

ILLUMINATING THE SHADOWS OF CONSTITUTIONAL SPACE WHILE TRACING THE CONTOURS OF PRESIDENTIAL WAR POWER

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[I] opposed the right of the President to declare anything future on the question, Shall there or shall there not be war[?]

—Thomas Jefferson, 1793¹

[War,] the true nurse of executive aggrandizement . . . In war, the honours and emoluments of office are to be multiplied; and it is the executive patronage under which they are to be enjoyed. It is in war, finally, that laurels are to be gathered; and it is the executive brow they are to encircle. The strongest passions and most dangerous weaknesses of the human breast; ambition, avarice, vanity, the honourable or venial love of fame, are all in conspiracy against the desire and duty of peace.

—James Madison, 1793²

I. INTRODUCTION

Monarchical aspirations and unbridled hubris have reinvigorated the issue of presidential war power, particularly since President George W. Bush directed soldiers into Iraq and Afghanistan. Abject disregard for the rule of law has faded the luster of the forty-third presidency of the United States, due in part to the perception that the President has been directing decisions and bypassing Congress. The rallying cry of

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1. THOMAS JEFFERSON, *THE COMPLETE ANAS OF THOMAS JEFFERSON* 176 (Franklin B. Sawvel ed., 1903).

2. *THE WRITINGS OF JAMES MADISON* 174 (Gaillard Hunt ed., 1900–1910).

Jefferson and the constricting chains of the Constitution that now bind the disillusioned populace because of presidential mischief have taken center stage.³ From wiretapping domestic citizens without warrants⁴ to imposing war on the basis of manufactured evidence,⁵ to influencing the Attorney General's office,⁶ these recent events all smell of a unitary

3. Joseph Margulies, *preface to JOSEPH MARGULIES, GUANTANAMO AND THE ABUSE OF PRESIDENTIAL POWER* (2006). In 1798, Thomas Jefferson spoke words that illuminate this very topic of presidential power within the shadow of the Constitution: "In questions of power, then, let no more be said of confidence in man, but bind him down from mischief by the chains of the Constitution." *Id.*

4. When questioned about his secret domestic wiretapping program, President Bush has defended it in the name of preventing terrorist attacks on U.S. soil. See *Insight: U.S. Wiretapping Controversy* (CNN television broadcast Dec. 23, 2005) (transcript available at http://transcripts.cnn.com/TRANSCRIPTS/0512/23/i_ins.02.html). He has confidently proclaimed since the 9/11 attacks that he has the legal authority to secretly listen in on conversations of people, without obtaining a warrant that is required by law. *Id.* He discounted the need for warrants and permission to wiretap because the regular procedures are too slow. *Id.* Further, President Bush takes his position as Commander-in-Chief during wartime, along with the U.S. Constitution and Congress' authorization to go after al Qaeda as evidence that he can ignore the normal channels to conduct wiretapping. But many scholars and analysts differ with the President on these issues. *Id.* A Supreme Court legal analyst, Thomas Goldstein said, "The [P]resident is on thin legal ice. No one knows for sure whether this was constitutional, but the Supreme Court has said that the [P]resident actually doesn't have the power to order domestic surveillance when you would ordinarily have to go to a court under the Fourth Amendment of the Constitution which protects the right to privacy." *Id.* On a similar note, legal analyst Jeffrey Toobin notes:

Here it seems to be a similar attempt to expand the power of the presidency. The interesting question here about this spying operation is whether anyone will have legal standing to challenge it, because under our rules of the courts, only someone who was wiretapped could probably challenge this law, and the people who are wiretapped don't know they're being wiretapped, so that's the interesting question.

Id.

5. John Diamond, *Ex-CIA Director Says Administration Stretched Facts on Iraq*, USA TODAY, June 17, 2003, http://www.usatoday.com/news/washington/2003-06-17-turner-usat_x.htm ("Former CIA director Stansfield Turner accused the Bush administration Tuesday of 'overstretching the facts' about Iraqi weapons of mass destruction in making its case for invading that country."); Marian Wilkinson, *The Garbage Intelligence That Helped to Unleash a War*, SYDNEY MORNING HERALD, June 21, 2003, <http://www.smh.com.au/articles/2003/06/20/1055828490548.html> ("A forged document was used to support claims by George Bush, John Howard and Tony Blair about Iraq's nuclear weapons program—even though the CIA and the State Department in the United States had dismissed it months earlier as 'garbage,' as one analyst said.").

6. See *Bush Administration U.S. Attorney Firings Controversy*, CONGRESSPEDIA, http://www.sourcewatch.org/index.php?title=Bush_administration_U.S._attorney_firings_controversy (discussing that recently the President used his sole discretion in the name of executive privilege to influence the firings of eight U.S. attorneys). This is rather unusual in the sense that it did not follow typical procedure, such as firing based on a performance review, or a downsizing of the department. *Id.* Rather, after these attorneys were fired at the whim of the President, the President instructed people to ignore subpoenas, evidence of executive usurpation of absolute power. *Id.*

executive,⁷ which some term “imperial presidency.”⁸

As the constitutional showdown on military tribunals,⁹ the USA

[T]he Bush administration fired eight U.S. attorneys, mostly on December 7, 2006. The attorneys, all appointees of President George W. Bush, were: Bud Cummins, Kevin Ryan, Daniel Bogden, Carol Lam, David Iglesias, Paul Charlton, John McKay, and Margaret Chiara. It later emerged that the attorneys were engaged in a number of public corruption investigations of Republican public officials or had refused to pursue investigations of Democrats that would have been beneficial to Republicans in elections.

Id.

7. See generally Saby Ghoshray, *Untangling The Legal Paradigm of Indefinite Detention: Security, Liberty and False Dichotomy in the Aftermath of 9/11*, 19 ST. THOMAS L. REV. 249, 270 (2006) (discussing that the theory of the unitary executive has been debated in recent days because President Bush has been claiming unitary executive privilege when it comes to his leadership role as President). In essence, the unitary executive privilege asserts that all executive authority is solely in the President’s domain. In the domain of war or declaring war, I have detailed that the concept of the unitary executive does not have legitimacy in the prevailing political and judicial parlance. *Id.* “The President cannot declare war without the Congress’ approval.” *Id.* “Only Congress can declare war.” *Id.* Since, arguably, no legislative act declaring a state of war was issued in connection with the broadly named war on terror, then the prevailing legal framework based on the laws of war model is not validated, and thus not applicable. *Id.*

8. See Adam Cohen, Editorial, *Just What the Founders Feared: An Imperial President Goes to War*, N.Y. TIMES, Jul. 23, 2007, at A18, available at <http://www.nytimes.com/2007/07/23/opinion/23mon4.html> (discussing that the perils of an imperial presidency are greatest when that President plunges the nation into war). Understanding this real issue, the framers of the U.S. Constitution ensured the real power was in Congress’ hands. *Id.* This was echoed by the framers’ disdain for the monarchy and British system under which they once lived. The framers were men who detested the power of kings, and wanted to guard against such systems flourishing in the United States. *Id.* Thus, “they sharply limited presidential authority, which Edmund Randolph, a Constitutional Convention delegate and the first [A]ttorney [G]eneral, called ‘the foetus of monarchy.’” *Id.* Cohen further noted:

[T]he founders were particularly wary of giving the [P]resident power over war. They were haunted by Europe’s history of conflicts started by self-aggrandizing kings. John Jay, the first chief justice of the United States, noted in Federalist No. 4 that “absolute monarchs will often make war when their nations are to get nothing by it, but for the purposes and objects merely personal.”

Id.; see also John W. Dean, *The U.S. Supreme Court and The Imperial Presidency: How President Bush Is Testing the Limits of His Presidential Powers*, Jan. 16, 2004, <http://writ.news.findlaw.com/dean/20040116.html> (discussing that just like the framers’ concern for an imperial presidency, others have noted concern). Dean also stated:

Not inaccurately, the Bush presidency has been called imperial, in Schlesinger’s sense. The evidence? Its “preemptive” and “preventive” military policy, its contentions that it can go to war regardless of whether Congress approves, its policies calling for American world domination, and its unprecedented blending of national security policy and domestic law enforcement. In my view, these policies and positions not only easily establish the Bush presidency as imperial, they also rank it beyond anything in the annals of the modern American presidency. This may be the most imperial [p]residency our history has yet seen.

Id.

Patriot Act,¹⁰ and torture¹¹ continues in the name of presidential war

9. See, e.g., Saby Ghoshray, *On the Judicial Treatment of Guantanamo Detainees in International Law*, in *GUANTANAMO BAY AND THE JUDICIAL-MORAL TREATMENT OF OTHERS* 80, 83 (Clark Butler ed., Purdue University Press 2007) (discussing secret courts and military tribunals).

10. See generally USA Patriot Act, Pub. L. No. 107-56, 115 Stat. 272 (2001) [hereinafter USA Patriot Act] (H.R. 3162 or the USA Patriot Act was created, “[t]o deter and punish terrorist acts in the United States and around the world, to enhance law enforcement investigatory tools, and for other purposes”); see also Library of Congress, available at <http://thomas.loc.gov/home/multicongress/multicongress.html> (search 107th Congress for “hr 3162” to review all related bills). In an effort to understand the legalities of the USA Patriot Act, the ACLU has noted that: Just 45 days after the September 11 attacks, with virtually no debate, Congress passed the USA PATRIOT Act. There are significant flaws in the Patriot Act, flaws that threaten your fundamental freedoms by giving the government the power to access to your medical records, tax records, information about the books you buy or borrow without probable cause, and the power to break into your home and conduct secret searches without telling you for weeks, months, or indefinitely. ACLU, *USA PATRIOT Act*, <http://www.aclu.org/safefree/resources/17343res20031114.html>; see Charles Doyle, Congressional Research Service, *The USA PATRIOT Act: A Legal Analysis*, CRS Rep. No. RL31377, at 51-52 (Apr. 15, 2002), available at <http://www.fas.org/irp/crs/RL31377.pdf>; see also John W. Whitehead, *Forfeiting ‘Enduring Freedom’ for ‘Homeland Security’: A Constitutional Analysis of the USA Patriot Act and the Justice Department’s Anti-Terrorism Initiatives*, 51 AM. U. L. REV. 1081, 1083-84, 1126 (2002) (stating that the expansive provisions of the USA Patriot Act allow for the government to eavesdrop on all electronic and wireless communication, to arrest individuals without specific charges, to hold them indefinitely, to monitor conversations between lawyer and client, as well as to carry out secret military trials of suspected terrorists); Marc Cooper, *Uncensored Gore*, L.A. WEEKLY, Nov. 13, 2003, <http://www.laweekly.com/general/features/uncensored-gore/2233> (explaining that these aspects of the Patriot Act are a concern to many, as noted by novelist and provocateur Gore Vidal: “An American citizen can be fingered as a terrorist, and with what proof? No proof. All you need is the word of the attorney general or maybe the [P]resident himself. You can then be locked up without access to a lawyer, and then tried by military tribunal and even executed All of this is in the USA PATRIOT Act”); Andrew Ayers, *UN Reports: The Financial Action Task Force: The War on Terrorism Will Not be Fought on the Battlefield*, 18 N.Y.L. SCH. J. HUM. RTS. 449, 458 (2002).

