

# **Institutional Powers of Congress\***

Bruce Fein and Louis Fisher

A Series of Seminars Presented to Legislative  
Staff during the Fall of 2014

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# Institutional Powers of Congress

Bruce Fein and Louis Fisher<sup>1</sup>

The purpose of these seminars for legislative staff is to cover basic powers and duties of Congress needed to carry out the checks and balances that are fundamental to constitutional principles, preservation of liberty, and the system of self-government. Without a strong and independent Congress we could not speak of democracy in America. Our political system would operate with two elected officers in the executive branch and no elected officers in the judiciary. It would be a government best described as elitist with little connection to the public.

We begin with an overview of the Framers' intent in establishing a government of separated powers, the general equilibrium that existed from 1789 to World War II, and the departure from that model beginning in 1950 when Harry Truman became the first President to take the country to war without receiving either a declaration or authorization from Congress. In these seminars, we discuss such topics as war powers, power of the purse, executive privilege, legislative oversight, and the judicial role, giving specific examples of how Congress can effectively protect both its institution and the Constitution. But first we need to explain basic points about the allocation of constitutional power and how developments from 1950 to the present have moved the country toward greater presidential control, abuse, and illegality, eerily reminiscent of the broad power of monarchs the Framers rejected.

## I. Evaluating the Three Branches

In discussing legislative power, it is good to keep in mind that entirely different methods are used to evaluate the three branches. Congress is criticized more than the other branches because it works largely in public. Contentious disputes within it, in committee and during floor action, remain on full display. That is natural, healthy, and inevitable for a deliberative body. White House and executive agency activities are more secretive. Moreover, scholars have a long tradition of describing the President in highly reverential and idealistic terms as someone devoted to the "national interest," surrounded by experts who regularly provide reliable evidence and analysis.

Beginning in the 1950s, such scholars as Clinton Rossiter, Richard Neustadt, James McGregor Burns, and Arthur Schlesinger championed inflated and entirely unrealistic

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expectations about presidential power and demonstrated no interest in constitutional or legal limitations. Louis Fisher, “Teaching the Presidency: Idealizing a Constitutional Office,” PS: Political Science and Politics, January 2012; <http://www.loufisher.org/docs/ci/teach.pdf>. The executive branch has a well-established pattern of operating with faulty facts, mistaken judgments, and making misleading statements to Congress and the public. Why is this pattern tolerated? Much of the problem in preserving self-government is this: “Human nature inclines more toward kings and despots than toward democrats and checks and balances.” Bruce Fein, *Constitutional Peril: The Life and Death Struggle for our Constitution and Democracy* xi (2008). There is a need to analyze this pattern and appreciate the costs to constitutional government of depending so heavily on presidential power.

Regarding the Supreme Court, scholars similarly describe it in lofty and unrealistic terms, such as having the final word on the meaning of the Constitution and serving as the trusted guardian of individual and minority rights. The record is quite clear that Congress has protected those rights over the last two centuries much better than the courts. We will cover those examples in Section III, including giving blacks equal accommodation to public facilities, protecting the right of women to practice law, regulating child labor, and safeguarding religious liberty in the military. As for judicial finality, Chief Justice Rehnquist put the matter crisply in *Herrera v. Collins*, 506 U.S. 390, 415 (1993): “It is an unalterable fact that our judicial system, like the human beings who administer it, is fallible.”

The open process within Congress makes for better decisions because of public input and scrutiny from private citizens and experts, giving all sides an opportunity to make their case. The availability of committee inquiries permits access to valuable resources, as with the work of the Ervin Committee on Watergate. Executive secrecy has bred costly policies, including the Bay of Pigs fiasco, the 1953 CIA overthrow of Mossadegh in Iran, the Vietnam War, Watergate under President Nixon, Iran-Contra during the Reagan administration, the Iraq war beginning in 2003, and NSA surveillance. Justice Brandeis regarded sunshine to be the best of disinfectants. Policy-making in Congress can be rancorous and frustrating, but that process is superior to executive insularity and deceit.

## **II. Allocation of Constitutional Authority**

On frequent occasions the Supreme Court will state, as it did in *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 404 (1819): “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.” Similarly, the Court in *United States v. Lopez*, 514 U.S. 549, 552 (1995) declared: “We start with first principles. The Constitution creates a Federal Government of enumerated powers.” That is not a first principle. If it were, the Court would not have the power of judicial review, the President could not remove department heads, and Congress could not issue subpoenas. Those powers are not enumerated. In *Boerne v. Flores*, 521 U.S. 507, 516 (1997), the Court again stated: “Under our Constitution, the Federal Government is one of enumerated powers.” In upholding the Affordable Care Act in *National Federation of Independent Business v. Sebelius*, 567 U.S. \_\_\_, \_\_\_ (2012), Chief

Justice John Roberts made this claim: “If no enumerated power authorizes Congress to pass a certain law, that Law may not be enacted . . . .”

Congressional power has never been defined or restricted in that manner. Some powers are enumerated, but the government is more than that. All three branches have a number of implied powers, provided they are reasonably drawn from enumerated powers. For example, Congress has the express power to legislate. To do that in an informed manner, it needs the implied power to investigate. To carry out that function, it has the implied power to issue subpoenas and to hold in contempt those who refuse to appear at a hearing or provide requested documents.

The President also has a range of implied powers. Beginning in 1789, Congress recognized that if department heads fail to discharge statutory duties, the President has an implied authority to remove them in order to fulfill his express duty under Article II of the Constitution to see that the laws are faithfully carried out. However, during debate in 1789 on the Treasury Department, Congress decided that certain types of officials within an executive department, such as the Comptroller, do not serve at the pleasure of the President. Their duty is to the law, not to the President.

In recent decades, scholars have developed a theory that promotes presidential control over the entire executive branch. They assert that all executive departments and agencies operate solely in accordance with the President’s wishes. Steven G. Calabresi and Christopher S. Yoo, *The Unitary Executive* (2008). The President has never exercised exclusive control over all employees who work in the executive branch, as is evident with the 1789 debate over the Comptroller in the Treasury Department.

Beginning in 1823, Attorneys General regularly advised Presidents that they may not interfere with the decisions of certain executive officers, such as Auditors and Comptrollers who handle the settlement of public accounts. Any presidential effort to control those individuals, Attorneys General said, would be “illegal.” Presidents have no authority to involve themselves in the settlement of accounts or agency decisions regarding veterans and social security benefits. Independent agencies and commissions operate at some distance from presidential control. Arguments for a “Unitary Executive” can lead to claims of presidential powers that are not subject to legislative and judicial checks. Louis Fisher, “The Unitary Executive and Inherent Presidential Power,” 12 U. Pa. J. Const. L. 569 (2010); <http://loufisher.org/docs/pip/unitaryexecutive2010.pdf>

Statutory policy binds not only agencies but also the President. In *National Treasury Employees Union v. Nixon*, 492 F.2d 587 (D.C. Cir. 1974), the D.C. Circuit held that President Nixon had violated the law by refusing to carry out a statute on federal pay. It was his obligation to either forward to Congress a pay plan recommended by the salary commission or offer an alternative proposal. Nixon had done neither. He was required, said the court, to do one or the other. There was no constitutional authority to ignore the law. When Nixon refused to spend appropriated funds (the impoundment controversy), he lost in the courts and in Congress. That issue is discussed in Section VII on “The Spending Power.”

Although Presidents have access to a number of enumerated and implied powers, it has also been argued that they possess “inherent” powers. Scholars often treat implied and inherent as equivalent. They are fundamentally different. Implied powers must be drawn reasonably from express powers. Inherent powers, by definition, are not drawn from express powers. As the word suggests, those powers “inhere” in a person or an office. They are powers beyond those expressly granted in the Constitution or reasonably implied. The Constitution is protected when Presidents act under express and implied powers. It is in danger when they claim inherent powers that are not subject to limits imposed by statutes, treaties, judicial review, or the system of checks and balances. Louis Fisher, *The Law of the Executive Branch: Presidential Power* 68-73 (2014). John Yoo, during his service with the Justice Department in the George W. Bush administration, advocated inherent presidential power. His legal memos, often prepared in secret, were discredited once they became public. The Justice Department, after reviewing the memos, found it necessary to remove them and issue legal analysis consistent with constitutional principles. Jack Goldsmith, *The Terror Presidency: Law and Judgment Inside the Bush Administration* 97-98, 141-65 (2007).

On four occasions, Presidents have invoked “inherent” powers. In each case they were rebuffed by Congress, the courts, or both: Truman deciding to seize steel mills in 1952 to prosecute the war in Korea, Nixon impounding appropriated funds, Nixon conducting warrantless domestic surveillance, and Bush II after the 9/11 terrorist attacks creating military tribunals without first obtaining authority from Congress. Those four actions will be discussed in subsequent sessions.

