. See Obama, *supra* note 112.

117. Al-Aulaqi v. Obama, 727 F. Supp. 2d 1, 10-12, 46 (D.D.C. 2010). In 2010, the government targeted Anwar Al-Aulaqi, an American citizen, for assassination, because he had extensive ties to al-Qaeda and had allegedly played an "operational" role in the thwarted terror attack by Farouk Abdulmutallab, the "Christmas Day bomber." *Id.* at 10.

118. *Id.* at 46. This analysis, the court said, would require resolving such matters as the precise involvement of Al-Aulaqi in al Qaeda; whether al-Qaeda in the Arab Peninsula was linked closely enough to al-Qaeda such that hostilities against it were authorized by AUMF; whether Al-Aulaqi's activities made him a "concrete, specific, and imminent threat to life or physical safety"; and whether the United States could employ other means to neutralize that threat. *Id.* (citation omitted).

119. Mark Mazetti, Eric Schmitt, & Robert F. Worth, *Two-Year Manhunt Led to Killing of Awlaki in Yemen*, N.Y. TIMES (Sept. 30, 2011), www.nytimes.com/2011/10/01/world/middleeast/anwar-al-awlaki-is-killed-in-yemen.html.

120. Press Release, Senator Ron Wyden, Senate Select Comm. on Intelligence, Wyden Statement on DOJ Memo on the Killing of Americans During Counterterrorism Operations (Feb. 5, 2013), available at www.wyden.senate.gov/news/press-releases/wyden-statement-on-doj-memo-on-the-killing-of-americans-during-counterterrorism-operations.

121. Obama, *supra* note 112.

Commander-in-Chief classifies as “enemy combatants.”¹²² However, Justice O’Connor’s plurality opinion concluded that detention of enemy combatants—which, according to international law, is a “fundamental incident” to waging war—was legitimate while hostilities continued.¹²³ This holding did not reconcile the Court’s rejection of indefinite detention with the perpetual nature of “hostilities” against non-state terrorist groups. The Court subsequently declined to review a D.C. Circuit decision regarding whether hostilities were continuing on the grounds that such an issue required a “political decision.”¹²⁴ The Court in *Boumediene v. Bush* rejected actions by both the executive and Congress when it upheld both the executive and Congress by upholding an American detainee’s right to petition for a writ of habeas corpus.¹²⁵ But despite the decision in *Boumediene* and a Guantanamo Review Task Force that has cleared some detainees for release, many detainees remain in custody without charge pursuant to an executive moratorium on the release of Yemenis.¹²⁶

Third, the Obama Administration has recently expanded the use of a “public safety” exception¹²⁷ to arrestees’ rights to remain silent under *Miranda v. Arizona*.¹²⁸ In 2011, the Department of Justice instructed the Federal Bureau of Investigation (FBI): “There may be exceptional cases in which, although all relevant public safety questions have been asked, agents nonetheless conclude that continued unwarned interrogation is necessary to collect valuable and timely intelligence not related to any immediate threat.”¹²⁹ The De-

122. 542 U.S. 507 (2004).

123. *Id.* at 519-21.

124. *Al-Bihani v. Obama*, 590 F.3d 866, 874-75 (D.C. Cir. 2010), *cert. denied*, 131 S. Ct. 1814 (2011).

125. 553 U.S. 723, 732-33 (2008) (invalidating the Military Commission Act’s creation of special tribunals with exclusive jurisdiction over detainee challenges to their status as enemy combatants).

126. See Baher Azmy, Op-Ed., *The Face of Indefinite Detention*, N.Y. TIMES (Sept. 14, 2012), www.nytimes.com/2012/09/14/opinion/life-and-death-at-guantanamo-bay.html. In *Latif v. Obama*, 677 F.3d 1175 (D.C. Cir. 2012), *cert. denied*, 132 S. Ct. 2741 (2012), the D.C. Circuit reversed a district court order for the release of one such detainee, holding that government evidence in support of the “enemy combatant” classification is presumed accurate absent “clear evidence to the contrary.”

127. *New York v. Quarles*, 467 U.S. 649, 657 (1984) (holding *Miranda* requirements could be waived while there was an immediate threat to public safety, which in that case, was a missing gun).

128. 384 U.S. 436, 460 (1966).