11. See Maher Arar, *The Horrors of “Extraordinary Rendition,”* Speech at the Institute for Policy Studies Letelier-Moffitt International Human Rights Award Ceremony (Oct. 27, 2006), available at <http://www.fpiif.org/fpiftxt/3636> (discussing that the concept of outsourcing torture under the guise of extraordinary rendition is a painful reality to many detainees). One such documented case is that of Canadian citizen Maher Arar, who was a victim of the U.S. policy of extraordinary rendition. *Id.* He was detained by U.S. officials in 2002, accused of terrorist links, and handed over to Syrian authorities, who tortured him. *Id.* Arar spoke publicly about his torture by the Syrians and recalled:

[W]ithout no warning [sic] the interrogator came in with a cable. He asked me to open my right hand. I did open it. And he hit me strongly on my palm. It was so painful to the point that I forgot every moment I enjoyed in my life. . . . This moment is still vivid in my mind because it was the first I was ever beaten in my life. Then he asked me to open my left hand. He hit me again. And that one missed and hit my wrist. The pain from that hit lasted approximately six months. And then he would ask me questions. And I would have to answer very quickly. And then he would repeat the beating this time anywhere on my, on my body. Sometimes he would take me to a room where I could, where I was alone, I could hear other prisoners being tortured,

power, seeking constitutional affirmation of broad constitutional war power attains enormous significance. Nowhere in the annals of executive rulemaking does this issue have a deeper impact. America has kept itself perpetually busy in active war since World War II,¹² and has recently busied itself debating the boundaries of executive war power with renewed vigor since 9/11.¹³ Whether it is the rising casualties in Iraq,¹⁴ or the flurry of talking heads discussing the possibility of war with Iran,¹⁵ the war-making power of the President has become a focal point for contentious debate.¹⁶ Some legal scholars support a constitutional basis for the President's assertion of an unbridled war power, while others take the opposite view.

Before I delve into the nature of constitutional grants of presidential war power, I will briefly illuminate the concept of the unitary executive. "Unitary executive power" refers to the unilateral imposition of

severely tortured. I remember that I used to hear their screams. I just couldn't believe it, that human beings would do this to other human beings.

Id.

12. See generally Killing Hope: U.S. Military and CIA Interventions since World War II, http://members.aol.com/bblum6/American_holocaust.htm (recounting how all U.S. administrations since 1945 have kept the nation at war in the name of shaping the world).

13. See generally *infra* note 16 (discussing how the President coupled 9/11 with the nation's debilitating fear to unleash untrammled war power of the President in various fronts).

14. The rising casualties of U.S. servicemen and women, Iraqi soldiers, and civilians in Iraq are undoubtedly horrific. The nightly news, print media, and even documentary stories describe the latest individuals killed, giving their names and the tales of their families' heart breaking loss. An example is readily available from the daily tribute given to the dead soldiers by television host Nancy Grace:

Let's stop, everyone, to remember Army Sergeant Steven Packer, 23, Clovis, California, killed, Iraq. Dreamed of enlisting as a boy, on a third tour, he gave his life trying to rescue other U.S. soldiers. Wanted to go to college and move into a new home with a high school sweetheart, he leaves behind brother, Robin, stepdad, Mark, three brothers, sister Danielle, and fiancée Stacey.

Nancy Grace, Medical Staff Watches as Woman Dies Untreated on Floor of ER (CNN television broadcast June 13, 2007) (transcript available at <http://transcripts.cnn.com/TRANSCRIPTS/070613/ng.01.html>); see also Fatalities List Since May 1st, www.antiwar.com/casualties/list.php (listing the American military deaths since May 1, 2003); Iraq Body Count, <http://www.iraqbodycount.net/> (providing additional figures on the fatalities of war).

15. See CNN.com, *Journalist: U.S. planning for possible attack on Iran*, Jan. 17, 2005, <http://www.cnn.com/2005/ALLPOLITICS/01/16/hersh.iran/> ("The Bush administration has been carrying out secret reconnaissance missions to learn about nuclear, chemical and missile sites in Iran in preparation for possible air strikes there . . .").

16. See Jane Mayer, *The Hidden Power: The Legal Mind Behind the White House's War on Terror*, THE NEW YORKER, July 3, 2006, at 44, available at http://www.newyorker.com/archive/2006/07/03/060703fa_fact1 (discussing opposing viewpoints on the use of executive power in the War on Terror).

presidential will on matters of grave consequence.¹⁷ The kind of absolutism associated with “unitary executive power” is akin to monarchical governance; as such, it is seen as an assault on the concept of shared governance enshrined in the Constitution.¹⁸ In theory, the concept of a unitary executive is supported by the recognized need for immediate action when the fear of imminent danger¹⁹ effectively bestows all decision-making power on the President. The danger of

17. See Ghoshray, *supra* note 7 (discussing how the unilateral imposition of presidential power by the Bush administration has been highlighted in various fronts). The impact “can be categorized into four distinct types: (i) indefinite detention of resident aliens; (ii) excessive domestic surveillance of citizens; (iii) the expansive reach of anti-money laundering provisions; and (iv) expanded immigration restrictions.” *Id.* at 252. These identified issues have grave consequences to both the citizenry and the legal establishment, which I have expounded upon elsewhere. *Id.*

18. See 1 ALEXANDER HAMILTON, *Federal Convention: Propositions for a Constitution of Government* in THE WORKS OF ALEXANDER HAMILTON 347–49, (Henry Cabot Lodge, ed., G.P. Putnam’s Sons 1904). Alexander Hamilton placed emphasis on controlling the war power the President held. *Id.* In his concern he detailed how the President should handle his war power and this well crafted commentary helps in developing the case against shrinking power of the President when it comes to war-making. *Id.* He specifically stated:

The Governor to have a *negative* upon all laws about to be passed—and (to have) the execution of all laws passed—to be the Commander-in-Chief of the land and naval forces and of the militia of the United States—to have the entire direction of war when authorized or begun—to have, with the *advice* and *approbation* of the Senate, the power of making all treaties—to have the appointment of the *heads* or *chief* officers of the departments of finance, war, and foreign affairs—to have the *nomination* of all other officers (ambassadors to foreign nations included), subject to the approbation or rejection of the Senate—to have the power of pardoning all offen[s]es but *treason*, which he shall not pardon without the approbation of the Senate.

Id.

James Madison also placed emphasis on not allowing one sole decision maker, like the President to declare war. Rather, James Madison asserted that the clauses in the Constitution vest war power in Congress. Madison recorded Hamilton’s proposal in the Federal Convention of 1787m which provided, “[t]he Senate to have the sole power of declaring war, the power of advising and approving all Treaties, the power of approving or rejecting all appointments of officers except the heads or chiefs of the departments of Finance War and foreign affairs.” See James Madison, Notes on Debates in the Federal Convention of 1787 (June 18, 1787), available at <http://www.yale.edu/lawweb/avalon/debates/618.htm#ham>.

19. Although the framers recognized the danger of an unchecked presidency, they kept some means through which the President could exert some war power. Such situations could arise when the duty of the President beckons him to protect the nation from imminent danger. However, in this Article I open up the possibility of propagating a false paradigm of imminent danger. Therefore, the central inquiry of this paper revolves around recognizing various shades of imminent danger and how its characterization influences the distribution of war power between Congress and the President. I argue that the limit of constitutional war power that the President can enjoy depends on fully evaluating this imminent danger paradigm.

bestowing such power on a President is well documented²⁰ and has become the focus of controversy in the current political landscape.²¹

The current war power debate centers on the question of whether the President has unqualified authority to make significant decisions regarding the nation's engagement in war. This question has given rise to the development of two diametrically opposite viewpoints. The proponents of unlimited presidential war power argue that there is constitutional support for expansive presidential authority in the emerging war on terror,²² and that the President is insulated from congressional interference.²³ The proponents of limited presidential war power argue that Article II explicitly requires congressional

20. See *supra* note 10 (discussing the USA Patriot Act). John W. Dean noted the historical evidence of Presidents attempting to expand their power under the umbrella of unitary executive privilege in his evaluation of historian Arthur Schlesinger, Jr.'s book *The Imperial Presidency*:

He traces its growth from George Washington to Richard Nixon, showing how a presidency never contemplated by the founders has evolved. As a basis for their authority, [P]residents typically cited their role as commander-in-chief—an undefined constitutional term—and "inherited powers" other [P]residents had used before them.

After Nixon pushed the presidential powers even further than past [P]residents had, both the Congress and Supreme Court acted to curtail his activities. In the name of protecting national security, Nixon wanted to be able to wiretap without the approval of a judge. The authority for this power? Before the Court of Appeals, Nixon relied on a vague "historical power of the sovereign to preserve itself" and "the inherent power of the President to safeguard the security of the nation."

Dean, *supra* note 8 (ranking the Bush presidency as the most imperial in history); see also ARTHUR M. SCHLESINGER JR., *THE IMPERIAL PRESIDENCY* (2004) (tracing the growth of presidential power from George Washington to George W. Bush and its effect on the Constitution).

21. See generally Ghoshray, *supra* note 7 (presenting a detailed discussion on various factors that led to the recent controversies surrounding the Bush presidency).