### **III. Protecting Individual and Minority Rights**

In 1937, when President Franklin D. Roosevelt attempted to increase the size of the Supreme Court to gain control over its decisions, the Senate Judiciary Committee vigorously repudiated his court-packing plan. In doing so, it praised the Court as an essential guardian of individual and minority rights: “Minority political groups, no less than religious and racial groups, have never failed, when forced to appeal to the Supreme Court of the United States, to find in its opinions the reassurance and protection of their constitutional rights.” S. Rept. No. 711, 75th Cong., 1st Sess. 20 (1937).

The historical record tells quite a different story. Minority political groups repeatedly failed when turning to the courts for protection. At the time of Roosevelt’s initiative, Henry W. Edgerton (later a federal judge) had been studying Supreme Court opinions from 1789 to the 1930s. His research found little support for the judiciary acting as caretaker of individual rights. Instead, federal courts regularly sided with the interests of government and corporations. Henry W. Edgerton, “The Incidence of Judicial Control over Congress,” 22 *Corn. L. Q.* 299 (1937).

In 1875, Congress passed legislation to provide freed blacks equal access to such public accommodations as inns, theaters, and public transportation. In *The Civil Rights Cases*, 109 U.S. 3 (1883), the Supreme Court struck down this statute as a federal encroachment on the states and an interference with private relationships. What could have been accomplished in

1875 had to await the Civil Rights Act of 1964 and its section on public accommodations. The bill passed with top-heavy majorities of 289-126 in the House and 73-27 in the Senate. Private groups lobbied for the bill, creating a political base that helped educate citizens and build public support. The rights of blacks were finally secured through this legislative process. In two unanimous decisions in *Heart of Atlantic Motel v. United States*, 379 U.S. 241 (1964) and *Katzenbach v. McClung*, 379 U.S. 294 (1964), the Supreme Court upheld the public accommodations title. The active, reliable judgment in protecting the constitutional rights of minorities came from the elected branches, finally overcoming judicial obstruction.

Congress also proved to be the better guardian of the rights of women who wanted to practice law. That issue reached the Supreme Court in *Bradwell v. State*, 83 U.S. (16 Wall.) 130 (1873), with the Justices deciding that no such constitutional right existed. In a concurrence, Justice Joseph P. Bradley remarked on the “natural and proper timidity and delicacy” of women that made them “unfit” for many occupations, including the field of law. A “divine ordinance” commanded that a woman’s primary mission in life is to the home. While some women did not marry, a general rule imposed upon females the “paramount destiny and mission” to fulfill the roles of wife and mother. “This is the law of the Creator.”

That attitude, drawing upon William Blackstone’s doctrine of “coverture” (placing women under the cover and wing of man) flourished in the courts. It held no such sway in Congress, even though at that time all lawmakers were male. Belva Lockwood, responding to a Supreme Court rule that prohibited women from practicing there, went to Congress for legislative support. She drafted language and worked closely with lawmakers to overturn the rule. Her bill provided that when any woman had been admitted to the bar of the highest court of a state, or of the supreme court of the District of Columbia, and was otherwise qualified as set forth in the bill (three years of practice and a person of good moral character, as with male attorneys), she may be admitted to practice before the U.S. Supreme Court. Her bill became law within one year. 20 Stat. 292 (1879).

Congress was determined to protect the rights of children subject to harsh and unhealthy working conditions. Its legislative efforts were repeatedly struck down by the Supreme Court. At first it passed legislation in 1916 under the Commerce Clause. No producer, manufacturer, or dealer could ship or deliver for shipment in interstate or foreign commerce any article produced by children under specified age ranges: under the age of 16 for products from a mine or quarry, or under the age of 14 from any mill, cannery, workshop, factory, or manufacturing establishment. 39 Stat. 675, sec. 1 (1916). Two years later, divided 5 to 4, the Court struck down the statute as exceeding congressional powers under the Constitution. *Hammer v. Dagenhart*, 247 U.S. 252 (1918). The Court decided that the steps of “production” and “manufacture” of goods were local in origin and therefore not part of commerce among the states subject to regulation by Congress.

Not taking that as the final word, Congress passed legislation to regulate child labor under the taxing power. A federal excise tax would be levied on the net profit of persons employing child labor within prohibited ages. 40 Stat. 1138 (1919). This time the Court struck down the law by a majority of 8 to 1. *Child Labor Tax Case (Bailey v. Drexel Furniture Co.)*, 259 U.S. 20 (1922). Congress then passed a constitutional amendment in

1924 to give it the power to regulate child labor. By 1937, only 28 of the necessary 36 states had ratified it. Beginning in 1937, conservative Justices began to retire, giving President Roosevelt his first opportunity to name members to the Court. With the Court's composition beginning to change, Congress passed legislation in 1938 to regulate child labor, relying on the same power the Court had invalidated earlier: the Commerce Clause.

In 1941, a thoroughly reconstituted (and chastened) Court not only upheld the new statute, but did so *unanimously*. Moreover, it proceeded to apologize for the Court's effort in 1918 to define the production and manufacture of goods as local in origin and therefore beyond the capacity of Congress to regulate. That legal analysis "was novel when made and unsupported by any provision of the Constitution." *United States v. Darby*, 312 U.S. 100, 115 (1941). Quite an indictment of judicial error: a decision lacking any constitutional support.

For a recent example of Congress protecting religious liberty in the face of a contrary Supreme Court decision, in 1986 a 5-4 decision upheld an Air Force regulation that prohibited Captain Simcha Goldman, an observant Jew in the military, from wearing his yarmulke indoors while on duty. *Goldman v. Weinberger*, 475 U.S. 503 (1986). One year later, Congress passed legislation telling the military to rewrite the regulation to permit members of the military to wear religious apparel unless it interferes with military duties. 101 Stat. 1086-87, sec. 508 (1987). The Supreme Court had balanced Goldman's religious liberty against Air Force needs and came down on the side of the military. Congress, engaging in the same kind of balancing exercise, protected Goldman and religious liberty. How could Congress prevail over the Court in interpreting constitutional rights? Article I, Section 8 of the Constitution grants this express power to Congress: "To make Rules for the Government and Regulation of the land and naval Forces."

#### **IV. The Constitution's War Powers**

Today it is frequently argued that the President as Commander in Chief may commit U.S. forces abroad without coming to Congress for authority. It continues to be believed that in order to be a great President one must be a war President. To pursue that goal, there is a temptation for Presidents and their advisers to dissemble and distort. Presidents are surrounded by aides who focus more on "mandates" from a winning campaign than on constitutional and legal constraints. The record is quite sobering. Contemporary Presidents (Truman, Johnson, Bush II) have been severely rebuked for failed military commitments in Korea, Vietnam, and Iraq. President Obama, who pledged to act more cautiously with U.S. troops, took the nation to war in Libya in 2011 without ever seeking congressional authority. As explained below, he subsequently admitted it was a mistake to remove Colonel Qaddafi without ensuring that the government following him could function in an effective manner. The current chaos in Libya, spilling into surrounding territories, came at great cost.

The Framers rejected the model of executive supremacy in matters of war because of the damage it would inflict on the nation and its people. Although John Jay's expertise lay strongly in foreign affairs, in Federalist No. 4 he counseled: "It is too true, however

disgraceful it may be to human nature, that nations in general will make war whenever they have a prospect of getting any thing by it; nay, 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.” For that reason, the decision to take the country from a state of peace to a state of war was vested exclusively in Congress as the representative body of the people.

It may be tempting to dismiss the Framers’ view of war as hopelessly rooted in antiquated 18th century values instead of those needed for the 20th and 21st centuries. However, Jay spoke of basic *human nature*. Has human nature changed fundamentally over the last two centuries to justify shifting the war power from Congress to the President? The record over that period underscores the strengths and merits of Jay’s position. There has been a steady pattern of Presidents promoting wars based on lies, deception, and ignorance, at great cost to the nation politically, economically, and constitutionally.

In 2005, the Constitution Project formed a bipartisan committee of experts to study how the United States can constitutionally and prudently decide how to use military force abroad. They recognized that the President as Commander in Chief has the power to repel sudden attacks against the United States and its armed forces, but concluded that Congress “must perform its constitutional duty to reach a deliberate and transparent collective judgment about initiating the use of force abroad” except for a limited range of defensive purposes. To satisfy that constitutional principle, the President “must seek advance authorization from Congress.” Moreover, Congress “should not and cannot delegate the use-of-force decision” to an international or regional body, such as the UN Security Council or NATO allies. Authorization “by a treaty organization, international body, or international law is not a constitutional substitute for authorization from Congress.” The Constitution Project, *Deciding to Use Force Abroad: War Powers in a System of Checks and Balances* (2005); [http://www.constitutionproject.org/pdf/War\\_Powers\\_Deciding\\_To\\_Use\\_Force\\_Abroad1.pdf](http://www.constitutionproject.org/pdf/War_Powers_Deciding_To_Use_Force_Abroad1.pdf)

## V. Presidents Initiating War with False Statements

A House subcommittee in 2009 held a hearing on legislation to apply criminal penalties to Presidents and executive officials who mislead Congress and the American people on the need to go to war because of asserted actions by another country. The record from 1789 to the present justifies the Framers’ decision to place the power to initiate war in Congress and the deliberative process, not in legislative, judicial, and public deference to executive claims. Louis Fisher, “When Wars Begin: Misleading Statements by Presidents,” 40 *Pres. Stud. Q.* 171 (2010); <http://www.loufisher.org/docs/wi/432.pdf>.

