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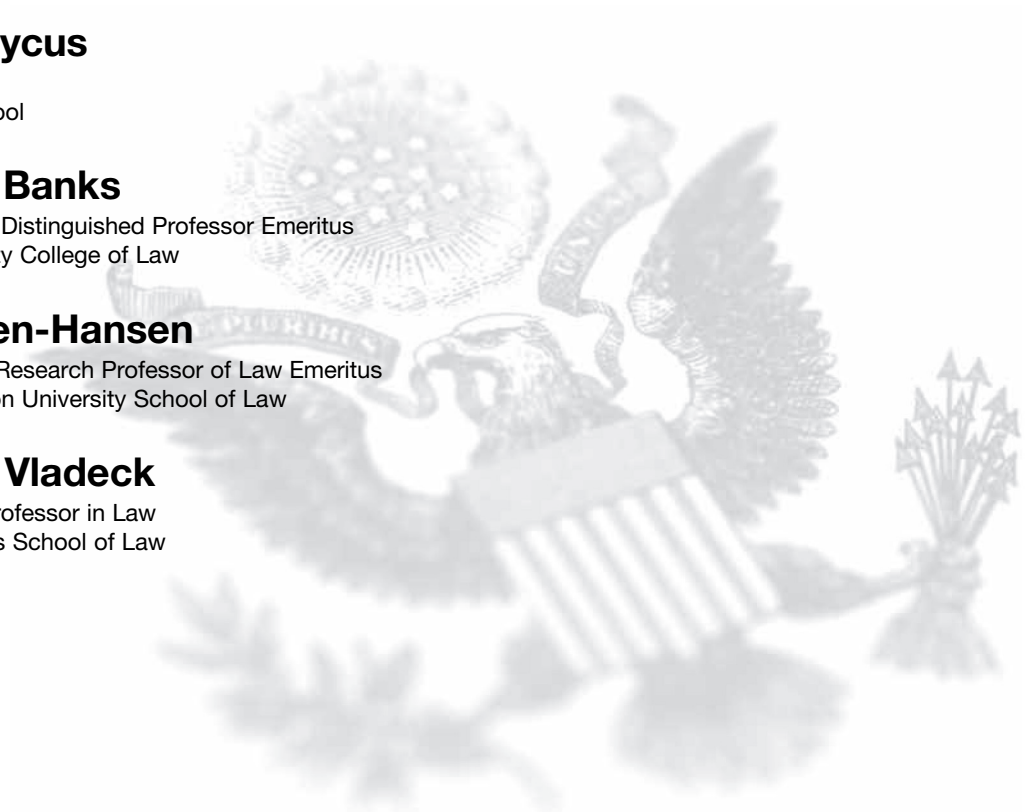

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To our teachers

SUMMARY OF CONTENTS

CONTENTS

PREFACE

Even after 30 years and six earlier editions, we find that preparing a new edition of this casebook is just as challenging and as rewarding as ever. Recent judicial rulings, legislative initiatives, and executive reforms — or the lack thereof — have refined our understanding of structures, processes, and institutions for national security and counterterrorism. They have also raised critically important new questions. So have the emergence of new threats and breathtaking advances in technology. And the election of President Donald Trump has brought dramatic changes in executive branch decisionmaking. All of these developments, furthermore, have come with unprecedented speed. Some of the materials presented here became available just days before this new book went to press.

In this edition we debut a chapter on nuclear war. While the threat posed by nuclear weapons is not new, global dynamics and the Trump administration's decision to withdraw from existing nuclear agreements has prompted us to call attention to the many legal challenges in preventing nuclear war. At the same time, the pace of change in cyber capabilities — for the good guys and the bad guys — has prompted major revisions to the cyber operations chapter. Apparent Russian preparations to attack critical U.S. infrastructure raise new legal questions about evolving U.S. cyber security efforts, including Defense Department plans to "defend forward" to stop malicious cyber intrusions outside existing armed conflicts. In a similar vein, new technologies to detect security threats and to evade detection have required important revisions and updates to the intelligence chapters.

Meanwhile, separation of powers disputes in national security law have become headline news. In this edition we present a detailed treatment of the Trump administration travel bans, the outcome of which turned in part on interpretation of the Immigration and Nationality Act, and in part on the Supreme Court's view of the judicial role in disputes purporting to implicate national security. We have also developed a powerful case study and extended treatment of the congressional defense appropriations powers alongside President Trump's determination to build a wall along our southern border based in part on his constitutional and statutory emergency powers. Last but certainly not least, congressional investigations of Russian interference in the 2016 elections and beyond have generated unprecedented clashes, described here, between the Executive and House of Representatives over access to information that may be critical for national security.