22. Here I refer to the tendencies of some recent scholarship in which the backers of unlimited presidential war power seek legitimacy in the Constitution. See David S. Friedman, *Waging War Against Checks and Balances—The Claim of an Unlimited Presidential Power*, 57 ST. JOHN'S L. REV. 213, 272–73 (1983) (urging a return to the constitutional procedure of waging war where Congress is actively involved); William P. Rogers, *Congress, the President, and the War Powers*, 59 CAL L. REV. 1194, 1213 (1971) (suggesting that Congress should have an active role in the war-making power and that the President should retain the power to act rapidly); Jeffrey W. Taliaferro, *Hegemonic Delusions Power, Liberal Imperialism, and the Bush Doctrine*, 31 FLETCHER F. OF WORLD AFF. 175, 175–76 (2007) (comparing divergent views of the Bush Doctrine and its application to the War on Terror); Michael Isikoff, *2001 Memo Reveals Push for Broader Presidential Power*, NEWSWEEK, Dec. 18, 2004, <http://www.newsweek.com/id/55508> (discussing a memo to White House counsel Alberto Gonzales' office that concluded that President Bush had the power to deploy military force "preemptively" against any terrorist groups or countries that supported the attacks on the World Trade Center or the Pentagon).

23. See Ghoshray, *supra* note 7 (discussing that during the historical development of the founding period, checks and balances were inserted into the Constitution to allow Congress to impose necessary interference in the war-making activities of the President). The proponents of unchecked presidential war power espouse a framework where Congress' controlling power is diluted to allow for the emergence of an imperial presidency. *Id.*

approval to declare war,²⁴ which calls for either shared power between the Congress and the President,²⁵ or congressional supremacy in exercising war power.²⁶

In my examination of the constitutional trajectories of presidential war power, I do not seek an explicit mandate from Article II's ambiguous text,²⁷ nor do I subscribe to the emerging war on terror paradigm.²⁸ Rather, I examine both paradigms in an attempt to find the true boundaries of presidential war power. First, I explore the origins of

24. U.S. CONST. art. II, § 2. Article II is part of the War Powers Resolution, 50 U.S.C. 1541 (2006), and it provides restrictions on the power of the U.S. President to wage war. He must have Congress' approval, because the power to wage war is shared between the President and Congress. Congress has the power to declare war under Article I, Section 8. The President is Commander-in-Chief and leads the armed forces under Article II, Section 2.

25. Shared war power comes from the concept of congressional control over presidential war power. See *infra* Parts III–IV for a discussion of how this paradigm of shared war power allows us to define the limits of the President's war power.

26. Scholars have noted that while there may be influences from the British model of law, the fact remains that the early framers of the Constitution rejected the British model because they did not want a monarchical rule of law. As noted by Cass Sunstein:

There is specific evidence that the British model was rejected. Just three years after ratification [James] Wilson wrote, with unambiguous disapproval, that "in England, the king has the sole prerogative of making war." Wilson contrasted the United States, where the power "of making war and peace" is in the legislature. Early Presidents spoke in similar terms. Facing attacks from Indian tribes along the western frontier, George Washington, whose views on presidential power over war deserve special respect, observed: "The Constitution vests the power of declaring war with Congress; therefore no offensive expedition of importance can be undertaken until after they have deliberated on the subject, and authorized such a measure." As President, both Thomas Jefferson and John Adams expressed similar views. In his influential Commentaries, written in 1826, James Kent wrote that "war cannot lawfully be commenced on the part of the United States, without an act of Congress."

Cass Sunstein, *The 9/11 Constitution*, THE NEW REPUBLIC, Jan. 16, 2006, at 21. Additional evidence points to the rejection of the British-based Constitution:

Diverse models were presented, as diverse as the men who sponsored them. The Madison model promoted a republican government by giving the people ultimate power and the people transferring that power to representatives. Hamilton's model was based on the British monarchy style of government and would have done away with state sovereignty. His model failed. Framers such as Roger Sherman, William Paterson, and Charles Pinckney tendered other admirable models which were rejected as well.

When the final draft of the Constitution appeared on September 17, 1787, it was signed by only 39 of the delegates. Ben Franklin wrote that day, "the Constitution had its faults, but it is possible that no better document could have been created."

The Starting Place, THE STARTING PLACE: WASHINGTON STATE LAW LIBRARY'S LEGAL RESEARCH E-NEWSLETTER (Washington State Law Library, Olympia, WA), Winter 2006/2007, <http://www.courts.wa.gov/library/newsLetter/200612Winter.pdf>.

27. U.S. CONST. art. II, § 2.

28. See generally Ghoshray, *supra* note 7 (discussing in detail the new landscape of war-making created by the Bush administration since 9/11).

presidential war power in the development of various war power theories. And second, I examine the shared war power between the President and Congress. My analysis reveals that the dichotomy in interpreting the limits of presidential war power does not result from a misinterpretation of the Constitution, but from over-reliance on narrow interpretations of presidential power without regard to exigent circumstances.

With this objective in mind, the Article is segmented as follows. In Part II, I examine various war theories that developed during the founding period to find evidence of untrammelled executive power.²⁹ My exploration continues in Part III, where I establish the shared power framework that emerged from jurisprudential developments beginning in the late 1700s.³⁰ In Part IV, I analyze the notion of shared war power from the perspective of Justice Jackson's famous opinion in the *Steel Seizure* case.³¹ My analysis of Justice Jackson's opinion discusses various asymmetric characteristics of the shared power model under the imminent danger doctrine.³² Finally, I conclude in Part VI that we must summarily reject any suggestions that the Constitution assigns unchecked war-making powers to the executive.³³

II. TRACING THE "CONSTITUTIONAL CURVATURE"³⁴ OF UNBRIDLED EXECUTIVE WAR POWER

One of the most important constitutional debates of our time centers on whether the independent power enjoyed by the President has broader and more pervasive implications in the context of war. Against the

29. See *infra* Part II (discussing war power theories).

30. See *infra* Part III (setting forth the shared power framework).

31. See *infra* Part IV (discussing Justice Jackson's opinion in *Steel Seizure*).

32. See *infra* Part V (analyzing Justice Jackson's opinion). By the imminent danger doctrine I refer to the legal reasoning that finds the legal consequence of usurpation of presidential war power is based on the perceived threat of national security. The point I want to drive home is the very subjective nature of the threat on which that imminent danger is based. As I have shown in this Article, when the analysis process is divorced from rational discourse, the perception of threat can get irrationally magnified which may give rise to unwarranted executive action.

33. See *infra* Part VI (concluding that the executive war-making powers must remain subject to congressional oversight).

34. See Laurence H. Tribe, *Essay: The Curvature of Constitutional Space: What Lawyers Can Learn From Modern Physics*, 103 HARV. L. REV. 1, 1 (1989). In my view the limits of presidential war power can be found within the curvature space of the Constitution, characterized by its hidden valleys and peaks in which the intensity of the presidential war power could expand and shrink much like curvature space supports fluctuating forces in an object. See generally Saby Ghoshray, *Symmetry, Rationality and Consciousness: Revisiting Marcusean Repression in America's War on Terror*, in *EROS AND LIBERATION: HERBERT MARCUSE'S VISION FOR A NEW ERA* (2007).

backdrop of a war that entangled the United States in a seemingly inextricable quagmire³⁵ and tore apart the centuries-old socio-political fabric of Iraq,³⁶ we must now confront a series of constitutional questions with far reaching consequences. What is the scope of executive power when dealing with foreign affairs and national security? Does an expansive reading of Article II allow for the recognition of absolute presidential power to make war? Can the President invoke national security as the basis for launching a military attack on any sovereign nation as he pleases? Although it is important to take a dynamic approach³⁷ to some legal and social issues, an original-intent based approach is more suitable for other areas of law. Framing the constitutional curvatures³⁸ of executive war power is one such area where we must show proximate fidelity to the Constitution.³⁹ This is best understood by analyzing the intentions of the framers and by examining the drafts and discussions preceding the Constitution.

During the first one hundred and fifty years since the unveiling of the written Constitution, presidential war power emanated from three distinct sources: (i) aggregate power, (ii) derived power, and (iii) necessary power. The concept of aggregate power found life in the early writings of Alexander Hamilton, who questioned the justification of granting extensive powers to the government while introducing the concept of aggregate power.⁴⁰ While addressing the people of the State of New York, James Madison introduced the concept of aggregate power in the *Federalist No. 41*:

35. See PHYLLIS BENNIS, ERIK LEAVER, AND THE IPS IRAQ TASK FORCE, THE IRAQ QUAGMIRE: THE MOUNTING COSTS OF WAR AND THE CASE FOR BRINGING HOME THE TROOPS i (2005), available at <http://www.ips-dc.org/iraq/quagmire/> (“‘The Iraq Quagmire’ is the most comprehensive accounting of the mounting costs and consequences of the Iraq War on the United States, Iraq, and the world. Among its major findings are stark figures that quantify the continuing of costs since the Iraqi elections, a period that the Bush administration claimed would be characterized by a reduction in the human and economic costs.”).

36. As the invasion of Iraq is entering into its fifth year it has been established with enormous clarity that the socio-political fabric of Iraq is broken beyond repair. Various commentators have examined the bond of autocratic rule that had glued the socio-political framework of Iraq together, but now has morphed into a civil war as a direct result of U.S. invasion.

37. For a more elaborate discussion on the importance of taking a dynamic perspective, see Saby Ghoshray, *To Understand Foreign Court Citation: Dissecting Originalism, Dynamism, Romanticism, and Consequentialism*, 69 ALB. L. REV. 709 (2005) (examining the viewpoint of a dynamic Constitution).

38. See *supra* note 34 and accompanying text (discussing the origin of the term “constitutional curvatures” and the application of this concept to define presidential war powers).

39. By proximate fidelity to the Constitution, I allude to the constitutional interpretation that departs from blindly acquiescing to the indeterminacy of the controlling legal paradigm and seeks to find ways to meld the constitutional text and statutes into an evolving legal reasoning process.

40. THE FEDERALIST NO. 23 (Alexander Hamilton).

Is the aggregate power of the general government greater than ought to have been vested in it? . . . It cannot have escaped those who have attended with candor to the arguments employed against the extensive powers of the government that the authors of them have very little considered how far these powers were necessary means of attaining a necessary end. They have chosen rather to dwell on the inconveniences which must be unavoidably blended with all political advantages: and on the possible abuses which must be incident to every power and trust, of which a beneficial use must be made.⁴¹

This passage makes clear that Madison questioned the aggregation of various powers by the executive. Although the history of the drafting of the Constitution provides evidence of the founding period's recognition of a strong executive, this passage suggests that the executive could usurp untrammelled executive power. Despite some scholars' tendency to obscure the presidential war powers debate by lumping together all the justifications for war-making in one general discussion, each justification warrants its own specific debate. For instance, engaging in war to defend one's nation against actual enemy aggression requires a different analysis than engaging in war based on a false pretext.