**Mexican War.** Consider the decision by President James Polk to take military action against Mexico in 1846, a war that Amy S. Greenberg in her book *A Wicked War* (2012) called “the first started with a presidential lie.” After hostilities began between U.S. and Mexican forces, Polk in a public address said that Mexico had passed the boundary of the United States and “invaded our territory and shed American blood upon the American soil.” In fact, the



fighting occurred in disputed territory with no one, including Polk, knowing the precise boundary between Mexico and the United States. The House of Representatives censured Polk in 1848 on the ground that the war had been “unnecessarily and unconstitutionally begun by the President of the United States.” One of the members voting for the resolution, which passed 85 to 81, was Abraham Lincoln.

**Civil War Measures.** It is sometimes charged that Lincoln was hypocritical to rebuke Polk while invoking even broader powers after the Confederates fired on Fort Sumter in April 1861. Yet Polk acted against a foreign country; Lincoln coped with a civil war. Polk wanted to extend American territory; Lincoln sought to preserve the existing Union. For both, war was a matter of choice. Polk concluded he could not acquire the territory he wanted by negotiating with Mexico so he chose war. Lincoln decided to resupply Fort Sumter to prevent it from falling in the hands of the Confederacy. He did not want war in the same way as Polk, but he decided that allowing states to secede meant destruction of the Union.

Unlike Polk, Lincoln respected republican government and congressional authority. On July 4, 1861, in a message to Congress, he publicly conceded that many of his emergency actions exceeded his Article II powers and therefore he needed Congress to make legal what was illegal. He believed “that nothing has been done beyond the constitutional competency of Congress,” thereby admitting he had exercised not only his Article II powers but also those of Congress under Article I. For that reason he needed retroactive authority from Congress, which he received (12 Stat. 326).

**Spanish-American War.** On February 15, 1898, the American Battleship *Maine* exploded while sitting in the Havana harbor. The blast killed two officers and 250 enlisted men. Fourteen of the injured later died, bringing the death toll to 266. A naval court of inquiry concluded that the destruction had been caused “only by the explosion of a mine situated under the bottom of the ship,” without fixing responsibility on who placed the mine there. Many newspapers, citizens, and members of Congress quickly assumed that Spain or its agents were to blame. On April 25, Congress passed legislation announcing that “war exists” between United States and Spain as of April 21 (30 Stat. 364).

The naval board failed to acknowledge that other ships had experienced spontaneous combustion of coal in bunkers. The board did not rely on many technically qualified experts who doubted that an external mine caused the explosion. They suspected that coal, stored next to magazines containing ammunition, gun shells, and gunpowder, had overheated by spontaneous combustion and detonated the adjacent magazine. The *Maine* carried bituminous coal, which was more subject to spontaneous combustion than anthracite coal. Fresh surfaces of newly broken coal oxidize as part of a chemical reaction that produces heat. If not dissipated, the heat accelerates the reaction. A higher moisture content in the coal will increase the tendency to heat up. The tropical climate in Cuba ensured that the coal was moist. Subsequent studies have cast doubt on the report issued by the naval board in 1898, pointing out that the likely reason for the explosion was internal rather than from an external mine. Fisher, “When Wars Begin,” at 175-77.

**World War I.** An event that helped bring the United States into the war in Europe was the sinking of the ocean liner *Lusitania* by a German U-boat on May 7, 1915. President Woodrow Wilson denied that the ship carried military equipment. His statement was false. The ship carried munitions and weaponry to be used against German forces. Germany charged that the United States had violated its publicly stated position of neutrality by shipping arms to assist allies. Wilson's fabrication is among a long list of executive deceptions intended to mislead Congress and the public. Bruce Fein, *American Empire Before the Fall* 90-91 (2010).

**The "Sole-Organ" Doctrine.** Presidential power often exceeds constitutional bounds because of errors and misconceptions promoted by the Supreme Court. In *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304 (1936), the Supreme Court upheld a statute that delegated to the President the authority to impose an arms embargo in a region in South America. The decision, written by Justice George Sutherland, added pages of extraneous material (dicta) that recognized for the President broad and unchecked powers in foreign affairs. Sutherland cited a speech that John Marshall gave in 1800 while serving with the House of Representatives, describing the President as "the sole organ of the nation in its external relations." When the speech is read in full, Marshall simply meant that when the two branches decide foreign policy (in this case by treaty), it is the President's duty under the Take Care Clause to see that the policy is faithfully carried out. At no point did Marshall recognize any plenary, exclusive, independent, or inherent powers of the President in external affairs. Nor did he, as Chief Justice from 1801 to 1835, ever advance such an argument.

Nevertheless, the false sole-organ doctrine continues to guide federal courts, the Justice Department, other agencies in the executive branch, and scholarly studies, most recently in the case of *Zivotofsky v. Kerry*, to be argued before the Supreme Court on November 3, 2014. For historical mistakes included in *Curtiss-Wright* by Justice Sutherland, see Louis Fisher, "Erroneous Dicta in *Curtiss-Wright*," amicus brief submitted to the Supreme Court, July 17, 2014; <http://www.loufisher.org/docs/pip/Zivotofsky.pdf>. In its September 2014 brief to the Supreme Court in *Zivotofsky*, the Justice Department repeatedly relies on those historical mistakes to argue that a congressional statute unconstitutionally infringes on the President's recognition power. "Justice Department Brief in *Zivotofsky v. Kerry* (Sept. 2014)"; <http://www.loufisher.org/docs/pip/Zivotofsky2.pdf>

**World War II.** Japan's bombing of Pearl Harbor on December 7, 1941, brought the United States into war, but President Franklin D. Roosevelt took several steps to move the nation from neutrality to armed conflict. On September 4, 1941, he told the nation that the USS *Greer* carrying American mail to Iceland had been attacked by a German submarine without warning in an effort to sink the ship. However, Admiral Harold Stark, Chief of Naval Operations, explained to the Senate Naval Affairs Committee that the *Greer* had notified a British airplane of the submarine's location. The British began dropping depth charges. Later, the *Greer* also used depth charges and the submarine responded with torpedoes. Fein, *American Empire Before the Fall*, at 93-94.

**Korean War.** On June 26, 1950, President Truman announced that North Korea had provoked aggression against South Korea. Relying on resolutions passed by the UN Security Council for authority, he ordered U.S. air and sea forces to support South Korea. At no time did he request authority from Congress. This marked the first time that a President had taken the country from a state of peace to a state of war without either a declaration or authorization from Congress.

Nothing in the history of the UN Charter supported the Security Council as serving as a constitutional substitute for Congress. During Senate debate on the Charter on July 27, 1945, Truman wired a note from Potsdam that he would always ask Congress for legislative authority to support a UN military action. 91 Cong. Rec. 8145 (1945). As agreed to by the Senate, the Charter required each member nation to decide how to contribute armed forces to a UN military action “in accordance with their respective constitutional processes.” Louis Fisher, *Presidential War Power* 90 (3d ed. 2013).

Congress passed the UN Participation Act of 1945 to require that all presidential agreements to the UN to use U.S. forces “shall be subject to the approval of the Congress by appropriate Act or joint resolution.” 59 Stat. 621, sec. 6. Through that clear language Congress decided the “constitutional processes” of the United States. Security Council resolutions do not provide a constitutional substitute for congressional authorization. Louis Fisher, “The Korean War: On What Legal Basis Did Truman Act?,” 89 *Am. J. Int’l L.* 21 (1995); <http://www.loufisher.org/wp/425.pdf>. Nevertheless, Presidents Bush I, Clinton, and Obama have relied on Security Council resolutions for military actions rather than seek authority from Congress.

Presidents seem to recognize that if a military action constitutes “war” they must come to Congress for authority. They therefore search for substitute words, no matter how strained and far-fetched. For Truman, the military action in Korea was not war but a UN “police action.” Fein, *American Empire Before the Fall*, at 117-18. A year later, however, Secretary of State Dean Acheson admitted to a Senate committee the obvious: “in the usual sense of the word there is a war.” Fisher, *Presidential War Power*, at 98.