129. Memorandum from the Fed. Bureau of Investigation on Custodial Interrogation for Public Safety and Intelligence-Gathering Purposes of Operational Terrorists Inside the United States (Oct. 21, 2010), *available at* <http://www.nytimes.com/2011/03/25/us/25-miranda-text.html>. The Department issued this internal memorandum after its request to Congress for additional guidance about applying the public safety exception went unan-

partment's approach to interrogating Dzhokhar Tsarnaev, one of the alleged 2013 Boston Marathon bombers, suggests that this rule is the new standard for *Miranda* warnings.¹³⁰ President Obama almost immediately identified the attack as an act of terrorism, and a Justice Department official said that Tsarnaev's interrogators would invoke the public safety exception as long as needed to gain "critical intelligence."¹³¹

Finally, confidential documents recently leaked by a contractor for the National Security Agency revealed that the Agency has been operating a number of programs that allow the federal government to access and search data related to millions of Americans' phone and Internet usage, compiled by corporations such as Verizon Wireless, Apple, Google, and Facebook.¹³² These companies are sometimes compelled by U.S. Foreign Intelligence Surveillance Court (FISA Court) orders,¹³³ which were top secret until one of them was leaked in 2013,¹³⁴ to turn over the user data that they routinely collect when a court finds that government access is justified under 50 U.S.C. § 1851.¹³⁵ The leaked FISA Court order, for example, compelled Verizon to turn over "all call detail records or 'telephony

swered. Charlie Savage, *Delayed Miranda Warning Ordered for Terror Suspects*, N.Y. TIMES (Mar. 24, 2011), <http://www.nytimes.com/2011/03/25/us/25miranda.html>.

130. Bill Chappell, *Miranda Rights and Tsarnaev: Ex-U.S. Attorney General Weighs In*, NPR (Apr. 21, 2013, 12:07 PM), <http://www.npr.org/blogs/thetwo-way/2013/04/21/178254784/miranda-rights-and-tsarnaev-ashcroft-says-u-s-move-is-the-right-one>.

131. Brian Beutler, *DOJ Official: No Miranda Rights for Boston Bombing Suspect Yet*, TALKING POINTS MEMO (Apr. 19, 2013, 10:18 PM), livewire.talkingpointsmemo.com/entry/doj-official-no-miranda-rights-for-boston-bombing.

132. Timothy B. Lee, *Here's Everything We Know About PRISM To Date*, WASH. POST (June 12, 2013), www.washingtonpost.com/blogs/wonkblog/wp/2013/06/12/heres-everything-we-know-about-prism-to-date/.

133. FISA Courts are established pursuant to 50 U.S.C. § 1802 (2012).

134. *Verizon Forced to Hand Over Telephone Data — Full Court Ruling*, THE GUARDIAN (June 5, 2013, 7:04 PM), www.guardian.co.uk/world/interactive/2013/jun/06/verizon-telephone-data-court-order.

135. 50 U.S.C. § 1861(a)(1) (2012) allows the FBI to apply for a court order compelling a business to produce tangibles related to an investigation of either a non-American citizen, or an American citizen in connection with international terrorism or clandestine intelligence. The order will be granted if:

there are reasonable grounds to believe that the tangible things sought are relevant to an authorized investigation . . . , such things being presumptively relevant to an authorized investigation if . . . they pertain to—(i) a foreign power or an agent of a foreign power; (ii) the activities of a suspected agent of a foreign power who is the subject of such authorized investigation; or (iii) an individual in contact with, or known to, a suspected agent of a foreign power who is the subject of such authorized investigation.

Id. § 1861(b)(2)(A). The government must also detail "minimization procedures" pursuant to § 1861(g) that are aimed at preventing the dissemination or disclosure of nonpublic information from nonconsenting individuals. *See id.* § 1861(b)(2)(B).

metadata' created by Verizon for communications (i) between the United States and abroad; or (ii) wholly within the United States, including local telephone calls."¹³⁶

President Obama, defending the Agency's search programs, said: "You can't have 100 percent security and also then have 100 percent privacy and 0 percent inconvenience. . . . We're going to have to make some choices as a country. What you can say is, in evaluating these programs, they make a difference to anticipate and prevent possible terrorist activity."¹³⁷ The President also observed that in light of legislative and judicial oversight of these programs, it is problematic if Americans do not trust the government's fundamental system of checks and balances.¹³⁸