Proponents of the theory of derived power assert that war power is derived from the Constitution's affirmative grant of powers related to foreign relations. Some of the early framers realized the need for executive efficiency in government matters and therefore refused to require explicit grants in the Constitution. Instead, they derived war-making power from other explicitly granted powers. In *McCulloch v. Maryland*,⁴² Chief Justice John Marshall observed that derived powers are not stated explicitly in the Constitution; rather, they are gleaned from other constitutional grants of power. Justice Marshall noted in this context:

This government is acknowledged by all to be one of enumerated powers. The principle, that it can exercise only the powers granted to it, . . . is now universally admitted. But the question respecting the extent of the powers actually granted, is perpetually arising, and will probably continue to arise, as long as our system shall exist.

. . . .

Among the enumerated powers, we do not find that of establishing a bank or creating a corporation. But there is no phrase in the instrument which, like the articles of confederation, excludes

41. THE FEDERALIST NO. 41 (James Madison).

42. *McCulloch v. Maryland*, 17 U.S. 316 (1819).

incidental or implied powers; and which requires that everything granted shall be expressly and minutely described.⁴³

In his opinion, Justice Marshall sketched the contours of constitutional grants of war-making power by referring to the necessary guideposts when interpreting the Constitution. This war-making power without explicit provision to declare a war must be construed as one of the enumerated powers.⁴⁴

Other theories of war power during the founding period included the characterization of war power as necessary power, as was done by Chief Justice Salmon Chase in *Ex Parte Milligan*,⁴⁵ or as “single unified power,” as was done by Abraham Lincoln in his 1861 message to Congress.⁴⁶ During the twentieth century, the concept of “inherent power” was first introduced by Chief Justice Edward White in 1919⁴⁷ and later substantiated by Justice George Sutherland in 1936. Justice Sutherland wrote in *United States v. Curtis-Wright Corp.*:

As a result of the separation from Great Britain by the colonies, acting as a unit, the powers of external sovereignty passed from the Crown not to the colonies severally, but to the colonies in their collective and corporate capacity as the United States of America. Even before the Declaration, the colonies were a unit in foreign affairs, acting through a common agency—namely, the Continental Congress, composed of delegates from the thirteen colonies. That agency exercised the powers of war and peace, raised an army, created a navy, and finally adopted the Declaration of Independence. . . .

It results that the investment of the Federal Government with the powers of external sovereignty did not depend upon the affirmative grants of the Constitution. The power to declare and wage war, to conclude peace, to make treaties, to maintain diplomatic relations with other sovereignties, if they had never been mentioned in the Constitution, would have vested in the federal government as necessary concomitants of nationality.⁴⁸

In my view, the concept of “necessary power” is implicit in the broader concept of inherent power, while the theory of “unified power” can be described as a version of “aggregate power.” If an entity necessarily possesses a certain power, the entity must inherently be ordained with that power for its survival and nurturing. The same can

43. *Id.* at 405–06.

44. *Id.* at 324.

45. *Ex Parte Milligan*, 71 U.S. 2, 139 (1866) (Chase, C.J., concurring).

46. CONG. GLOBE, 37th Cong., 1st Sess., App. at 1 (1861).

47. *See* N. Pac. Ry. Co. v. North Dakota *ex rel.* Langer, 250 U.S. 135, 149 (1919).

48. *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304, 316, 318 (1936).

be observed about “unified power,” which emanates from the aggregation of other powers. The founding period provides us with robust doctrinal developments in the concept of war power. Our inquiry should therefore center on understanding whether war power under any of these theories could justify granting absolute war power to the President. It is also important to understand how these three theories form a continuous spectrum representing the possible degrees of war power authority.

Inherent war power manifests itself where the sovereignty of the state is threatened. This was the controlling argument in *Ex Parte Milligan*, where Chief Justice Chase implied that the executive might have an inherent right to engage in war if threatened with possible loss of sovereignty. He observed that Congress cannot intrude upon the proper authority of the President in the exercise of his military authority. Congress could not, for instance, interfere “with the command of the forces and the conduct of campaigns.”⁴⁹ If the Constitution can be seen as a curvature of space,⁵⁰ inherent power is the point at which the President possesses the greatest war power. This is also the point of greatest tension. Inherent power is absolute and does not require any consultation with Congress. I do not deny the existence of absolute Presidential power, which is supported by both jurisprudential development and constitutional text. However, the history of the founding period only supports granting the awesome privilege of unchecked war power in circumstances where it is absolutely necessary to protect the nation. In my view, this inherent power is inalienable and must be unleashed with extreme caution. Inherent power comes with the tremendous responsibility of acting prudently, wisely, and cautiously.

The framework of derived power marks the point of lowest intensity of presidential power. The power to make war is an overwhelming proposition and must be carefully justified. The framers held that the power to declare war gives rise to the power to make war, a supposition that must be further clarified in this context. First, it relies on the premise that having the power to declare war automatically gives rise to the power to make war. Second, it depends on the development of war power as a derivative power. In examining the truth of this assertion, we must determine whether all the conditions for declaring war are

49. *Ex Parte Milligan*, 71 U.S. at 139.

50. See *supra* note 34 and accompanying text (discussing the “curvature of constitutional space” notion).

present before declaring it valid. Therefore, Chief Justice Marshall's enumerated power analysis must be examined in the proper context.⁵¹

The enumerated power doctrine fails to point to an affirmative constitutional grant of unilateral presidential war power.⁵² Rather, the plenary war power of the president must be recognized as an inherent or necessary power, which has not been clearly articulated anywhere in the Constitution. The most affirmative grant that the Constitution bestows upon the president is derived war power. I would assert that all scenarios where the President might require executive war power can be resolved within a broader conception of derived power. Neither constitutional development nor the writings of the founding period support the case for absolute unitary executive power in exigent circumstances.

Aggregate power falls between inherent power and derived power in the continuous war powers spectrum.⁵³ The idea that war power is the sum of various other powers—such as the power to raise an army, the power to build a navy, or the power to make treaties—is a fluid concept.⁵⁴ Its genesis is the notion that power results from conditions and events that influence the nation. The intensity of such war power,

51. The proponents of enumerated power saw an expanded conception of power residing within the Constitution. According to them, there are some powers so fundamental that they could never be articulated by either the government or the legislature. Therefore, no explicit textual grant could deny the usurpation of such power. These are indeed the fundamental powers that could emanate either via natural process of governance or via inherent sovereign discourse. Therefore, according to the minds of its proponents, the conception of enumerated power is so fundamental that they may not have been properly enumerated within the Constitution, as the historical development of civilization did not recognize them at the time of Constitution's writing. How could this happen? I would argue that the proponents of such powers saw them as derived powers.

52. In my view, a distinction must be made between enumerated power and derived power. Derived power could emanate or be extrapolated from an explicit constitutional grant of power by the emergence of new legal reasoning or changes to the conditions governing the constitutional provisions. In other words, derived power could change with time, place, and application. On the other hand, enumerated power is more static in nature and automatically befalls upon the exponents of the Constitution. Although the contours of enumerated power could alter as a result of evolving factors, its basic premise remains the same.

53. In my view, the intensity of the war power is at its highest when it could be seen as an inherent power; under such a scenario the owner has less of a burden to share it with any one. When the war power is derived, it is assumed to have come via layers of inheritance and as such, its intensity is much less pronounced. On the other hand, the aggregate power emerges as a function of other powers that have been firmly established and as such, has a higher intensity level than derived power.

54. See *supra* note 18 (discussing the views of Alexander Hamilton and James Madison in relation to the war powers of the President). Both Hamilton and Madison emphasized controlling the executive war power, but Madison encouraged vesting the power in more than just the President. *Id.*

which is derived from constantly evolving circumstances, changes and evolves also; it can be constrained by nation building, or expanded by the liberty enhancing features of the Constitution. Although the sovereign power of war-making was accepted in the founding period, the framers and the Supreme Court Justices always recognized the danger of granting this awesome responsibility unilaterally to the executive. Justice Joseph Story echoed this sentiment:

The power of declaring war is not only the highest sovereign prerogative . . . It is in its own nature and effects so critical and calamitous, that it requires the utmost deliberation, and the successive review of all the councils of the nations. War, in its best estate, never fails to impose upon the people the most burthensome taxes, and personal sufferings. It is always injurious, and sometimes subversive of the great commercial, manufacturing, and agricultural interests. Nay, it always involves the prosperity and not unfrequently the existence, of a nation. It is sometimes fatal to public liberty itself, by introducing a spirit of military glory, which is ready to follow, wherever a successful commander will lead; . . . It should therefore be difficult in a republic to declare war; but not to make peace The cooperation of all the branches of the legislative power ought, upon principle, to be required in this the highest act of legislations.⁵⁵

The historical landscape provides us with diverging theories of war power that have evolved over the last two centuries. These theories form a continuous spectrum of seamless possibilities under which presidential war-making powers could arise. Do any of these theories support absolute presidential war-making power? Although isolated scenarios exist where the executive is obligated to defend the sovereign, evidence of unilateral war power simply does not exist.

III. UNDERSTANDING THE SHARED POWER FRAMEWORK

The limits of presidential war power can be examined through a framework of shared power between Congress and the President. Historical data from the founding period captures the framers' difficulty with allocating power between the legislature and the President.⁵⁶ This

55. JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES 60–61 (1887).

56. Fearful of a President that might declare war as an attempt to gain fame and glory, the original framers of the Constitution elaborated extensively on this issue. David Alder notes the importance of a President's rate of greatness and its correlation with whether or not he engaged in war during his tenure. Alder stated:

President John F. Kennedy, according to Arthur Schlesinger, Jr., 'observed that war made it easier for a [P]resident to achieve greatness' (Schlesinger 2003, 18). No doubt the assumption has been encouraged by the practice of presidential rankings

undertaken by political scientists and historians who, with some slight variation, typically have rated as "great" or "near-great" twelve men who constitute the top tier of chief executives and are associated with warfare: Abraham Lincoln, Franklin Roosevelt, George Washington, Thomas Jefferson, Theodore Roosevelt, Woodrow Wilson, Andrew Jackson, Harry Truman, John Adams, Lyndon Johnson, Dwight Eisenhower, and James Polk (Murray and Blessing 1983). To the extent that scholars have drawn a correlation between wartime [P]residents and presidential greatness, some consideration must necessarily have been given to either the decision to go to war or to the [P]resident's conduct of it, or perhaps to both factors. In any event, it is difficult to contemplate the premise of a correlation between wartime tenure and presidential greatness without recognition of at least one of the factors as a basis for evaluation and judgment.