**Vietnam War.** On August 3, 1964, President Lyndon Johnson ordered the U.S. Navy to take retaliatory actions against the North Vietnamese for their attacks in the Gulf of Tonkin involving the U.S. destroyer *Maddox*. A day later he reported a second attack against two American destroyers. Although there were substantial doubts that a second attack occurred, Congress passed the Gulf of Tonkin Resolution authorizing Johnson to take “all necessary measures to repel any armed attack against the forces of the United States and to prevent further aggression.” 78 Stat. 384. Various members of the Johnson administration recognized that insufficient evidence existed to prove a second attack. Fein, *American Empire Before the Fall*, at 126-29. In 2005, a newspaper story reported that a study by the National Security Agency concluded that the “second attack” was actually late signals arriving from the first attack. In short, there was no second attack. Congress and the public had been deceived to support a war that lacked sufficient justification. NSA decided to declassify the study and make it publicly available. Robert J. Hanyok, “Skunks, Bogies,

Silent Hounds, and the Flying Fish: The Gulf of Tonkin Mystery, 2-4 August 1964.”  
[http://www.nsa.gov/public\\_info/files/gulf\\_of\\_tonkin/articles/re11\\_skunks\\_bogies.pdf](http://www.nsa.gov/public_info/files/gulf_of_tonkin/articles/re11_skunks_bogies.pdf).

**Iran-Contra Affair.** On November 3, 1986, a Lebanese periodical *El Shiraa* disclosed a secret U.S. program of selling arms to Iran. Funds from those sales were used to provide military assistance to the Contra rebels in Nicaragua, in violation of a congressional statute (the Boland Amendment) that prohibited such assistance. The administration, denied funds by Congress, decided it could seek financial assistance from other countries and private citizens in order to support the Contras. House and Senate committees filed a joint report, concluding that senior officials in the Reagan administration “misled Congress, withheld information, or failed to speak up when they knew others were giving incorrect testimony.” H. Rept. 100-433, S. Rept. 100-216, 100th Cong., 1st Sess., 381 (1987). Executive officials and private citizens who participated in this illegal assistance to the Contras were prosecuted by an Independent Counsel. Lawrence E. Walsh, *Firewall: The Iran-Contra Conspiracy and Cover-Up* (1997).

The full story of Iran-Contra remains incomplete for many reasons. On December 24, 1992, President George H. W. Bush pardoned six key figures involved in Iran-Contra, three of them from the CIA. Independent Counsel Walsh’s efforts were blocked in part because the executive branch refused to declassify certain documents. Although the Reagan administration destroyed many documents, confidential materials were later made public. In 1993, a 419-page book issued by the National Security Archive reproduced various presidential findings, agency memos, letters, and notes, many of them marked Secret, Top Secret, and Eyes Only. Malcolm Byrne & Peter Kornbluh, *The Iran-Contra Scandal* (1993). A number of computer messages about Iran-Contra were recovered and became publicly available. Tom Blanton, *White House E-Mail* (1995). A study published this year by Michael Byrne relies on many other documents made available over the years by FOIA actions. Malcolm Byrne, *Iran-Contra: Reagan’s Scandal and the Unchecked Abuse of Presidential Power* (2014). Byrne’s book underscores the willingness of executive officials to support presidential power—especially in the field of national security—without any consideration of constitutional limits and ethical values. *Id.* at 334. That attitude, prominent in the Nixon administration with Watergate and the Reagan administration with Iran-Contra, has continued with subsequent administrations.

**Military Actions by President Clinton.** During his eight years in office, President Clinton initiated military operations in Iraq, Haiti, Bosnia, and Kosovo. Not once did he come to Congress to request statutory authority. Instead, he claimed to receive authority either from the UN Security Council or NATO allies. Louis Fisher, “Sidestepping Congress: Presidents Acting Under the UN and NATO,” 47 *Case Western Res. L. Rev.* 1237 (1997); <http://www.loufisher.org/docs/wp/424.pdf>. When he sent U.S. troops to Haiti in 1994, some lawmakers defended him by pointing to military actions ordered by President Jefferson against the Barbary pirates. However, Jefferson notified Congress that he had taken only *defensive* actions and that anything of an offensive nature required congressional authority, which Congress supplied by passing ten statutes for Jefferson and later for President Madison. Louis Fisher, “The Barbary Wars: Legal Precedent for Invading Haiti?,” CRS Report, August 16, 1994; <http://www.loufisher.org/docs/wp/barbary.pdf>.

**Iraq War (2003).** During the summer and fall of 2002, the Bush administration claimed that Iraq was reconstituting its nuclear weapons program by purchasing aluminum tubes to enrich uranium. In addition, the administration said that Iraq attempted to procure uranium from Niger, possessed mobile labs capable of transporting biological weapons, and had access to unmanned aerial vehicles able to disperse weapons of mass destruction. Those claims, and others, were used to urge Congress to quickly pass the Iraq Resolution in October 2002. All of the administration's assertions were found to be empty of substance. The United States went to war on the basis of false and deceptive executive branch arguments. Fein, *American Empire Before the Fall*, at 137-39; Louis Fisher, "Deciding on War Against Iraq: Institutional Failures," 118 *Pol. Sci. Q.* 389 (2003); <http://www.loufisher.docs/wp/423.pdf>.

**Libya (2011).** In March 2011, President Obama decided to use military force in Libya to save the lives of civilians at risk. Instead of requesting congressional authority, he relied on a resolution adopted by the UN Security Council and support from NATO allies. He estimated the military commitment would be a matter of days, not weeks. It lasted seven months. The operation moved from its initial limited purpose of protecting citizens to include siding with the rebels and helping to support the removal of Colonel Qaddafi. Throughout the seven months, the Obama administration insisted that military activities did not amount "war" or even "hostilities." Louis Fisher, "Military Operations in Libya: No War? No Hostilities?," 42 *Pres. Stud. Q.* 176 (2012); <http://loufisher.org/docs/wplibya/Libya.Fisher.PSQ.2012.pdf>. The result: Libya became a failed state: politically, legally, and economically. In an interview with Thomas Friedman on August 8, 2014, Obama conceded it was a mistake to remove Qaddafi without staying to rebuild the country: "So that's a lesson that I now apply every time I ask the question, 'Should we intervene militarily? Do we have an answer [for] the day after?'" Thomas L. Friedman, "Obama on the World," *N.Y. Times*, Aug. 9, 2014, A19.

**Syria (2013).** In the fall of 2013, President Obama threatened to use military force against the regime of President Assad, particularly after reports of the use of nerve gas against civilians. He was prepared to order cruise missiles into Damascus and take other military measures without seeking congressional authority. Unlike Libya two years earlier, he was unable to secure the support of the Security Council. Although continuing to insist that he possessed constitutional authority to act independently, in an address on September 10, 2013, Obama announced that "it was right, in the absence of a direct or imminent threat to our security, to take this debate to Congress. I believe our democracy is stronger when the President acts with the support of Congress. And I believe that America acts more effectively abroad when we stand together." Congress did not provide statutory authority for military action against Syria.

**Iraq-Syria (2014).** During the spring of 2014, the Islamic State of Iraq and Syria (ISIS) moved militarily against Iraq, conquering large sections in the north. Although Congress in recent years has had difficulty in finding bipartisan solutions for public policy issues, on June 25, 2014, the House voted 370 to 40 for H. Con. Res. 106, stating: "The President shall not deploy or maintain United States Armed Forces in sustained combat role in Iraq without specific statutory authorization for such use enacted after the date of the adoption of this

concurrent resolution.” 160 Cong. Rec. H6819-33. If the Senate supports this measure, it would not be legally binding because concurrent resolutions are not submitted to the President for his signature or veto. However, such a resolution would have substantial political force because it would represent the collective bipartisan judgment of Congress, reflecting the views of the general public.

On August 7, President Obama announced he had ordered a number of “targeted airstrikes” against the Islamic State in Iraq and Syria (ISIS, also called ISIL). On the following day, he described his military operations as “limited in their scope and duration.” By August 9, however, he admitted he did not think he would “solve this problem in weeks. This is going to be a long-term project.” On September 3 he stated: “This is not going to be a one-week or one-month or six-month proposition.” On September 5, Secretary of State John Kerry estimated: “It may take a year, it may take two years, it may take three years.”

The House and the Senate completed action on September 17 and 18 on a continuing resolution that provides funds for the assistance, training, equipment, supplies, and sustainment to vetted elements of the Syrian opposition to defend the Syrian people from attacks by the Islamic State, protect the United States and its allies, and promote conditions for a negotiated settlement to end the conflict in Syria. That resolution became law on September 19 as P.L. No. 113-164 (H.J. Res. 124). The language on Syria appears in Section 149. By September 22, military strikes extended into Syria. Other than the short-term continuing resolution to train and equip Syria militias, President Obama did not seek authorization from Congress for a military action that is likely to continue into the next administration, at heavy financial cost.

## **VI. Congressional Oversight and Judicial Checks**

Congress has available a formidable list of legislative tools to check the President. Over the years, the Supreme Court has also placed limits on executive power, including a decision this year in *NLRB v. Canning*, finding that President Obama possessed no constitutional authority to make three recess appointments to the National Labor Relations Board. Although these legislative and judicial checks are often effective, it is also true that congressional abdication and acquiescence have greatly strengthened presidential power, while judicial decisions have substantially broadened the President’s authority in many areas, including the field of national security.