B. Compromised Foreign Policy Goals

Because members of violent organizations do not necessarily isolate themselves from civilian areas and may even attempt to carry out some basic governing functions, people with no intent to commit violence (e.g., family members, housekeepers, drivers, doctors, journalists) may nevertheless become linked to terrorists through social connections or economic dependence. An absolutist approach to terrorism severely disadvantages these individuals and places significant constraints on other U.S. foreign policy objectives, such as public diplomacy, refugee relief, and economic development.

For example, drone strikes in Pakistan and Yemen are inflicting collateral damage that generates hatred of the U.S. government among local populations. Although the Pakistan drone campaign is classified, most sources report that strikes in Pakistan peaked in 2010, with about 120 strikes killing between 411 and 884 civilians (including 168 to 197 children) and injuring between 1177 and 1480.¹³⁹ The Pakistani government, which shares the goal of elimi-

136. Secondary Order *In re* Application of the Fed. Bureau of Investigation for an Order Requiring the Prod. of Tangible Things from Verizon Bus. Network Servs., Inc., (FISA Ct. Apr. 25, 2013), available at www.guardian.co.uk/world/interactive/2013/jun/06/verizon-telephone-data-court-order.

137. Philip Ewing, *NSA Memo Pushed to "Rethink" 4th Amendment*, POLITICO (June 7, 2013, 2:21 PM), www.politico.com/story/2013/06/nsa-memo-4th-amendment-92416.html.

138. *See id.*

139. Jack Serle & Chris Woods, *March 2013 Update: US Covert Actions in Pakistan, Yemen and Somalia*, BUREAU OF INVESTIGATIVE JOURNALISM (Apr. 2, 2013), www.thebureauinvestigates.com/2013/04/02/march-2013-update-us-covert-actions-in-pakistan-yemen-and-somalia/. CBS news gives similar figures. Elizabeth Palmer, *Angry Pakistanis Fight to End U.S. Drone Strikes*, CBS NEWS (May 23, 2013, 7:42 PM), www.cbsnews.com/8301-18563_162-57586008/angry-pakistanis-fight-to-end-u.s-drone-strikes/. The New America Foundation puts the number of civilian fatalities closer to 300, but some doubt this estimate. Conor Friedersdorf, *Flawed Analysis of Drone Strike Data is Misdread-*

nating al-Qaeda and Taliban presence, must now respond to public outcry against the strikes. In April 2013, a Pakistani court said that the strikes were illegal,¹⁴⁰ and in June, Nawaz Sharif, a staunch opponent of the drone strikes, became Pakistan's new prime minister.¹⁴¹ The new Pakistani government has reportedly lodged an official protest with the American delegation to end the strikes, saying they are inspiring anti-American sentiment among the public, thus undermining the relationship between the two countries.¹⁴²

Though the United States has struck Yemeni targets less frequently, some of the most highly publicized civilian casualties have occurred there, and the Bureau of Investigative Journalism reports up to 49 civilian fatalities and 144 injuries as of 2013.¹⁴³ In April 2013, at a subcommittee hearing for the Senate Judiciary Committee, legislators heard testimony from Farea Al-Muslimi, a Yemeni activist who advocates for better relations with the United States.¹⁴⁴ He reported that the strikes were undermining the Yemeni government, inspiring resentment of the United States, and giving more legitimacy to al-Qaeda groups in the region.¹⁴⁵ "What radicals had previously failed to achieve in my village, one drone strike accomplished in an instant: there is now an intense anger and growing hatred of America," Al-Muslimi said.¹⁴⁶

A second policy area affected by the absolutist approach is political asylum. The legal burden to prove political persecution is high;¹⁴⁷ however, even if refugees do not qualify for asylum status, U.S. and international law prohibits their return ("refoulement") to countries where their life or freedom would be threatened based on their race, religion, nationality, political opinion, or membership in a particular

ing Americans, THE ATLANTIC (July 18, 2012, 2:00 PM), www.theatlantic.com/politics/archive/2012/07/flawed-analysis-of-drone-strike-data-is-misleading-americans/259836/.