David Gray Adler, *Presidential Greatness as an Attribute of Warmaking*, PRESIDENTIAL STUDIES QUARTERLY, Sept. 1, 2003, available at http://goliath.ecnext.com/coms2/gi_0199-3281590/Presidential-greatness-as-an-attribute.html. The concern of a President seeking war glory over the sincere interest of the nation has been a hot topic since the framers began debating on the context of the Constitution. Adler further noted:

[The framers] were nonetheless wary of their ability to fend off the temptations of power and avoid seduction by fame and glory. Fearful that a [P]resident might plunge the nation into carnage or distress for reasons having little to do with merit or the national interest but on other, less virtuous grounds—personal agendas, political motives, and the lure of fortune, among them—the framers granted to Congress the sole and exclusive authority to initiate military hostilities, great or small, on behalf of the American people. Founding documents and materials are rife with references to the framers' fear of unilateral executive power in warmaking and foreign affairs, a fear rooted in their doubts about the ability of the executive to perceive the national interest in matters involving war and peace. Alexander Hamilton's explanation in Federalist No. 75 of the Constitutional Convention's refusal to vest in the President unilateral authority to make treaties applies with equal force to the authority to initiate war:

The history of human virtue does not warrant that exalted opinion of human nature which would make it wise in a nation to commit interests of so delicate and momentous a kind, as those which concern its intercourse with the rest of the world, to the sole disposal of a magistrate created and circumstanced as would be a [P]resident of the United States.

The widespread fear of executive power was striking in its expression of opposition to a presidential war-making power, principally on the grounds that an executive might plunge his nation into war when it did not serve the nation's interest. An executive with "spirit and ambition," John Adams wrote, "looks forward with satisfaction to the prospect of foreign war," or other "wished-for-occasions presenting themselves, in which he may draw upon himself the attention and admiration of mankind." The distrust of the executive, which derived from the widespread acknowledgment of his thirst for glory, domination, and power, colored most of the contemporaneous essays, tracts, and speeches. In Federalist No. 4, John Jay, whose experience as Secretary of Foreign Affairs under the Articles of Confederation and, later, as an ambassador, rendered him more sensitive than most to executive ambition and international intrigue, stated:

[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 glory These and a variety of 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.

Id. (internal citations omitted).

difficulty arose due to the practical problems that arise from shared power which have now become quite relevant. Consider the following questions: can the executive order military action against another country in violation of legislative enactments?⁵⁷ Can the President order covert operations inside another sovereign jurisdiction by circumventing procedures set up by Congress?⁵⁸ Can the unitary

57. The history of the founding period reveals that the President's ability to order military action was countenanced by the requirement of congressional legislation. In 1788, the debate was ongoing within the nation about ratifying the Constitution. At that time, many politicians as well as the common citizen were concerned that the Constitution would authorize too much power to the President. This possibility haunted the people of the new America because they had just fought to end their relationship as servants to the British Kingdom. According to Charlie Savage, Alexander Hamilton defined the role of the U.S. President in *Federalist No. 69*:

The American commander in chief's powers would be subject to strong checks and balances, including submission to regulation by laws passed by Congress. Hamilton describes the commander in chief as "nothing more" than the "first general" in the military hierarchy. The commander in chief's powers are "much inferior" to a king because all the power to declare war and to create and regulate armies is given instead to Congress, he explained. Some state governors, Hamilton noted, had greater security powers as head of their state militias than the [P]resident would. "It may well be a question whether [the constitutions] of New Hampshire and Massachusetts, in particular, do not . . . confer larger powers upon their respective governors than could be claimed by a [P]resident of the United States."

Charlie Savage, *Scholars are Split on the Bush Administration's Use of the Federalist Papers to Justify its Position on Presidential War Powers*, BOSTON GLOBE, June 11, 2006, available at http://www.boston.com/news/globe/ideas/articles/2006/06/11/recommended_reading/?page=1 (discussing presidential powers and the Federalist papers).

58. Scholars have pointed out that the President can never order military action against sovereign nations. See David Gray Adler, *The Constitution and Presidential Warmaking: The Enduring Debate*, 103 POL. SCI. Q. 2, 2 (Spring 1988) ("[T]he Constitution vests in Congress the sole and exclusive authority to initiate total as well as limited war."). See generally Louis Fisher, *Unchecked Presidential Wars*, 148 U. PA. L. REV. 1637 [hereinafter Fisher, *Unchecked Presidential Wars*] (discussing the history of presidential wars). In recent history we have seen Presidents committing troops to overseas locations solely on their authority as Commander-in-Chief, without the consent of Congress. These Presidents justify sending troops into places like Bosnia, Iraq, and Afghanistan because of the imminent danger at hand, and because they lead U.S. foreign policy. According to many experts, like Louis Fisher, this justification for bypassing Congress and sending troops overseas is wrong, if not illegal, because the Constitution states that Congress, not the President, has the power to declare war. As Fisher details, the framers had good reason for their language. "These models of executive power were well known to the framers. They knew that their forebears in England had committed to the executive the power to go to war. However, when they declared their independence from England, they vested *all* executive process in the Continental Congress." LOUIS FISHER, *PRESIDENTIAL WAR POWER 2* (2d ed. 2004) [hereinafter FISHER, *PRESIDENTIAL WAR POWER*]. "On numerous occasions the delegates to the constitutional convention emphasized that the power of peace and war associated with monarchy would not be given to the President." *Id.* at 4; see also RAOUL BERGER, *GOVERNMENT BY JUDICIARY, THE TRANSFORMATION OF THE FOURTEENTH AMENDMENT* 287 (1977) ("Given a Constitution designed to 'limit' the exercise of all delegated power . . . the admonition contained in the Massachusetts Constitution of 1780, drafted by John Adams and paralleled in a number of early State constitutions, [was] that 'A frequent recurrence to the fundamental principles of the constitution . . . [is] absolutely necessary to preserve the advantages

executive seize and detain citizens of another country without a trial, or subject them to military commissions without specific legislative authorization?⁵⁹ Can the President determine unilaterally whether captured individuals under U.S. custody have rights under international treaties?⁶⁰ Finally, do the war power theories discussed above shed light on these practical questions?

The questions above can be captured with a single inquiry. Are there circumstances in which the executive can act on its own initiative, without legislative support? When, if ever, can the executive act in direct contravention of the legislature? Against the backdrop of a war that ravaged the very fabric of a country and the stability of a region, the war power of the President requires a fresh and vigorous look. The unilateral war power of the President has gained significant momentum today in the new paradigm⁶¹ propagated by the Bush administration and some scholars;⁶² that is, a preemptive and preventive military policy premised on the ability of the President to go to war regardless of Congress' approval.⁶³ James Madison highlighted the dangers of giving the President the sole responsibility of deciding whether to go to war. He warned:

In no part of the [C]onstitution is more wisdom to be found than in the clause which confides the question of war or peace to the legislature, and not to the executive department. Beside the objection to such a mixture of heterogeneous powers: the trust and the temptation would be too great for any one man: not such as nature may offer as the prodigy of many centuries, but such as may be expected in the ordinary successions of magistracy. [sic] War is in fact the true nurse of executive aggrandizement. In war a physical force is to be created, and it is the executive will which is to direct it. In war the public treasures are to be unlocked, and it is the executive hand which is to dispense them. In war the honors and emoluments of office are to be multiplied; and it is the executive patronage under which they are to be enjoyed. It is in war, finally, that laurels are to be gathered, and it is the executive brow they are to encircle. The strongest passions, and most dangerous weaknesses of the human breast; ambition, avarice,

of liberty and to maintain a free government The people . . . have a right to require of their law givers and magistrates an exact and constant observance of them.'").

59. See Adler, *supra* note 58, at 1–36 (discussing presidential war-making).

60. See generally Ghoshray, *supra* note 7 (discussing President Bush's post-9/11 actions overstepping his executive power).

61. See Mayer, *supra* note 16 (discussing varying viewpoints on presidential power).

62. *Id.*

63. *Id.*

vanity, the honorable or venial love of fame, are all in conspiracy against the desire and duty of peace.⁶⁴

This Madisonian declaration is consistent with the congressional authority granted under Article I, Section 8.⁶⁵ One should consider why the current administration keeps asserting the right to initiate further attacks.⁶⁶ The proponents of unlimited presidential war power cite the framers' intention as to who has the sole authority and exclusive right to launch the nation into war.⁶⁷ They point to Article IX of the Articles of Confederation, which originally granted Congress the sole and exclusive right to determine peace and war. The fact that this clear and explicit allocation of war power authority was excluded from the Constitution is considered evidence in the history of a declared war clause.⁶⁸ Alexander Hamilton asserted that "the President would have 'with the advice and approbation of the Senate' the power of making treaties, the Senate would have the 'sole power of declaring war' and the President would be authorized to have 'the direction of war when authorized or begun.'"⁶⁹

Hamilton vehemently objected to allocating significant war-making power to the sole custody of the President. He observed in the *Federalist No. 75* that "it would be utterly unsafe and improper to intrust that power [war-making and declaring] to an elective magistrate of four years' duration."⁷⁰ Moreover, the creation of the Constitution could not support giving power "to the sole disposal of a magistrate created and circumstanced as would be a President of the United States."⁷¹

The history of the founding period makes it abundantly clear that the U.S. Constitution intended to protect against monarchical aspiration.

64. THOMAS A. MASON ET AL., *THE PAPERS OF JAMES MADISON*, vol. 15, 106–10 (1985), available at http://oll.libertyfund.org/index.php?option=com_staticxt&staticfile=show.php%3Ftitle=1910&chapter=112553&layout=html#_lf3953_footnote_nt_031.

65. Article I, Section 8, Clause 11 states that Congress shall have the power "to declare war." U.S. CONST. art. I, § 8, cl. 11; see also *supra* note 24 (discussing U.S. CONST. art. II, § 2).

66. See Ghoshray, *supra* note 7 (discussing the new landscape of war-making created by the Bush Administration since 9/11).

67. See Mayer, *supra* note 16 (discussing the hidden powers of the executive); see also Julian G. Ku, *Is There an Exclusive Commander-in-Chief Power?* 115 *YALE L.J. POCKET PART* 84 (2006), available at <http://yalelawjournal.org/content/view/37/14/> (discussing sole authority to enter into war).

68. See *supra* note 56 and accompanying text (discussing the framers' fear of providing the President with unilateral war powers).