Constitutional authority does not become a power unless it is used. As important as legislative power is will power: the determination of Congress to use the powers available to it. In *Youngstown Co. v. Sawyer*, 343 U.S. 579, 654 (1952), Justice Robert Jackson said in his concurrence: “We may say that power to legislate for emergencies belongs in the hands of Congress, but only Congress itself can prevent power from slipping through its fingers.” A key legislative power is over taxation and appropriations.

## VII. The Spending Power

In Federalist No. 58, James Madison described the power of the purse as the “most complete and effectual weapon with which any constitution can arm the immediate representatives of the people, for obtaining a redress of every grievance, and for carrying into effect every just and salutary measure.” Article I, Section 9, places this weapon squarely in the hands of Congress: “No Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law.” Whatever a President hopes to do in terms of new programs and initiatives depends on obtaining funds from Congress. Even the President’s personal White House staff, including secretarial support and policy advisers, is defined exclusively by what Congress decides to authorize and fund.

In signing an April 15, 2011, bill that defunded certain “czar” positions, President Obama objected that the cancellations interfered with his “well-established authority to supervise and oversee the executive branch” and the President’s “prerogative to obtain advice that will assist him in carrying out his constitutional responsibilities.” The President does have general authority to supervise the executive branch and obtain advice, but he has no authority to create and fund White House positions. That authority belongs to Congress, which can increase and decrease the number of White House officials and increase or decrease their salaries. President Obama referred to a prerogative that does not exist. The only advice a President is entitled to, without limit, comes from individuals in the private sector.

In his State of the Union address in January 2014, President Obama stated that if Congress failed to legislate on a number of issues, he would act independently. As an example, he expressed his intent to raise the minimum wage for federal contractors. However, when he issued an executive order to do that the next month, on February 12, he relied not on independent presidential authority but on statutory authority: the Federal Property and Administrative Services Act, 40 U.S.C. 101. He also acknowledged that his executive order required “the availability of appropriations.” In short, nothing would happen unless Congress provided money to carry out his proposal. The power of the purse has often been used by Congress to place limits on presidential actions and policies.

**Defunding the Vietnam War.** In 1973, Congress added language to an appropriations bill forbidding the use of any funds to support combat activity in Cambodia and Laos. The language covered not only supplemental funds in the bill but also funds made available by previous appropriations. When President Nixon vetoed the bill, Congress was unable to muster a two-thirds majority in each house for an override. As a result, the bill had to be revised to delay the cutoff of funds from June 30 to August 15, 1973, giving Nixon 45 additional days to bomb Cambodia.

Congresswoman Elizabeth Holtzman filed a lawsuit in New York, asking a federal district court to determine that the President could not engage in combat operations in Southeast Asia without congressional authorization. In *Holtzman v. Schlesinger*, 361 F. Supp. 553 (E.D. N.Y. 1973), District Judge Orrin Judd held that Congress had not authorized the bombing of Cambodia. Moreover, he decided that the inability of Congress to override Nixon’s veto

could not be interpreted as an affirmative grant of authority. As he observed: “It cannot be the rule that the President needs a vote of only one-third plus one of either House in order to conduct a war, but this would be the consequence of holding that Congress must override a Presidential veto in order to terminate hostilities which is has not authorized.” His order was stayed by the Supreme Court because the August 15 compromise agreed to by Congress had broken the impasse between the two branches. Eventually, Judd’s decision was reversed by the Second Circuit, which treated the dispute as a political question. Nevertheless, the determination by Congress to deny funding removed legislative support and the war wound down to its end.

**Other Spending Limits.** After Saddam Hussein invaded Kuwait on August 2, 1990, President George H. W. Bush sent several hundred thousand troops to Saudi Arabia and the Middle East. Instead of turning to Congress for statutory support, the administration created a multinational alliance. This coalition was willing to cover most of the costs involved in military action by the United States. Saudi Arabia, Kuwait, the United Arab Emirates, Japan, Germany, France, Great Britain, and other nations agreed to shoulder the financial burden. The administration wanted those funds to go directly to the Defense Department as “gifts” to be later allocated as the administration determined. H. Doc. No. 101-237, 101st Cong., 2d Sess. (1990). Such a system would bypass the appropriations power of Congress. Senator Robert C. Byrd intervened to scotch the idea. Contributions from foreign governments would go first to the Treasury, subject to appropriations by Congress. 136 Cong. Rec. 25067-68 (1990).

In 1992, civil war and famine in Somalia prompted President Bush to dispatch U.S. troops to that region as part of a multinational relief effort. He advised Congress there was no intention for U.S. armed forces to become “involved in hostilities.” Public Papers of the Presidents, 1992-93, II, at 2180. In early 1993, with President Bill Clinton in office, Congress debated the need for authorizing legislation. What began as a humanitarian mission turned into the use of military force against a Somali political figure, Mohamed Farah Aideed. U.S. warplanes launched a retaliatory attack. U.S. soldiers died in several conflicts. The Clinton administration spoke of a long-term, nation-building effort in Somalia. Louis Fisher, *Presidential War Power* 176-78 (3d ed. 2013). Congress turned to the spending power to end military involvement. Legislation provided that no funds for U.S. armed forces in Somalia could be used for expenses after March 31, 1994. President Clinton could request additional funds but they would first have to be authorized and appropriated by Congress. 107 Stat. 1475-77, sec. 8151 (1993).

**Nixon Impoundments.** Presidents have always exercised a measure of discretion over the spending of appropriations. If they can carry out a program for fewer funds than Congress provides, no one would object. Rep. George Mahon, chairman of the House Appropriations Committee for many years, cautioned: “Economy is one thing, and the abandonment of a policy and program of the Congress another thing.” 95 Cong. Rec. 14922 (1949).

In 1972, as part of President Nixon’s reelection effort, the character of impoundment took a new and decisive turn. Nixon claimed that Congress, operating through its decentralized actions of authorizing, appropriating, and tax committees, “arrives at total Federal spending



in an accidental, haphazard manner.” Public Papers of the Presidents, 1972, at 742. However, the “scorekeeping reports” maintained by the Joint Committee on Reduction of Federal Expenditures, printed regularly in the *Congressional Record*, revealed a systematic and responsible pattern, not chaos. Legislative totals generally remained within the President’s budget aggregates.

During a news conference on January 1, 1973, President Nixon asserted that the constitutional right of a President to impound funds—for the purpose of combating inflation or avoiding a tax increase—was “absolutely clear.” To Nixon and his legal advisers, it represented an “inherent” power of the President. Officials in his administration maintained that impoundment was consistent with the President’s constitutional duty to “take care that the laws be faithfully executed,” even if President Nixon was determined to cut programs in half or eliminate them altogether.

Of about 80 cases brought by private parties against these impoundments, the administration lost almost all, including one decided by the Supreme Court, *Train v. City of New York*, 420 U.S. 35 (1975). On the legislative front, Congress passed the Impoundment Control Act of 1974, placing severe constraints on presidential power. To cancel funds entirely (“rescissions”), both houses must complete action on a bill or joint resolution within 45 days: a high hurdle for any administration. To delay appropriations (“deferrals”), either house could pass a resolution of disapproval. When that procedure was invalidated by the Supreme Court in the legislative veto case, *INS v. Chadha*, 462 U.S. 919 (1973), federal courts later determined that the one-house veto was tied inextricably to the deferral authority. If one vanished so did the other. Congress quickly converted the judicial decision into statutory policy. 101 Stat. 785, sec. 206 (1987). Broad presidential discretion to withhold funds, as practiced over the years, disappeared because of Nixon’s overreach.

## **VIII. Warrantless Surveillance**

As a second form of “inherent” authority, President Nixon decided to approve warrantless surveillance of individuals and organizations involved in protesting against the Vietnam War. On June 5, 1970, Nixon met with the heads of several intelligence agencies to help monitor what the administration considered radical individuals and groups. One idea, drafted by White House attorney Tom Charles Huston, directed the NSA to intercept—without judicial warrant—the domestic communications of U.S. citizens who used international phone calls or telegrams. That plan was withdrawn after objections raised by FBI Director J. Edgar Hoover and Attorney General John Mitchell. Athan Theoharis, *Spying on Americans: Political Surveillance from Hoover to the Huston Plan* (1978).

Although that program was dropped, NSA had been conducting a warrantless surveillance program called SHAMROCK from August 1945 to May 1975. Such U.S. companies as Western Europe and RCA Global agreed to turn over telegrams to be read by the NSA. Bruce Fein, *Constitutional Peril: The Life and Death Struggle for Our Constitution and Democracy* 127-29 (2008); James Bamford, *Body of Secrets* 438-39; Richard E. Morgan, *Domestic Intelligence* 75-76 (1980).

NSA also created MINARET, a tracking system that allowed the agency to monitor individuals and groups opposed to the Vietnam War. Newspaper stories in 1974 revealed that the CIA had been extensively involved in illegal domestic surveillance, infiltrating dissident groups in the country, and collecting close to 10,000 files on American citizens. CIA Director William Case later acknowledged the existence of this program while testifying before a Senate Committee. Kathryn S. Olmstead, *Challenging the Secret Government* 11-13, 35 (1996).