140. Saeed Shah, *Pakistan is Pressed to Halt U.S. Drone Strikes*, WALL ST. J. (May 22, 2013, 7:29 PM), <http://online.wsj.com/article/SB10001424127887323336104578499400909516098.html>.

141. Shah, *supra* note 140.

142. Aliza Kassim, *Islamabad Summons a Top U.S. Envoy Over Deadly Drone Strike*, CNN (June 10, 2013, 10:59 AM), www.cnn.com/2013/06/08/world/pakistan-drones/.

143. Serle & Woods, *supra* note 139.

144. *Drone Wars: The Constitutional and Counterterrorism Implications of Targeted Killing: Hearing Before the S. Subcomm. on the Constitution, Civil Rights and Human Rights*, 113th Cong. (2013) (statement of Farea Al-Muslimi).

145. *Id.* at 6-7.

146. *Id.* at 4.

147. To be granted asylum, individuals must show that they have a well-founded fear of persecution in their home country, based on their race, religion, nationality, political opinion, or membership in a particular social group. 8 U.S.C. § 1101(a)(42) (2012).

social group.¹⁴⁸ On the other hand, current immigration laws create a complete bar to asylum if the applicant has “engaged in terrorism,” which includes providing material support to terrorist organizations.¹⁴⁹ A terrorist organization is a group of two or more individuals, whether organized or not, which engages in any activity that is unlawful involving explosives, firearms, or any other dangerous device with intent to endanger one or more individuals or to cause substantial damage to property.¹⁵⁰ There are no statutory exceptions based on knowledge or duress.¹⁵¹ Although the Board of Immigration Appeals has developed a basic mens rea requirement in its rulings, and the Department of Homeland Security can grant waivers at its discretion, recent scholarship indicates that these remedies are not reliable.¹⁵² By sending such people back to danger, the United States undermines the goals of its asylum policy and may also violate international standards for refoulement.

A third foreign policy area compromised by absolutist antiterrorism is humanitarian aid to promote economic development. In 2009, an extreme drought in the Horn of Africa led to a famine that put 3.7 million people, mostly in southern Somalia, “in crisis.”¹⁵³ But an al-Qaeda-controlled Somali terrorist organization called al Shabaab, substantially prevented aid groups from delivering food¹⁵⁴ and de-

148. *Id.* § 1231(b)(3)(A); Convention Relating to the Status of Refugees, art. 33, Apr. 22, 1954, 189 U.N.T.S. 176.

149. § 1231(a)(3)(B)(iv)(VI).

150. § 1182(a)(3)(B).

151. Under *Holder v. Humanitarian Law Project*, 561 U.S. 1 (2010), this language disqualifies from asylum not only simple armed criminals, but almost anyone who has ever conducted an economic transaction with such people. See Maryellen Fullerton, *Terrorism, Torture, and Refugee Protection in the United States*, 29 REFUGEE SURV. Q. 4, 13 (2010) (describing the definition of terrorist organization as “two guys and a gun”).

152. This work reveals tragic stories of refugees victimized twice: by violence in their home country, and by unfair process when they seek asylum in the United States. They include individuals fleeing violent families, women engaged or married to violent men, and democracy activists charged as violent criminals by oppressive governments. See, e.g., Scott Aldworth, *Terror Firma: The Unyielding Terrorism Bar in the Immigration and Nationality Act*, 14 LEWIS & CLARK L. REV. 1159 (2010); Daniella Pozzo Darnell, *The Scarlett Letter “T”: the Tier III Terrorist Classification’s Inconsistent and Ineffectual Effects on Asylum Relief for Members and Supporters of Pro-Democratic Groups*, 41 U. BALT. L. REV. 557 (2012); Gregory F. Laufer, *Admission Denied: In Support of a Duress Exception to the Immigration and Nationality Act’s “Material Support for Terrorism” Provision*, 20 GEO. IMMIGR. L.J. 437 (2006); Courtney Schusheim, *Cruel Distinctions of the I.N.A.’s Material Support Bar*, 11 N.Y. CITY L. REV. 469 (2008).

153. *UN Declares Somalia Famine in Bakool and Lower Shabelle*, BBC NEWS: AFRICA (July 20, 2011, 5:18 PM), www.bbc.co.uk/news/world-africa-14211905.