In this new edition we have refined our Framework chapters in an effort to make them easier to navigate. Thus, for the first time, we have omitted *The Steel Seizure Case* (although we will leave our lengthy edit of it on the casebook's website for those who

can't let go) in favor of shorter excerpts in the chapters on presidential and congressional powers. We have expanded the discussion of emergency and appropriations powers to keep abreast of current events, and we have substituted a new case on justiciability to streamline the chapter on courts.

The continuing rapid growth of the field underscores one of the main challenges to teaching and learning national security law. The original sources included here — judicial opinions, statutes, executive orders, and the like — often lack clarity or coherence, and they typically raise as many questions as they answer. We nevertheless rely on such materials because they are the stock in trade of lawyers working in the field and of political decision makers. They reflect the state of the law, such as it is, and they illustrate the law's very dynamic character.

A mastery of this subject necessarily requires considerable patience and devotion. In this edition of the casebook we have redoubled our efforts to guide students and faculty alike in their study. Even a book as up to date as this one is, however, unavoidably incomplete. Courts continue to write opinions at a rapid clip, new sausage is being made (if at a somewhat slower pace) up on the Hill, and officials in the defense and intelligence communities scramble to respond to a bewildering variety of new security threats. Constant attention to these developments is essential.

We therefore urge our students to read a national newspaper every day, and in most classes a discussion of current events lends a special sense of urgency to our assigned readings. Further updates are provided by annual published supplements to this casebook and by additional edited original materials that will be made available to teachers on the book's web site throughout each year.

Perhaps because of the importance of the subject matter, hardly any course in the curriculum is likely to provoke stronger feelings or more spirited debate. In our classrooms we encourage that debate, while at the same time demanding respect for everyone's opinions. So in this casebook we have tried to fuel that debate by fairly presenting both sides of the most contentious issues. We also have repeatedly stressed the strong interdependence of law and policy, and of the critical role of politics in shaping and implementing law. We have opinions, too, however, and we dare not hope that we have always been politically or ideologically neutral. We only wish to emphasize that national security is too important to be left to either "conservative" or "liberal" characterizations. Good legal analysis and the nation's future security depend on a careful consideration of all points of view.

In spite of — and perhaps because of — its inherent difficulty and political sensitivity, we believe that teaching and learning National Security Law will be more fun and more rewarding than ever in the years to come. And we hope that this book contributes to the indispensable work that lawyers do in keeping this nation safe and free. As always, we welcome your feedback and suggestions.

Stephen Dycus
William C. Banks
Peter Raven-Hansen
Stephen I. Vladeck

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William Banks dedicates this edition to the memory of Brady Howell, a former National Security Law student and victim of the September 11 attack on the Pentagon. Thanks to the law and graduate students at Syracuse who have helped test drive many of these materials over the years, through successive editions. Thanks as well to a group of fine research assistants who supported my work on this and earlier editions, most recently Jake Saracino. The best part of this project has always been working with the finest co-authors and best friends any of us could ask for. We continue the good fortune of having Steve Vladeck on our team, and all of us know that Steve Dycus makes everything we write a little better. Thanks, too, to my wife, Cheryl, whose patience and encouragement has been so important.

Peter Raven-Hansen thanks George Washington University Law School students Christine Chen and Kristianna Anderson, and their many able and careful predecessors, for invaluable research and editorial assistance. Thank you, too, to my friends and co-authors for keeping this project fun and challenging (and to Steve Vladeck for raising our average national security IQ by double digits). Special thanks and respect to our commander in chief, Steve Dycus, who led this time from multiple locations. Without him, there would be no book, let alone seven editions. Finally, thank you, as always, to my wife Winnie for enduring (but encouraging) yet another edition.

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Class of 2020; and, most importantly, his family — Karen, Madeleine, Sydney, and Roxy — for everything that can't be put into words.

This work would not have been started and could not have been completed without the efforts of our esteemed original co-author, Arthur Berney. Arthur thinks and writes with piercing clarity. He has provided inspiration and moral leadership for the book. He is kind to a fault, yet stubborn when it comes to speaking the truth. In the Preface to the First Edition he wrote, "I did what little I could" to promote understanding of the work of lawyers as peacemakers. He was far too modest. We remain enormously grateful to Arthur for his original contributions and for his continuing friendship.