A district court decision in 1972 held that warrantless electronic surveillance could not be justified on the ground that some domestic organizations and individuals were trying to subvert government. Warrants were needed. The court directed the government to fully disclose to the defendants any illegally monitored conversations and ordered an evidentiary hearing to determine the extent of the constitutional violation. In doing so, the court expressly dismissed the claim of a broad “inherent” presidential power. *United States v. Sinclair*, 321 F. Supp. 1074 (E.D. Mich. 1971). The Sixth Circuit affirmed, reminding the government that the Fourth Amendment “was adopted in the immediate aftermath of abusive searches and seizures directed against American colonists under the sovereign and inherent powers of King George III.” *United States v. United States Dist. Ct. for E.D. of Mich.*, 444 F.2d 651, 665 (6th Cir. 1971). Unanimously, the Supreme Court affirmed the Sixth Circuit. Executive officers charged with investigative and prosecutorial duties “should not be sole judges of when to utilize constitutionally sensitive means in pursuing their tasks.” *United States v. United States District Court*, 407 U.S. 297, 317 (1972).

**The FISA Court.** Congress responded to this litigation by passing the Foreign Intelligence Surveillance Act (FISA) of 1978 to limit the scope of presidential power. A court order was now required to engage in electronic surveillance within the United States for purposes of obtaining foreign intelligence information. A special surveillance court (the FISA Court) would review applications submitted by government attorneys. The statute specified that this process constituted the “exclusive means” for conducting national security surveillance within the United States, thus excluding any access to presidential inherent powers.

Following the terrorists attacks of 9/11, the Bush administration requested new authority to protect the nation. The USA Patriot Act, enacted on October 26, 2001, gave federal officials additional powers to track and intercept communications, both for law enforcement and foreign intelligence gathering purposes. In secret, however, the administration ordered the NSA to work with private telecommunications companies to conduct a surveillance program outside of FISA, claiming inherent presidential powers under Article II. The administration decided that the exclusive framework under FISA was not legally binding on the President and instead followed a purely executive-made process. Rather than be limited by FISA, the administration justified the NSA program under the AUMF passed immediately after 9/11. However, nothing in the AUMF amended or modified the exclusive FISA framework. Bruce Fein, *Constitutional Peril*, at 131-49.

The existence of the secret NSA program was revealed by the *New York Times* on December 16, 2005, precipitating a number of lawsuits. On January 19, 2006, OLC produced a 42-page

“white paper” defending the legality of NSA actions. OLC said the agency’s activities “are supported by the President’s well-recognized inherent constitutional authority as Commander in Chief and sole organ for the Nation in foreign affairs to conduct warrantless surveillance of armed forces for intelligence purposes to detect and disrupt armed attacks on the United States.” Regarding the President’s role as “Commander in Chief”, it is analytically hollow to cite three words in the Constitution without explaining what those words mean. As for the sole-organ doctrine, Justice Sutherland’s plain misconception in the 1936 *Curtiss-Wright* has already been discussed in Section V. In 2008, Congress passed legislation that revised FISA and granted immunity to telecoms that had cooperated with NSA.

**Proposal for a Special Advocate.** There has been recent discussion about amending FISA to introduce an adversary quality to the proceedings. Although Congress in 1978 expected federal judges in the FISA Court to supply an independent countercheck to executive proposals, concerns arose about the lack of constitutional safeguards when a secret court does its work solely dependent on arguments put forth by the administration. Were Article III judges being conscripted to promote executive policy? How could the FISA Court protect constitutional rights by hearing only the side presented by the government (*ex parte*) and in secret session (*in camera*)?

Those questions grew more pronounced after revelations during the Obama administration that NSA had engaged in broad surveillance of U.S. citizens. From this debate came the proposal for Congress to pass legislation to create some kind of “special advocate” to appear before the FISA Court, a security-cleared lawyer appointed to argue against the government and thereby provide elements of an adversarial proceeding. A number of studies have explored the advisability and constitutionality of a Special Advocate. Andrew Nolan, Richard M. Thompson II, & Vivian S. Chu, “Reform of the Foreign Intelligence Surveillance Courts: Introducing a Public Advocate,” March 21, 2014, Congressional Research Service, R43260; <http://fas.org/sgp/crs/intel/R43260.pdf>; “The Case for a FISA ‘Special Advocate,’” The Constitution Project, Liberty and Security Committee, May 29, 2014; [http://www.constitutionproject.org/wp-content/uploads/2014/05/The-Case-for-a-FISA-Special-Advocate\\_FINAL.pdf](http://www.constitutionproject.org/wp-content/uploads/2014/05/The-Case-for-a-FISA-Special-Advocate_FINAL.pdf); Andrew Nolan & Richard M. Thompson II, “Return of the Foreign Intelligence Surveillance Courts: Procedural and Operational Changes, Aug. 26, 2014, Congressional Research Service, R43362; <http://fas.org/sgp/crs/intel/R43362.pdf>.

## IX. Intelligence Committees

Following hearings and a report by the Church Committee in 1975 and 1976, Congress created Intelligence Committees in each house to more closely monitor the CIA and other agencies in the Intelligence Community. Bruce Fein, *Constitutional Peril*, at 34-35, 101-02, 118-22, 124-29. After reports that the CIA had tortured suspected terrorists of being involved in the 9/11 attacks, the Senate Intelligence Committee prepared a report to determine the extent of torture and whether the information received from such interrogations had helped prevent additional terrorist attacks, as claimed by the CIA and the Bush II administration.

The Senate Intelligence study led to an extraordinary confrontation between an oversight committee and the agency being overseen. In attempting to block public disclosure of the executive summary of the Senate report, CIA broke into the committee's computer to determine how committee staffers had gained access to certain materials. It then recommended to the Justice Department that certain committee staffers be prosecuted for their actions. Greg Miller, Ed O'Keefe & Adam Goldman, "Feinstein says CIA illegally spied on Senate," Wash. Post, March 12, 2014, A1; Mark Mazzetti & Jonathan Weisman, "Conflict Erupts in Public Rebuke on C.I.A. Inquiry," March 12, 2014, A1. In July 2014, the Justice Department found insufficient evidence to warrant a criminal investigation against the committee staffers. David S. Joachim, "Justice Dept. Declines to Investigate C.I.A. Review," N.Y. Times, July 11, 2014, A8.

When Senate Intelligence submitted the executive summary to the administration for its review prior to making it publicly available, the committee report was subjected to heavy redaction, resulting in further friction between the two branches. Mark Mazzetti, "Redactions of Report on C.I.A. Stoke Ire," N.Y. Times, Aug. 6, 2014, at A14. Under S. Res. 400, the Senate has available a procedure for making public its findings without review by the executive branch, but this process has never been used. Senate Select Committee on Intelligence, Rules of Procedure, S. Prt. 111-14, 112th Cong., 1st Sess. Appendix A 10-19 (2011).

## **X. Military Tribunals**

On November 13, 2001, President George W. Bush issued a military order to create military tribunals to try individuals who gave assistance to the terrorist attacks on 9/11. The administration depended heavily on the availability of "inherent" powers for the President, arguing in court that military tribunals "have tried enemy combatants since the earliest days of the Republic under such procedures as the President has deemed fit." Brief for Appellants, *Hamdan v. Rumsfeld*, No. 04-5393 (D.C. Cir. Dec. 8, 2004), at 53. The Justice Department made this claim: "It was well recognized when the Constitution was written and ratified that one of the powers inherent in military command was the authority to institute tribunals for punishing enemy violations of the laws of war," and that General George Washington had appointed a Board of General Officers in 1780 to try British Major John André as a spy. *Id.* at 58.

However, the history of military tribunals from this early period supports an entirely different picture. Tribunals were created under such procedures as *Congress* deemed fit to spell out by statute. There was no President in 1780 or even a separate executive branch. The national government consisted of one branch: the Continental Congress. In 1776 it adopted a resolution expressly providing that enemy spies "shall suffer death . . . by sentence of a court martial, or such other punishment as such court martial shall direct," and ordered that the resolution "be printed at the end of the rules and articles of war." 5 Journals of the Continental Congress, 1774-1789, at 693. General Washington adhered to the Articles of War and recognized that changes in the military code "can only be defined and fixed by Congress." 17 The Writings of George Washington 239 (John C. Fitzpatrick ed., 1931).

In 2006, the Supreme Court rejected the claim of the Bush administration that the President possessed inherent authority to create military tribunals and determine their rules and procedures. The Constitution required President Bush to ask Congress for authorizing legislation. *Hamdan v. Rumsfeld*, 548 U.S. 557 (2006). For further details on the history and legal issues concerning military tribunals: Bruce Fein, *Constitutional Peril*, at 189-97; Louis Fisher, *The Constitution and 9/11: Recurring Threats to America's Freedoms* 172-247 (2008); Louis Fisher, *Military Tribunals and Presidential Power: American Revolution to the War on Terrorism* (2005).