154. After the provisional government took control of the country, this loose organization of Islamists fought the new regime with suicide attacks and assassinations. They also undertook to win local clan support by handing out food and money; but these efforts were undermined by forced recruitment of children, abuse of women, and kidnappings. The group pledged its allegiance to al-Qaeda in 2008. See Johnathan Masters, *Backgrounders:*

manded payments in exchange for access to starving populations.¹⁵⁵ Relief workers, including some who worked for the U.S. government, feared criminal prosecution for material support under federal law in the event that money, food, or other resources inevitably found their way to al Shabaab.¹⁵⁶ The famine worsened for two years before the U.S. Department of Treasury's Enforcement Office agreed not to pursue "support" delivered "in good faith" to Somalia through the State Department.¹⁵⁷ It also stated that food assistance was "not a focus" of agency enforcement action,¹⁵⁸ but that any other person or group giving money to anyone in Somalia "should be extremely cautious."¹⁵⁹

The Obama Administration's slow response to the worst famine in sixty years led to a Senate Foreign Relations Committee hearing, after which Congress directed the implicated agencies to evaluate their processes.¹⁶⁰ But administrative reassessment alone is unlikely to address the underlying policy dilemma: an absolute commitment to eradicating terrorists often means also punishing non-terrorists in a way that can generate political instability and anti-American sentiment, thereby actually strengthening the roots of terrorism. The United States is likely to invest in Somalia's political environment for the foreseeable future; in the meantime, al-Qaeda affiliates continue to build strongholds wherever effective government is absent, abus-

Al-Shabaab, COUNCIL ON FOREIGN REL. (Sept. 5, 2014), www.cfr.org/somalia/al-shabaab/p18650; *Somalia Profile: Timeline*, BBC NEWS: AFRICA, www.bbc.co.uk/news/world-africa-14094632 (July 16, 2014, 10:25 AM); Rob Wise, *Al Shabaab*, CENT. FOR STRATEGIC & INT'L STUDS., July 2011, available at csis.org/files/publication/110715_Wise_AlShabaab_AQAM%20Futures%20Case%20Study_WEB.pdf.

155. Mark Tran, *Al-Shabaab in Somalia Exploited Aid Agencies During 2011 Famine – Report*, THE GUARDIAN (Dec. 8, 2013, 7:01 PM), <http://www.theguardian.com/global-development/2013/dec/09/al-shabaab-somalia-exploited-aid-agencies-famine>. See Clar Ni Chonghaile, *Al-Shabaab Bans Aid Agencies in Somalia and Raids Offices*, THE GUARDIAN (Nov. 28, 2011, 7:21 AM), www.guardian.co.uk/world/2011/nov/28/al-shabaab-bans-aid-agencies-somalia.

156. Jeffrey Gettleman, *U.S. Delays Somalia Aid, Fearing It Is Feeding Terrorists*, N.Y. TIMES (Oct. 2, 2009), www.nytimes.com/2009/10/02/world/africa/02somalia.html?_r=0.

157. *Id.*

158. Office of Foreign Assets Control, *Frequently Asked Questions and Answers: Questions Regarding Private Relief Efforts in Somalia* [hereinafter *Frequently Asked Q&As*], U.S. DEP'T OF THE TREASURY (Oct. 10, 2014, 11:20 AM), www.treasury.gov/resource-center/faqs/Sanctions/Pages/answer.aspx#som; see also OFFICE OF FOREIGN ASSETS CONTROL, U.S. DEP'T OF THE TREASURY, SOMALIA SANCTIONS PROGRAM (2010), available at www.treasury.gov/resource-center/sanctions/Programs/Documents/somalia.pdf.

159. *Frequently Asked Q&As*, *supra* note 158.

160. *Responding to Drought and Famine in the Horn of Africa: Hearing Before the S. Comm. on Foreign Relations*, 112th Cong. (2011), available at www.foreign.senate.gov/hearings/responding-to-drought-and-famine-in-the-horn-of-africa. This concern is also articulated in the recent Senate report regarding the Appropriations Bill (S. 3241). U.S. DEP'T OF STATE, FOREIGN OPERATIONS, AND RELATED PROGRAMS APPROPRIATIONS BILL, 2013, S. REP. NO. 112-72, 29 (2012).

ing local populations in the process.¹⁶¹ The Somalia dilemma will almost certainly recur, forcing the United States to make difficult, subjective, and fact-specific choices between waging war on terrorists and promoting social stability and prosperity. But the policy nuance and flexibility that such choices require is being crowded out by the executive branch's predictably extreme, and virtually unchecked, reliance on the use of coercive power to eliminate terrorist threats.