69. LOUIS FISHER, *PRESIDENTIAL WAR POWER* 5 (2d ed. 2004).

70. *THE FEDERALIST NO. 75* (Alexander Hamilton).

71. *Id.*

Thus, any assertion that the President holds unlimited war power is contrary to the Constitution. This is evident in *Federalist No. 69*, where Hamilton's definition of concurrent power first expresses the shared power concept. He defines concurrent power of the President as "concurrent power with a branch of the legislature in the formation of treaties" in lieu of the British style kingship as "sole possessor of the power of making treaties."⁷² Thus, concurrent power is a bulwark against presidential usurpation of absolute power. According to Hamilton, the U.S. President differs from the King of England because "the President will have only the occasional command of such part of the militia of the nation as by legislative provision may be called into the actual service of the Union."⁷³

The Hamiltonian philosophy of shared power formed a bedrock principle in the American Constitution. It constructed the limits of executive war power as seen through the debates at the Philadelphia convention. The framers were not only concerned about concentrated power in the hands of the President, but also were careful not to give Congress too much power. As a result, the delegates of the Philadelphia convention changed Congress' power from the power to "make war" to the power to "declare war."⁷⁴ This limit on presidential power has repeatedly been cited in the literature as evidence that the framers did not intend for the President to impose his will of engaging in war on its citizens. One scholar, John Bassett Moore, noted:

There can hardly be room for doubt that the framers of the constitution, when they vested in Congress the power to declare war, never imagined that they were leaving it to the executive to use the military and naval forces of the United States all over the world for the purpose of actually coercing other nations, occupying their territory, and killing their soldiers and citizens, all according to his own notions

72. THE FEDERALIST NO. 69 (Alexander Hamilton).

73. *Id.*

74. Constitutional historian Louis Fisher noted that:

the debates at the Philadelphia convention reveal that the framers were determined to circumscribe the President's authority to take unilateral military actions. The early draft empowered Congress to "make war." Charles Pinckney objected that legislative proceedings "were too slow" for the safety of the country in an emergency, since he expected Congress to meet but once a year. Madison and Elbridge Gerry moved to insert "declare" for "make," leaving to the President "the power to repel sudden attacks." Their motion carried on a vote of 7 to 2. After Rufus King explained that the word "make" would allow the President to conduct war, which was "an Executive function," Connecticut changed its vote and the final tally became 8 to 1.

FISHER, *supra* note 69, at 8.

of the fitness of things, as long as he refrained from calling his action war or persisted in calling it peace.⁷⁵

These historical developments during the founding period confirm that the President must have congressional authority to make war. Article I, Section 8 states that, “Congress shall have power to . . . provide for common defense and . . . [t]o declare war.”⁷⁶ If we combine Article I, Section 8 with Article II, Section 2, which states that, “The President shall be the Commander in Chief of the Army and Navy of the United States,”⁷⁷ then the meaning of the Articles becomes clear. These are the Articles cited as support for providing the President the power to initiate war or hostilities,⁷⁸ with Congress as the rubber stamp to make formal declaration. This arrangement can be understood under two lines of argument. The first interprets the President to be the sole organ for external relations, which has plenty of historical support.⁷⁹ In the second line of reasoning, I would argue that the President is bound by an implicit contract to protect the nation. Some scholars have relied on the foreign affairs dimension to solidify absolute presidential power. Conversely, it has been argued that during the ratification process, the war power was allocated to give the President enough power to repel certain attacks. While Congress has the power of the past to curb presidential excesses when it comes to war power, the President is the sole executor who is in charge of protecting the nation. The constitutional issue clearly at stake is the balance of power between the President and Congress in wartime.

This balance defines the legal status of the nation with respect to the enemy, whether or not at war, which brings in a long-standing tension between Article I and Article II. In Article I, Section 8, we are reminded that, “Congress shall have power to . . . provide for the common defense and . . . [t]o declare war.”⁸⁰ However, Article I, Section 10 states that, “No state shall, without the consent of Congress, . . . engage in war, unless actually invaded, or in such imminent danger as

75. *The Control of the Foreign Relations of the United States*, THE COLLECTED PAPERS OF JOHN BASSETT MOORE 196 (Yale University Press 1944) (1921).

76. U.S. CONST. art. I, § 8, cl. 1, 11.

77. U.S. CONST. art. II, § 2, cl. 1.

78. *See supra* notes 74–75 and accompanying text (discussing the framers’ intent to limit the executive’s war power through their written work and the debates during the constitutional convention).

79. *See supra* note 18 (discussing the views of Alexander Hamilton and James Madison, in relation to the war powers of the President). Both Hamilton and Madison placed emphasis on controlling the executive war power, but Madison also encouraged vesting the power in more than just the President. *Id.*

80. U.S. CONST. art. I, § 8, cl. 1, 11.

will not admit of delay.”⁸¹ To understand Article I, Section 10, one must interpret the phrase: “unless actually invaded, or in such imminent danger.” Indeed, the perception of threat is central to understand and structure the limits of the presidential power.

Since the Korean War, the reference in Article II, Section 2 to the President as the “Commander-in-Chief of the army and navy of the United States” has been interpreted to mean that the President may act with unbridled discretion in international affairs. The phrase has been expansively interpreted to mean that the President can wage war against another nation without consulting Congress. The framers clearly did not intend for this development.⁸² One unintended consequence of such an expansive interpretation is being played out today in Iraq and Afghanistan. As long as the question of where the shared authority

81. U.S. CONST. art. I, § 10, cl. 3.

82. See generally Louis Fisher, *Unchecked Presidential Wars*, 148 U. PA. L. REV. 1637–1672 (2000) (discussing the President’s warmaking powers); Adler, *The Constitution and Presidential Warmaking*, *supra* note 58, at 1–36 (discussing the President ordering military action). Consider further David Gray Adler’s commentary on the title and power given to the commander in chief:

As Francis D. Wormuth observed, “the office of commander in chief has never carried the power of war and peace, nor was it invented by the framers of the Constitution.” In fact, the office was introduced by King Charles I in 1639, when he named the Earl of Arundel commander in chief of an army to battle the Scots in the First Bishops War. In historical usage the title of commander in chief has been a generic term referring to the highest officer in a particular chain of command. In the English experience, the ranking commander in chief always was under the command of a political superior. This long practice was transplanted to American soil by the English and implemented during the Revolutionary War. The Continental Congress continued the usage of the title when on June 15, 1775, it unanimously decided to appoint George Washington as general. On June 17, his commission named him “General and Commander in Chief, of the Army of the United Colonies.” The instructions of the Congress drafted by John Adams, Richard Henry Lee, and Edward Rutledge kept President Washington on a short leash. He was ordered “punctually to observe and follow such orders and directions, from time to time, as [he] shall receive from this, or a future Congress of these United Colonies, or Committee of Congress.” Congress did not hesitate to instruct the commander in chief on military and policy matters.

The practice of entitling the office at the apex of the military hierarchy as commander in chief and of subordinating the office to a political superior, whether a King, parliament, or Congress, was thus firmly established for a century and a half and was thoroughly familiar to the framers when they met in Philadelphia. Perhaps this settled understanding and the consequent absence of concerns about the nature of the post accounts for the fact that there was no debate on the Commander in Chief Clause at the Convention. Any interest on the part of the delegates in reversing this familiar practice and vesting the President with a substantive power to initiate military hostilities surely would have been accompanied by some comment, some appeal, or some argument to that effect. The record, however, reveals no such interest

David Gray Adler, *Constitution, Foreign Affairs and Presidential War-making: A Response to Professor Powell*, 19 GA. ST. U. L. REV. 947, 981–82 (2003).

between the U.S. President and Congress lies remains unanswered, it continues to drain the financial, human, and emotional resources of the nation on account of unending wars. Therefore, we must no longer create a false need for presidential rulemaking and resolve any existing constitutional uncertainty surrounding the executive prerogative to engage in war.

The next Part begins with an explanation of why the presidential proclivity to make war has superseded Congress' power to declare war.⁸³ This discussion will illuminate why the post-World War II period created an ambience where the President regularly bends the meaning of constitutional principles by ignoring democratic values and shared responsibilities long ordained by the framers.

IV. JACKSON'S TWILIGHT ZONE AND ITS LASTING IMPACT ON THE SHARED POWER PARADIGM

Thus far, I have surveyed the war power theories of the founding period to seek traces of absolutism in executive discretion to unleash war.⁸⁴ I also examined the "constitutional space" shared by both the Congress and the President to find evidence of executive unilateralism in war-making. While it is clear from the foregoing analysis that the framers intended for the executive to share war power,⁸⁵ the constitutional support for this power is subject to interpretation with regard to the controlling areas of Congress and the President. The lack of delineation between these two areas, however, does not provide any opportunity to construe an affirmative grant for the President's war power. The contours of executive war power within the shared power framework must therefore be examined.

In Part II, I examined three war power theories to understand the limits of presidential power. In *Steel Seizure*,⁸⁶ Justice Robert Jackson

83. See *infra* Part IV (discussing the impact of the President's power to make war versus Congress' power to declare war).

84. See *supra* Part II (explaining the history of the war power through founding period writings).

85. See *supra* Part III (explaining the shared war powers of the legislative and executive branches).

86. *Youngstown Sheet & Tube Co. v. Sawyer (Steel Seizure)*, 343 U.S. 579, 634 (1952) (Jackson, J., concurring). In *Steel Seizure*, the Supreme Court limited the power of the President's ability to seize private property if (i) he does not have the specific authority under Article II or (ii) if it is not granted to him by Congress. *Id.* Understanding the background that led to the ruling in *Steel Seizure* is quite relevant. Under the direction of President Harry Truman the United States sent soldiers into South Korea with only a UN resolution and without approval from Congress. The President also imposed price controls in an effort to avoid inflation hikes and with the hopes of avoiding major labor strikes. Those efforts failed and the United Steel

also identified three theoretical constructs for the legitimate exercise of presidential power.⁸⁷ These three scenarios are different than the three war power theories I discussed earlier.⁸⁸ The *Steel Seizure* case⁸⁹ identified three distinct scenarios in which the President can operate within his constitutional mandate. First, the President may act pursuant to an express or implied authorization of Congress.⁹⁰ In this scenario, presidential authority is considered to be at its maximum point.⁹¹ Difficulties may arise when the President is thought to have the implied consent of Congress. How do we measure implied consent? Without explicit mandate or legislative guidance, how do we refine our understanding of implied consent? Despite some lack of clarity in the area of implied consent, acting pursuant to an express or implied authorization by Congress remains the most comfortable area for the presidency.⁹² As recent events have proven, it becomes difficult to work without a legislative mandate.