## **XI. Gaining Access to Executive Documents**

Nothing in the Constitution *expressly* authorizes the President to withhold documents from Congress, nor does any provision empower Congress to obtain such documents. The Supreme Court has recognized certain *implied* powers, including the constitutional power of Congress to investigate (*McGrain v. Daugherty*, 273 U.S. 135, 175 (1927)) and the President's power to withhold information (*United States v. Nixon*, 418 U.S. 683, 711 (1974)), but those powers would exist with or without judicial rulings. The difficult issue is how to resolve the two implied powers when they collide. Court cases provide some guidance, but most executive-legislative disputes are settled through political accommodations.

A lengthy study by Herman Wolkinson in 1949, expressing the executive branch position, asserted that federal courts "have uniformly held that the President and the heads of departments have an uncontrolled discretion to withhold the information and papers in the public interest, and they will not interfere with the exercise of that discretion." Herman Wolkinson, "Demands of Congressional Committees for Executive Papers" (Part 1), 10 Fed'l Bar J. 103, 103 (1949). At the time he wrote the article, Wolkinson served as an attorney with the Justice Department. His position was incorrect when written and is even less true today as a result of litigation and political precedents established in the years following 1949.

A more realistic view appears in testimony by Antonin Scalia in 1975 when he served as head of the OLC. When congressional and presidential interests collide, the answer is likely to lie in "the hurly-burly, the give-and-take of the political process between the legislative and the executive. . . . [W]hen it comes to an impasse the Congress has the means at its disposal to have its will prevail." "Executive Privilege—Secrecy in Government," hearings before the Subcommittee on Intergovernmental Relations of the Senate Committee on Government Operations, 94th Cong., 1st Sess. 87 (1975). Congress has the edge because of abundant tools at its disposal. However, to convert this institutional advantage to success requires from lawmakers and their staff an intense motivation, the staying power to cope with a long and frustrating battle with executive branch resistance, and an abiding commitment to honor their constitutional purpose and fulfill the system of checks and balances.

**Congressional Leverage.** Members of Congress have many ways of obtaining documents the executive branch might like to withhold. An early legislative-clash involved a 1790

request from Treasury Secretary Alexander Hamilton, asking Congress to provide financial compensation to Baron von Steuben for his military assistance to America during the Revolutionary War. Hamilton was not very cooperative in supplying documents requested by lawmakers. The advantage lay clearly with Congress. If the administration failed to provide documents, Congress could retaliate simply by not acting on the relief bill. Eventually, Congress received the documents it needed and, based on that information, passed legislation that substantially reduced what Hamilton had requested. Louis Fisher, *The Politics of Executive Privilege* 7-10 (2004).

With regard to treaties that require congressional authorization and funding, the House of Representatives can insist that it receive documents to permit it to make an informed judgment. With the Jay Treaty in 1796, President Washington refused to make documents available to the House, explaining that under the Constitution it is not part of the treaty-making process. True, but the House is part of the treaty-*implementing* process. Denied documents, the House may always refuse to act on authorizing and appropriating bills until it receives the information it requests. Fisher, *The Politics of Executive Privilege*, at 30-39. Treaties and executive agreements often make clear to a foreign government that what it will receive in terms of defense articles and services are subject to “the annual authorizations and appropriations contained in the United States security assistance legislation.” Under that understanding, U.S. officials may negotiate as they like. What the country will actually receive depends on action by both houses of Congress. *Id.* at 43. For specific techniques used by Congress to gain access to agency information needed for oversight and legislation, see Morton Rosenberg, *When Congress Comes Calling: A Primer on the Principles, Practices, and Pragmatics of Legislative Inquiry* (The Constitution Project, 2009); <http://www.constitutionproject.org/wp-content/uploads/2012/09/175.pdf>.

## **XII. The Confirmation Process**

Until the President submits the name of a nominee to the Senate, Congress has no grounds for gaining access to the individual’s files. Once the name is submitted, however, the executive branch may be forced to surrender sensitive documents not only about the individual but larger concerns about the administration. If it refuses, the Senate can announce it will not act on the nominee.

Those circumstances developed in 1972 when President Nixon nominated Richard G. Kleindienst to be Attorney General. Although the Senate Judiciary Committee held hearings and voted unanimously its approval, Jack Anderson published several columns charging that the administration had entered into a corrupt deal with the International Telephone and Telegraph Corp. (ITT) and claimed that Kleindienst told “an outright lie” about his involvement. The committee held a special hearing to have Kleindienst explain his role in having the Justice Department settle the case against ITT. When the committee called White House aide Peter M. Flanigan to testify, White House Counsel John Dean replied that the doctrine of executive privilege protected Flanigan and all White House aides from testifying.

Senator Sam Ervin made it clear that if Kleindienst's nomination cleared the committee and reached the floor, he was prepared to mount a filibuster. The White House now decided to abandon Dean's theory of executive privilege, allowing Flanigan to testify and respond to written questions submitted by the committee. With those steps cleared, the Senate confirmed Kleindienst by a vote of 64 to 19. However, as part of Nixon's effort to save the presidency, he asked Kleindienst and several other officials to resign to give an appearance of housecleaning. Kleindienst later pled guilty to a misdemeanor for not telling the truth at his confirmation hearing about Nixon's intervention in the ITT affair. Fisher, *The Politics of Executive Privilege*, at 71-74.

On July 31, 1986, President Reagan refused to give the Senate Judiciary Committee certain internal memos that his nominee for Chief Justice, William Rehnquist, had written while serving as head of OLC. With Democrats on the committee rounding up votes to subpoena the memos, the dispute threatened to prevent action not only on Rehnquist but also on the nomination of Antonin Scalia to be Associate Justice. A bipartisan majority of the committee (8 Democrats and 2 Republicans) supported the subpoena. Reagan agreed to allow the committee access to some of Rehnquist's OLC memos. The Senate then confirmed Rehnquist and Scalia on September 17. Fisher, *The Politics of Executive Privilege*, at 76-77.

The Kleindienst and Rehnquist precedents, along with many others, reinforce the Senate's access to executive branch documents whenever a confirmation is pending. This year, all Senators were able to read a previously secret memo written by David Barron when he served in OLC. The memo concerned the constitutionality of using an armed drone to kill a U.S. citizen in Yemen. Only after an opportunity to read the unredacted memo did Senators proceed to vote on, and confirm, Barron's nomination to be federal judge of the First Circuit.

### **XIII. Subpoenas and the Contempt Power**

The Supreme Court has described the congressional power of inquiry as "an essential appropriate auxiliary to the legislative function." *McGrain v. Daugherty*, 272 U.S. 135, 174 (1927). The issuance of a subpoena pursuant to an authorized investigation is "an indispensable ingredient of lawmaking." *Eastland v. United States Servicemen's Fund*, 421 U.S. 491, 505 (1975). Lawmakers and their committees usually receive agency documents they need for legislation or oversight without threats or use of subpoenas. Both houses, however, authorize their committees and subcommittees to issue subpoenas to require the production of documents and the attendance of witnesses regarding matters within the panel's jurisdiction. Committee subpoenas "have the same authority as if they were issued by the entire House of Congress from which the committee is drawn." *Exxon Corp. v. FTC*, 589 F.2d 582, 592 (D.C. Cir. 1978), cert. denied, 441 U.S. 943 (1979). If a witness refuses to testify or produce papers in response to a committee subpoena, and the committee votes to report a resolution of contempt to the floor, the full House or Senate may vote to support the contempt citation.

Toward the end of 2001, President George W. Bush invoked executive privilege for the first time, acting in response to subpoenas issued by the House Government Reform Committee

regarding campaign finance and FBI corruption in Boston. He succeeded in withholding the campaign finance documents but folded on the Boston materials. They revealed that the FBI had been involved in a 30-year-old scandal that sent innocent people to prison for decades and allowed mobsters to commit murder. The FBI tolerated those practices because it wanted to preserve its access to informers, even though it knew the individuals imprisoned were innocent of the charges. During this crime spree, some FBI agents took cash from the mobsters. “Investigation Into Allegations of Justice Department Misconduct in New England—Volume 1,” hearings before the House Committee on Government Reform, 107th Cong., 1st-2d Sess. 1-4 (2001-02). Although the administration initially invoked executive privilege to bar the committee access to the Boston materials, it agreed to the committee’s request for prosecutorial memos on FBI misconduct in Boston. Some of the documents were released within an hour of the committee’s decision to hold President Bush in contempt. Fisher, *The Politics of Executive Privilege*, at 106-09.

Although the legislative power of contempt is not expressly provided for in the Constitution, as early as 1821 the Supreme Court recognized that without this power the legislative branch would be “exposed to every indignity and interruption that rudeness, caprice, or even conspiracy, may mediate against it.” *Anderson v. Dunn*, 6 Wheat. (19 U.S.) 204, 228 (1821). If either house votes for a contempt citation, the President of the Senate or the Speaker of the House shall certify the facts to the appropriate U.S. Attorney, “whose duty it shall be to bring the matter before the grand jury for its action.” 2 U.S.C. § 194.