IV. ASSERTING A CONGRESSIONAL CHECK ON NATIONAL SECURITY POLICY

In traditional wars, threats could be reduced with the exercise of superior military force, and the model of a Commander-in-Chief simply executing a war declared by Congress was less problematic. But most political violence since World War II has taken the form of civil conflict and often involves non-governmental entities.¹⁶² Despite the short-term successes of the United States' counterterrorism tactics, no one expects terrorism to disappear as a significant threat in the foreseeable future. Bruce Riedel, a counterterrorism adviser to President Obama, illustrated the futility of drone strikes as a long-term strategy: "You've got to mow the lawn all the time. The minute you stop mowing, the grass is going to grow back."¹⁶³ Because the nature of armed conflict has changed, laws based on a traditional state-to-state model of conflict—including U.S. constitutional war powers—are already becoming obsolete, thus creating space for new conventions to take their place. The rapid evolution of weapons and warfare also favors executive expertise, intelligence resources, and quick response time.

Under these conditions, Congress will have to fight for any influence it wishes to have over the nation's foreign policy. But it has tools to do so: the Constitution provides clear authority for the legislature to set foreign policy objectives, including parameters for military actions against terrorists. Congress can do this by reforming three key statutes that currently define the legal framework of U.S. foreign policy: AUMF, the prohibition on providing material support to terrorist groups, and the Foreign Assistance Act.

161. See, e.g., Eric Schmitt, *American Commander Details Al Qaeda's Strength in Mali*, N.Y. TIMES (Dec. 3, 2012), www.nytimes.com/2012/12/04/world/africa/top-american-commander-in-africa-warns-of-al-qaeda-influence-in-mali.html?_r=0.

162. Halvard Buhaug et al., *Global trends in armed conflict*, INT'L PEACE RES. INST. (Apr. 12, 2007), <http://www.regjeringen.no/nb/dep/ud/kampanjer/refleks/innspill/engasjement/prio.html?id=492941>.

163. Miller, *supra* note 90.

In light of how the contours of the war on terror have changed since 2001, Congress should repeal AUMF and replace it with legislation that more specifically identifies America's enemies. The new authorization statute should codify requirements for targeted killing that provide manageable judicial standards for determining whether executive action is authorized. It should also increase transparency surrounding drone strikes by prohibiting their use in covert operations and requiring their results to be reported publicly.

After *Holder v. Humanitarian Law Project*, the prohibition on providing material support to terrorist groups should be a specific intent crime in which the perpetrator's purpose must be to contribute to violent activities or to promote the stated goals of the terrorist organization. The prohibition should exclude groups who seek to undermine terrorism through socialization (e.g., doctors, teachers, and journalists). At the very least, the prohibition should exclude interactions that actively seek to discourage a terrorist group's violence.

Congress should also direct the Departments of State and Homeland Security to develop rules that: (1) assess the humanitarian impact of any antiterrorism policy; and (2) set special enforcement priorities in dire humanitarian circumstances, such as natural disaster. These procedures should allow relaxed enforcement in cases of an emergency, like famine, that may call for a temporary rebalancing of priorities. Congress should also direct the State Department to compile an annual list of neutral aid agencies to be granted immunity under the material support prohibition.¹⁶⁴

Finally, Congress must revisit its foreign assistance framework if economic development is to be an effective complement to counterterrorism. In an unprecedented conceptual merger of strategic, ideological, and humanitarian interests after the horror of September 11, 2001, policymakers acknowledged global poverty as a threat to national security—terrorists can operate most effectively in societies with weak governments, and they can exploit the anger and desperation of poor populations.¹⁶⁵ Yet foreign assistance is profoundly un-

164. Kate Mackintosh notes that groups such as Médecins Sans Frontières have long operated under a principle of neutrality that ensures neither side in a conflict will prevent their relief work. She argues that such groups must stay neutral even with respect to terrorists; otherwise, civilian populations will not get access to emergency relief and relief workers themselves will become targets of political violence. Kate Mackintosh, *Holder v. Humanitarian Law Project: Implications for Humanitarian Action: A View from Médecins Sans Frontières*, 34 SUFFOLK TRANSNAT'L L. REV. 507, 507-08 (2011).