The second scenario that Justice Jackson illustrated in the *Steel Seizure* case occurs when the President can act independently of Congress based on the concurrent power spectrum enjoyed by both.⁹³ The enquiry in this context should center on determining whether the President can act without congressional grant of authority or with congressional denial of authority.⁹⁴ This could also be the shared space

Workers of America threatened strikes unless they received greater price increases than those promised by the government. The Truman administration, concerned about possible strikes which would hamper the defense contractors, decided to seize the steel production facilities. President Truman did not get approval from Congress before seizing control of the steel industry. This backdrop has become a bone of contention for many on the area of presidential power and the far-reaching impact it has on the population when a President acts as sole executive. See generally MAEVA MARCUS, TRUMAN AND THE STEEL SEIZURE CASE: THE LIMITS OF PRESIDENTIAL POWER (1977) (discussing presidential seizure).

87. *Steel Seizure*, 343 U.S. at 634. Justice Jackson created a dividing line between the authority of the President and that of Congress. In order of importance, Justice Jackson's three categories of legitimate authority are: (1) cases in which the President was defying congressional orders, (2) cases in which Congress had thus far been silent, and (3) those cases in which the President was acting with express or implied authority from Congress. *Id.* Justice Jackson ruled that the President's actions in *Steel Seizure* fell into the first category.

88. The three scenarios Justice Jackson identified and the three war power theories presented earlier are distinctive. While Justice Jackson presented three cases of fluctuations in the intensity of presidential power, the war power theories merely give us different geneses of the war power.

89. See generally MARCUS, *supra* note 86 (discussing presidential seizure).

90. *Steel Seizure*, 343 U.S. at 635 (Jackson, J., concurring).

91. *Id.*

92. *Id.* at 637. Under these circumstances, "the burden of persuasion would rest heavily upon any who might attack it." *Id.*

93. *Id.* at 637.

94. *Id.* This has been referred to as the "zone of twilight." *Id.*

in which both the President and Congress have joint authority.⁹⁵ It is not clear, however, whether concurrent authority can also be exercised independently.⁹⁶ Clearly, whenever the powers and responsibilities of the President and Congress are commingled, we see the need for further illumination.

Justice Jackson's third scenario is one in which the President's actions are incompatible with the expressed or implied will of Congress and, consequently, his authority is at its lowest point. This untenable situation occurs when the President acts unilaterally, exercising only his own discretion.⁹⁷ This could arise where Congress denies approval for certain measures the President deems appropriate, or where the President vetoes a congressional enactment. Under this construct, if a President engages in war without obtaining the necessary mandate from Congress, he is acting illegally, according to the Constitution. It can be argued that the power of the President along the constitutional curvature is very insignificant unless backed by Congress.

Therefore, we must understand how presidential power evolves in light of several factors within the constitutional landscape. These factors include what Justice Jackson termed "congressional inertia."⁹⁸ That is, presidential authority can rise and fall in accordance with what the Constitution mandates when there is congressional indifference. Based on events in recent years, the deliberate creation of a false sense of national emergency could be one of the factors that influenced Justice Jackson's "congressional inertia."⁹⁹

The current discourse on constitutional interpretation of overlapping powers between the Congress and the President lacks two important premises. First, overlapping distribution of war power could provide the President with some level of independent responsibility, and we

95. *Id.* at 635. Congress' failure to act, therefore, may "enable, if not invite, measures of independent presidential responsibility." *Id.*

96. *Id.*

97. *Id.*

98. In the *Steel Seizure* case Justice Jackson noted:

When the President acts in absence of either a congressional grant or denial of authority, he can rely upon his own independent powers, but there is a zone of twilight in which he and Congress may have concurrent authority, or in which its distribution is uncertain. 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.

Id. at 637.

99. *Id.*

must examine how he can use this responsibility to push the limits of the Constitution. Second, evolving world events and national interests could provide a newer interpretation and narrower textual meaning of executive power as a function of overlapping authority of Congress and the President.¹⁰⁰ What is the genesis of this overlapping authority? Let us return to Article I, Section 10 which states, “No state shall, without the consent of Congress . . . engage in war, unless actually invaded, or in such imminent danger as will not admit of delay.”¹⁰¹ This issue of imminent danger or the perception of threat is important in this discourse.

Two elements are necessary to understand the paradigm of imminent danger. The first is the President’s power to repel certain attacks, and the second is the threat of imminent attack.¹⁰² Some scholars argue that during the ratification process, the constitutional allocation of war power was meant to give the President enough power to repel certain attacks.¹⁰³ This power is based on a threat of imminent attack, which could bring in a false paradigm of fear. This scenario could arise where an administration keen on imposing war injects a false paradigm of fear to influence the collective consciousness of the nation. The citizens in this scenario perceive an imminent danger, which does not exist in reality. However, the manufactured fear provides the President with an opportunity to impose war within constitutional boundaries. Scenarios such as this highlight the possible dangers of an imperial Presidency. Thus, confusion about the President’s war-making power under the Constitution can arise when there is a pressing national crisis. A theory of a unitary executive is evidenced by the President’s emphasis on the urgency of war and feverish attempt to unsettle established legal principles. The result is a “unitary consciousness of law,” which may shape the limits of presidential power. Can this unitary consciousness

100. See *supra* note 56 (discussing David Gray Adler’s article, *Presidential Greatness as an Attribute of Warmaking*, explaining the correlation between a presidency and seeking glory in war while in that occupation, as well as the framers’ fear of this issue).

101. U.S. CONST. art. I, § 10, cl. 3.

102. See *supra* note 19 (discussing the limits of the presidential war power based on the various levels of imminent danger to the nation).

103. While expanding on the concept of how the framers intended to incorporate the presidential authority to repel sudden attacks, Louis Fisher commented:

There was little doubt about the limited scope of the President’s war power. The duty to repel sudden attacks represents an emergency measure that permits the President to take actions necessary to resist sudden attacks either against the mainland of the United States or against American troops abroad.

FISHER, *supra* note 58, at 8–9.

of law¹⁰⁴ explain the heightened responsibility of the President and the inertia of Congress in acting as a check on his actions? Unitary consciousness of law is premised on a temporary departure from proximate fidelity to the Constitution. Its intensity is measured by observing presidential lack of commitment to the Constitution. In this context, the imminent danger paradigm is influenced by the gap between Article I and Article II's expansive reach on the meaning of shared power. This gap can be closed by fully evaluating the will of the people, the will that has not been adulterated by the implantation of a false sense of urgency.

It is through this prism of false consciousness¹⁰⁵ that we must engage in the current debate. This is relevant because the United States has never before been vilified and ridiculed in the eyes of the world.¹⁰⁶ Never before has the United States been thrown into the vortex of war that has no end in sight.¹⁰⁷ Never before has humanity seen a war with no limits in the horizon, without any definition within the existing political discourse,¹⁰⁸ all because of the unbridled usurpation of executive power. Can we, therefore, find the rationale for this executive excess within the legal constructs developed in Justice Jackson's *Steel Seizure* opinion?

Problems arise when the issue of presidential power to execute war under the premise of imminent threat becomes commingled with an expanding concept of protecting U.S. interests. This is an uncharted area of legal scholarship. The question I am most interested in addressing is how to clarify this constitutional defect. It is the imminent threat element or the perception of threat that sits in the twilight zone of the concept of shared power.

Earlier we sought guidance from the historical development of the constitutional boundaries of presidential power. Now we examine one of the guiding precedents in constitutional jurisprudence. Nowhere does the Constitution affirm that the President can obliterate all existing laws on the basis of some purported external threat. The reason for this

104. By unitary consciousness of law, I allude to the flawed perception of law that permeates both the citizenry and the legal community. This false perception emerged as a consequence of the post-9/11 fear psychosis and is premised on the imminent danger paradigm I discussed earlier. See Ghoshray, *supra* note 7 (analyzing false perception in detail).

105. See generally Ghoshray, *supra* note 34 (discussing how false consciousness impacts the imminent danger doctrine).

106. See Ghoshray, *supra* note 7 (discussing the illegitimacy of the concept of a unitary executive and the implications of the Bush Administration's use of it after 9/11).

107. See *id.*

108. See *id.*

is very clear. If the President is granted absolute power by the Constitution, then the President is in a position to impose his monarchical aspiration on the nation. The President could also create false needs of war and impose war on the nation. These are precisely the scenarios the framers hoped to avoid. This is echoed in *Federalist No. 23*, where Alexander Hamilton provided further clarity regarding the need for restricting presidential war powers within strict constitutional boundaries:

The authorities essential to the common defence [sic] are these: to raise armies, to build and equip fleets: to prescribe rules for the government of both: to direct their operations: to provide for their support. These powers ought to exist without limitation The circumstances that endanger the safety of nation are infinite, and for this reason no constitutional shackles can wisely be imposed on the power to which the care of it is committed.¹⁰⁹

How does this impact our understanding of imminent danger? Earlier I established the relationship between imminent danger and the President's war power. The President is obligated by the Constitution to act unilaterally against any imminent danger. This is an area that requires further exploration because under certain circumstances, such as to preserve the nation's security, the President might be allowed to exercise unlimited war power. Therefore, we must bear in mind that the rationale for the invocation of imminent danger must be based on a full disclosure of all the available facts. The President should not be allowed to create a false sense of danger under any circumstances and should not be allowed to manipulate the collective will of the nation. Constitutional checks and balances on the President in this context still remain within the legislative power that Congress must exert in that situation. The imminent danger paradigm, therefore, does not provide the President with a sufficient basis to exert absolute executive war power. The war-making power of the President must be interpreted for transparency. However, this transparency will not come either by looking through the prism of distraction, nor via the threat of imminent

109. THE FEDERALIST NO. 23 (Alexander Hamilton)

danger, both of which are shaped by the bounded rationality¹¹⁰ of false consciousness.¹¹¹

V. EXAMINING THE CONSTITUTIONAL QUANDARY OF THE SHARED POWER PARADIGM

The position articulated above established the framers' intent to develop a set of checks and balances. However, this understanding must emerge organically from a cogent theory of nation building and executive responsibility. Delving into the archives of the founding period, we find traces of executive authority bestowed upon the President which sharply contradict our stated position so far. This confusion comes from the shared power framework whereby the war-making power of the President is bundled with the power of Congress.