The decision of the House or the Senate to hold an executive official in contempt generally leads an administration to release requested agency documents. Fisher, *The Politics of Executive Privilege*, at 111-26. However, from 1982 to the present, there have been three occasions where a chamber held an executive official in contempt but the U.S. attorney did not take the matter before a grand jury for possible indictment.

In 1982, Congress sought documents on EPA’s enforcement of the “Superfund” program, which provided \$1.6 billion to clean up hazardous-waste sites and to prosecute companies responsible for illegal dumping. After agreeing to share some confidential documents, the Reagan administration decided to withhold documents in active litigation files. EPA Administrator Anne Gorsuch, acting under instructions from President Reagan (meaning the Justice Department), refused to turn over “sensitive documents found in open law enforcement files.” With that reasoning, congressional oversight would have to be put on hold for years until the government completed its enforcement and litigation actions.

With a bipartisan vote of 9 to 2, a subcommittee of the House Public Works Committee cited Gorsuch for contempt, as did the full committee. The House of Representatives voted 259 to 105 to support the contempt citation. 55 Republicans joined 204 Democrats to build the top-heavy majority. 128 Cong. Rec. 31746-76 (1982). Instead of taking the case to a grand jury, the Justice Department asked a district court to declare the House action an unconstitutional intrusion into the President’s authority to withhold information from Congress. The court dismissed the government’s suit on the ground that judicial intervention in executive-legislative disputes “should be delayed until all possibilities for settlement have been exhausted.” *United States v. U.S. House of Representatives*, 556 F. Supp. 150, 152 (D.D.C.



1983). After the Justice Department chose not to appeal, the administration agreed to release “enforcement sensitive” documents to the House Public Works Committee. Fisher, *The Politics of Executive Privilege*, at 126-29.

One of the casualties of the House investigation into the Superfund program was EPA official Rita M. Lavelle. The House Energy and Commerce Committee voted unanimously to find her in contempt for defying a committee subpoena to testify. With a vote of 413 to zero, the House held her in contempt. She was sentenced in 1984 to six months in prison, five years’ probation, and a fine of \$10,000 for lying to Congress about her management of the Superfund program. She was the only EPA official indicted in the scandal, but more than 20 other top officials, including Anne Gorsuch, left the agency amid allegations of perjury, conflict of interest, and political manipulation. Fisher, *The Politics of Executive Privilege*, at 129-30. After the Gorsuch confrontation, an OLC opinion of May 30, 1984, concluded that a U.S. Attorney is not required to bring a congressional contempt citation to a grand jury when the citation is directed against an executive official who is carrying out the President’s decision to invoke executive privilege. 8 Op. O.L.C. 101 (1984).

A second challenge to the contempt power of Congress occurred in 2008 during the administration of George W. Bush. The House Judiciary Committee held two officials in contempt: White House Counsel Harriet Miers for refusing to testify, and White House Chief of Staff Joshua Bolten for withholding requested documents. Following the OLC opinion of 1984, the Justice Department did not take the two cases to a grand jury. The House filed suit in district court to require the administration to comply with Section 194 of Title 2. In a decision supporting the House, the court held that Miers was required to appear before the committee and the administration had no valid excuse for Bolten to withhold nonprivileged documents. The D.C. Circuit decided to leave the dispute to the incoming Obama administration. At that point, Miers appeared before the committee and Bolten released some documents. For details on this dispute: Mark J. Rozell, *Executive Privilege: Presidential Power, Secrecy, and Accountability* 169-79 (3d ed. 2010).

The third example of Section 194 not being followed involved a House vote on June 28, 2012, to hold Attorney General Eric Holder in contempt as part of the legislative investigation of the “Fast and Furious Program,” which permitted about two thousand guns to leave the United States and enter Mexico. The contempt vote was not taken to a grand jury because President Obama invoked executive privilege. On August 13, 2012, the House brought a civil action against Holder, asking a district court to reject Obama’s claim of executive privilege and order the administration to release agency documents sought by the House Committee on Oversight and Government Reform. As of October 2014, that matter remains in court.

#### **XIV. State Secrets Privilege**

In *United States v. Reynolds*, 345 U.S. 1 (1953), the Supreme Court decided a case involving the crash of a B-29 that killed a number of crew members and four civilian engineers who provided assistance with confidential equipment on the aircraft. Three widows of the civilian

engineers sued under the Federal Tort Claims Act to determine if the government had acted negligently in allowing the plane to fly. When they asked for the official accident report, the government insisted that it could not be shared because it contained state secrets that, if made publicly available, would be injurious to the national interest. District Judge William H. Kirkpatrick ordered the government to give him the accident report to be read in his chambers. When the government refused, he held in favor of the plaintiffs. Louis Fisher, *In the Name of National Security: Unchecked Presidential Power and the Reynolds Case* 29-58 (2006). The Third Circuit affirmed, insisting that an independent judiciary is part of the U.S. system of constitutional checks and that courts may not defer to assertions by the executive branch about the contents of the accident report. It was necessary for the district judge to read the report *in camera*. *Reynolds v. United States*, 192 F.2d 987 (3d Cir. 1951).

The Supreme Court, divided 6 to 3, ruled that the government had presented a valid claim of privilege even though the Justices never looked at the accident report. Among other authorities, the Court cited John Henry Wigmore's treatise on evidence. However, Wigmore insisted that the institution empowered under the U.S. Constitution to decide what evidence had to be submitted in a state secrets case is the judiciary, not the executive. Fisher, *In the Name of National Security*, at 48-49, 111. Writing for the Court, Chief Justice Vinson cautioned that judicial control "over the evidence of a case cannot be abdicated to the caprice of executive officers." 345 U.S. at 9-10. Without looking at the accident report, the Court was in no position to judge whether executive officers had acted capriciously or arbitrarily.

In early 1996, the Air Force decided to release aircraft accident reports covering the period from 1918 to 1955. Judith Loether, daughter of one of the civilian engineers who died in the crash, discovered the B-29 accident report while browsing the internet in 2000. She shared it with the other two families and the law firm that represented them in *Reynolds*. It was evident that the report contained no state secrets, but it did provide evidence that the government had been negligent in allowing the plane to fly. The attorneys brought a *coram nobis* case against the government, charging that it had perpetrated fraud against the judiciary. Fisher, *In the Name of National Security*, at 166-69, 176-82. After losing in district court and the Third Circuit, the families took their case to the Supreme Court. It denied certiorari on May 1, 2006. *Id.* at 188-211.

Through this process, the executive branch was able to deceive the judiciary without any cost to itself, establishing a precedent that has guided courts in state secrets cases from 9/11 to the present time. Without looking at the accident report, the Supreme Court allowed itself to be deceived. In 2008, the House and Senate Judiciary Committees held hearings on the state secrets privilege and reported legislation to strengthen judicial independence and extend greater protection to the rights of private parties in court. However, no floor action was taken. For a study by The Constitution Project on "Reforming the State Secrets privilege," May 31, 2007, see: <http://www.constitutionproject.org/wp-content/uploads/2012/10/52.pdf>.

From the Bush II administration to the presidency of Barack Obama, the state secrets privilege has been regularly invoked "to protect government lawlessness from judicial scrutiny." Fein, *American Empire Before the Fall*, at 141. The types of cases in which the executive branch has avoided accountability include torture, kidnapping, and illegal

surveillance. Id. at 21-22. A recent case in which the Obama administration relied on the state secrets privilege involved a professor who had been placed on the no-fly list because of an error committed by an FBI agent in filling out her form. Despite the government's mistake, she had to spend a decade in court in an effort to clear her name. Louis Fisher, "Government Errors Are Shrouded in Secrecy," National Law Journal, March 10, 2014; <http://loufisher.org/docs/ssp/nofly.pdf>. A recent CRS report reviews some of the current issues involving the state secrets privilege and the no-fly list. Jared P. Cole, "The No Fly List: Procedural Due Process and Hurdles to Litigation," Sept. 18, 2014, Congressional Research Service, R43730.

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What attitude should members of Congress and legislative staffers have about their institutional duties? An understanding of legislative independence, congressional contributions to constitutional government, and the system of checks and balances are essential. All three branches make mistakes, often major ones. There is no basis for Congress to defer to executive and judicial judgments. In yielding to other branches, lawmakers fail to represent their constituents, violate their oath of office, and deprive government of needed constraints and direction. The Framers valued deliberation because it strengthens the democratic process and lessens the chances of political mistakes.

Justice Robert Jackson, whose entire career with the federal government lay outside the legislative branch, serving as Attorney General and later as Associate Justice of the Supreme Court, urged us to hold fast to fundamental values: "With all its defects, delays and inconveniences, men have discovered no technique for long preserving free government except that the Executive be under the law, and that the law be made by parliamentary deliberations." *Youngstown Co. v. Sawyer*, 343 U.S. 579, 655 (Jackson, J., concurring).