165. As Colin Powell explained at the end of his tenure as U.S. Secretary of State, "Poverty breeds frustration and resentment, which ideological entrepreneurs can turn into support for . . . terrorism." Colin L. Powell, *No Country Left Behind*, FOREIGN POL'Y (Jan. 5, 2005), http://www.foreignpolicy.com/articles/2005/01/05/no_country_left_behind; see also

dermined by development programs' reputation for inefficiency and lack of accountability, which has engendered strong legislative mistrust.¹⁶⁶ Global non-governmental organizations are seen by some as inadequate, at best, and self-serving, at worst.¹⁶⁷

To address these concerns, a congressional roundtable spent three years drafting a proposed replacement of the fifty-year-old Foreign Assistance Act.¹⁶⁸ The new legislation seeks to improve efficiency and accountability through modernized reporting practices, information sharing between agencies, decentralized aid that utilizes local resources, and frequent re-evaluation of basic objectives and strategies to adjust to rapidly changing circumstances.¹⁶⁹ The bill also makes specific reforms to emergency and disaster assistance programs, generally prioritizing global food security in development programs and implementing better advance planning for emergency aid to reduce inefficiency caused by haste.¹⁷⁰ Although a thorough analysis of the Global Partnerships Act is well beyond the scope of this Comment, I suggest only that if legislators wish to decrease the need for military counterterrorism, they should continue these efforts to make badly-needed changes to U.S. foreign assistance.

V. CONCLUSION

Entrenched congressional and judicial deference to the executive branch in matters of national security has predictably led to an absolutist approach to combating global terrorism. This approach is implemented in a way that encroaches on American civil liberties and

Richard G. Lugar, *Foreign Assistance: Strengthen the "Third Pillar" of National Security*, 35 HUMAN RTS. 1 (2008).

166. William Easterly argues that aid organizations operate as cartels in a system where "customers" (aid recipients) have no way to provide feedback about the assistance they receive; while at the same time, no organizing entity ensures coordination and efficiency. William Easterly, *The Cartel of Good Intentions*, 131 FOREIGN POL'Y 40 (2002). Journalist Linda Polman argues that the emergency response model of many foreign aid "corporations" has incentivized the manufacture of emergencies, encouraged Band-Aid solutions, and diverted attention from more effective long-term prevention strategies. LINDA POLMAN, *WAR GAMES: THE STORY OF AID AND WAR IN MODERN TIMES* 10-11 (2010).

167. As aid to Africa has increased, per capita income has decreased and the number of people living on less than one dollar per day has almost doubled. Dambisa Moyo, *Why Foreign Aid is Hurting Africa*, WALL ST. J. (Mar. 21, 2009, 11:59 PM), online.wsj.com/article/SB123758895999200083.html. About half of food aid delivered by the World Food Program to Somalia during its recent famine was unaccounted for or misdirected, and local distribution centers operated quite differently depending on whether there were journalists present. See Katharine Houreld, *Somalia Famine Aid: How Aid Went Astray*, HUFFINGTON POST (Mar. 17, 2012, 10:29 AM), www.huffingtonpost.com/2012/03/17/somalia-famine-aid_n_1355348.html.

168. Global Partnerships Act of 2012, H.R. 6644, 112th Cong. (2012).

169. *Id.*

170. *Id.*

undermines the broader goal of supporting stable and prosperous societies around the world. While reasonable people may differ on the correct balance between security and liberty, the foregoing analysis demonstrates that legal restraints on the executive in this area are not particularly apparent. When the war paradigm persists with no end in sight, actions that may have once represented the outer bounds of legality can become normal standards. President Obama correctly acknowledges that the United States, as a society, should engage in a profound debate about the tradeoffs at stake in the war on terror. However, that debate should take place, not only among members of the public and the press, but also between the political branches in the adversarial system that the constitutional Framers envisioned.