Clearly, based on this Hamiltonian doctrine, presidential power consists of enumerated powers, emanating from the framers' explicit recognition of the need for presidential efficiency in emergencies. However, regardless of exigency, the invocation of an unbridled grant of presidential power does not bode very well for the theory of checks and balances so frequently cited. It also sharply contrasts with the Madisonian doctrine premised on Congress' controlling power to shackle presidential excess.¹¹² The disparity between enumerated power and enumerated objects may explain this.

The distinction between enumerated power and enumerated objects is revealed in the constitutional grant given to Congress. It comes from the difference between the ability to develop legislation and the power to implement it. Congressional power is revealed in its ability to emerge, not exert, because Congress can legislate, not usurp power. In my view, the powers of Congress are not enumerated powers,¹¹³ but are

110. By bounded rationality I refer to the limitation and weakness of rational discourse shaped by the all pervasive fear of outside threats. Thus, irrational fear causes an otherwise rational mind to inculcate a false framework of analysis that does not take into consideration all possible rational discourses. Therefore, bounded rationality restricts an individual from engaging in a rational discourse needed for decision making on grave matters of international law and foreign relations.

111. False consciousness, for introductory purposes, could be seen as a distorted version of collective consciousness that takes root among a larger collection of humanity, as a result of a multitude of factors. I have examined this concept in detail elsewhere. See Ghoshray, *supra* note 34 (discussing how false consciousness impacts the imminent danger doctrine).

112. See Mayer, *supra* note 16 (discussing the Bush Administration's use of power versus the intent of the founders).

113. I define enumerated power as a more inherent and static power as compared to derived power, such that the enumerated power which automatically befalls upon the exponents of

rather enumerated objects.¹¹⁴ This means there is a difference between enumerated power and enumerated object, power that already resides and that does not need to be created. It seems that Congress' checks and balances are based on powers that must be created and are not inherently ascribed or bestowed upon it. In current events, Congress' power is a function of various factors that the framers of the Constitution could have anticipated.

As I examine the asymmetric nature of the power balance between the President and Congress, I draw attention to the non-enumerated¹¹⁵ nature of Congress' power. The myth looms that the Constitution provides enough checks and balances on presidential action through Congress, specifically Congress' power of the purse.¹¹⁶ Congress can thus reign in an imperialistic President.¹¹⁷ However, Congress' power is largely organic, something that must be cultivated. When the framers of the Constitution promulgated three branches of the government, the President, the Legislature, and the Judiciary, they did not envision the power of the corporation. Corporations in America today have assumed a gigantic, mammoth proportion with the power to persuade people and establish a unitary consciousness of law. As we have seen in the recent days, in spite of popular sentiment against a grossly unpopular war, Congress has measurably failed to implement its checks and balances enshrined in the Constitution. Why is this so?

When the framers of the Constitution articulated the distribution of power across the various branches, and when the framers provided for checks and balances by commingling power in various portions amongst the presidency, the legislature, and the judiciary, perhaps they did not anticipate the external influences that shape today's legislatures. In a utopian scenario, an empowered Congress would be in a position to put the shackles on an unbridled presidency. But, in a modern political landscape, congressional delegates are simply the product of the media, corporate entities, and vested interest groups, and to some extent are influenced by a public that could be easily manipulated. Since the time

Constitution. Although the contours of enumerated power could change as a result of evolving factors, its basic premise remains the same.

114. Enumerated objects can be understood as the enactment of legislation, the procedural discourse that the Congress could mandate, which is different than actually acting on that mandate.

115. Non-enumerated powers are implicit guarantees that do not follow the contours of constitutional guarantees, rather they emerge as a derivative of some affirmative grants of authority in the Constitution.

116. U.S. CONST. art. I, § 8 (granting to Congress numerous powers related to the control of the nation's money).

117. *See supra* note 56 (discussing congressional control of President's war power).

of the framing of the Constitution, the corporate bastions have accumulated power by supporting various political entities, receiving reciprocated favors thereby consolidating their power base. As a result, Congress no longer acts in an independent, transparent manner, so that the broader and unadulterated interest of the nation becomes the sole objective of the Congress. Therefore, I would submit that an overtly manipulated and biased legislature is inconsistent with the framers' vision of a legislature that will check executive excesses. This lends further credence to my hypothesis that the two hundred year history of the American Constitution is nothing but a developing unitary executive theory. The basic tenets on which the U.S. Constitution was framed and the tenet to shy away from a monarchy are indeed coming full circle because of political pressures, and a confluence of events that is unfolding. Why are corporations so influential in shaping Congress' power? This is because the modern day legislative process is based on the ability of the would-be legislature to sway the public in subscribing to certain political beliefs. It is also because of the power of the media, which is controlled by corporate conglomerates and is therefore part of a political process whereby the corporate will is transplanted into the minds of the public. The public in turn chooses its legislature, which makes its decision based on its calculated political future. This calculation does not take into account the constitutional framework, the anticipated benchmark the framers intended for Congress and as a result we see a total failure of the Congress to put the checks and balances, and a continuing trajectory of developing a unitary executive.

Let us next focus on the element of imminent threat, which is at the intersection of the powers of the presidency and the legislature. I would argue that this very element is the bridge between Article I and Article II of the Constitution. The factors that shape this imminent threat and the factors that influence our perception of the threat are important in structuring and limiting constitutional interpretations of the President's power.

With an understanding of an asymmetric power structure¹¹⁸ between Congress and the President, we are now more empowered to recognize the full extent of presidential power. It is a power based on the imminent threat doctrine.¹¹⁹ An imminent threat has historically been

118. By asymmetric power structure, I draw attention to the differential mechanism by which the executive branch and Congress can exert their power in certain areas of national security and foreign relations. The asymmetry comes from an ability to extract a clear mandate from the constitutional text while attempting to delineate the shared power that exists between Congress and the President.

119. *See supra* note 18 (discussing the founders' intent for presidential war powers).

defined as a circumstance that would allow a President to declare the state of war.¹²⁰ This perception of threat is not only shaped by a multitude of functions but also is magnified by isolationism and exceptionalism, the two ingredients that have influenced American foreign policy for the last century.

Imperialistic presidency is not new, but by using the role of Commander-in-Chief, a term not defined in the Constitution, the President has invoked inherent power and the presidency has evolved into a form the framers did not contemplate. That is why the perception of the people is important here. Within a framework of false consciousness, people identify imminent danger, which shapes the political process whereby the President utilizes the constitutional power vested in him, Congress remains inert, and the country slogs on tolerating the unabridged and unbridled usurpation of executive excess. How, then, can one determine this imminent threat? Perhaps a better framework could be to identify the factors that are used in the presidential manipulation of the perception of fear. The President's power to act where there is imminent danger is the link between the powers vested in Congress under Article I and the powers vested in the President in Article II. It defines the overlapping jurisdiction between the President and Congress as explained by Justice Jackson in the *Steel Seizure* case. Thus, the concept of a unitary executive is bolstered by the imminent threat doctrine. Although the constitutional text clearly states that the President cannot declare a war unless invaded or clear and present danger is imminent, Presidents have historically manipulated the mindset of the people to create a scenario where the public felt the specter of imminent danger.

The scenario above explains why the multiple factors not only magnify the perception of threat but also make imminent danger seem more imminent in the mind of the American people. This implantation of false consciousness to establish a unitary consciousness of law, defined by an imperial presidency that perpetuates an emergency situation and a sense of vulnerability, is cultivated to establish a strong form of executive power. Therefore, by imposing false beliefs in a methodical and scientific manner, the political process injects dread and fear in the minds of citizens. This cultivates dependence on executive action, moving away from the basic tenets of a democratic process.

120. The focus of Part V is to articulate how the imminent danger paradigm can be manipulated and shaped for the personal glory and monarchical aspirations of the President. I urge in this Article an understanding of the dangerous implications of applying the imminent danger doctrine rather loosely.

This helps form an administrative framework where abrogation of civil liberties is justified as necessary. Once the public accepts the abrogation of liberty, the twenty-four-hour media corroborates it and propagates the presidential will, again bypassing constitutional safeguards.

VI. CONCLUSION

Absolute 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.

—John Jay, *The Federalist No. 4*¹²¹

Recognizing the calamitous impact of presidential hubris on a nation, the framers of the Constitution put in place various checks and balances against untrammelled presidential power. The presidency of George W. Bush has brought us face-to-face with a unitary executive. What constitutional remedies are at the nation's disposal when executive excess threatens to shake its very foundation? My goal in this Article has been to search for an answer within the Constitution.

I have shown that, despite scholarship supporting a broadening of presidential war power, the remedy against an imperial presidency still remains within a broader framework of shared war power. More specifically, constitutionally mandated congressional oversight is the most effective bulwark against presidential excesses in matters of war. This oversight must go far beyond controlling the disbursement of funds for military intervention by clearly providing for legislative enactment to declare war, even the newer variety of war on terror in the post 9/11 era. The concept of imminent danger, however, remains an opening in the Constitution's affirmative grant of power to the President that a shrewd executive might utilize in an attempt to impose war on a nation, as has President Bush. It is, therefore, the solemn responsibility of a vigilant Congress to overcome its inertia and curb presidential excesses.

I have no doubt that Presidents will aspire to act upon their human ambitions. Unitary executives will attempt to unleash the governmental machinery to shape the nation's consciousness. However, the salvation of the nation can still be attained by maintaining proximate fidelity to

121. THE FEDERALIST NO. 4 (John Jay).

the Constitution. If the history of the founding period has any historical relevance, there must not be any confusion about the wisdom of the framers. Therefore, Jeffersonian chains of the Constitution still remain strong to bind presidential mischief, the way the framers envisioned.

These constitutional chains do not prevent a President from being a prudent executive, one emboldened by decision, activity, secrecy and dispatch, as Alexander Hamilton envisioned in *Federalist No. 70*. However, his decision must not be infected by vengeance, as seen by President Bush's unleashing of war on Iraq. His activity must not revolve around abrogation of liberties, such as surveillance and wiretapping of citizens. His secrecy must not interfere with fundamental rights, for example, by way of indefinite civilian detention. And, finally, his dispatch must not involve a false notion of imminent danger, such as what occurred with alleged weapons of mass destruction. After all, the executive is a President, not an absolute monarch. He or she must share war power with Congress, a Congress that is not stymied by the inertia of the political process and that is faithful to the ideals of the framers of the Constitution.