Together, the authors deeply appreciate the support and encouragement of the staff at Little, Brown and Wolters Kluwer, especially our longtime Editor and Publisher Carol McGeehan, our former Senior Managing Editor John Devins, our current Managing Editor for Legal Education Jeff Slutzky, and our marvelous Production Editor, Patrick Cline and Copy Editor, Renee Cote.

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EDITORS' NOTE

In general we have adhered to the rules for citation of authority followed by most lawyers and courts. They are set out in *The Bluebook: A Uniform System of Citation* (20th ed. 2015). For reasons of economy we have omitted without notation many citations within excerpted materials, and we have removed almost all parallel citations. We have, on the other hand, sought to provide citations that will enable readers to locate and review original sources. We have included URLs for many materials available online, but not for those easily located by a Google search.

To make it easier to refer back to materials where they were originally published, we have preserved original footnote numbers in all excerpted materials. Editors' footnotes are numbered consecutively throughout each chapter. Additions to quoted or excerpted materials are enclosed in brackets.

NATIONAL SECURITY LAW

1

Introduction

The law spoke too softly to be heard amidst the din of arms.

Plutarch, Lives: Caius Marius[1]

A. PURPOSES

There is no field of legal study more critical to the well-being of our people or our republic than National Security Law. In an ever more dangerous world, an inadequate national defense would jeopardize our lives and ideals. Yet measures taken in the name of national security sometimes pose comparable threats to those same ideals of liberty and justice. This irony has not escaped the attention of the Supreme Court:

> [T]his concept of "national defense" cannot be deemed an end in itself, justifying any exercise of legislative power designed to promote such a goal. Implicit in the term "national defense" is the notion of defending those values and ideals which set this Nation apart. For almost two centuries, our country has taken singular pride in the democratic ideals enshrined in its Constitution. . . . It would indeed be ironic if, in the name of national defense, we would sanction the subversion of one of those liberties . . . which make the defense of the Nation worthwhile. [*United States v. Robel*, 389 U.S. 258, 264 (1968).]

President Ronald Reagan described the goal of national defense this way: "The primary objective of U.S. . . . security policy is to protect the integrity of our democratic institutions . . . embodied in the Declaration of Independence and the Constitution." National Security Decision Directive 238, *Basic National Security Strategy*, Sept. 2, 1986, http://www.reagan.utexas.edu/archives/reference/Scanned%20NSDDS/NSDD238.pdf. The delicate balance of liberty and security must be appraised and learned, and learned again, by each generation of students and teachers. One purpose of this book is to study that balance.

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1. John Langhorne & William Langhorne, trans. (n.d.).

It might appear that national security issues have taken center stage in our national life only since the 9/11 terrorist attacks. In fact, they have held that position periodically throughout our history. In the first 75 years of the Republic, the federal courts unhesitatingly, though infrequently, grappled with core issues of national defense — the existence, legality, and scope of war and military authority. Congress and the Executive closely debated questions of war power and foreign policy, not just because they were conscious of setting precedent, but also because each assumed an independent constitutional duty to consider the legality of executive conduct. No one called the resulting body of law — articulated in relatively few judicial opinions and laid bare in a larger number of congressional debates — "national security law." The makers of this law simply applied their evolving understanding of the constitutional framework and their ordinary legal skills to the problems of security as these presented themselves.

Seven major wars in a little more than a century (including the first one ever lost — or at least not won — by American forces), the prolonged tension of the Cold War, the specter of a nuclear holocaust, the unstable post — Cold War world, and the rise of transnational terrorism at home and abroad have changed the way we approach national security law. Today, the lines between foreign and domestic issues of national security, and even between peace and war, have seriously eroded: every foreign affairs issue has domestic ramifications, and the country lives in a seemingly permanent state of war. In 2012, the National Intelligence Council issued a report titled *Global Trends 2030: An Alternative World* (Dec. 2012). It describes megatrends and tectonic geopolitical shifts that the Council believes may shape our increasingly fraught national security affairs. It also warns us to be on the lookout for potential "black swans" — outlier events outside the scope of traditional planning that might cause massive disruptions to American society.

This state of affairs has empowered and perhaps emboldened the Commander in Chief — the President — to stake out national security as executive domain. Justice Stewart noted as much when he said executive power "in the two related fields of national defense and international relations[,] . . . largely unchecked by the Legislative and Judicial branches, has been pressed to the very hilt since the advent of the nuclear missile age." *New York Times Co. v. United States*, 403 U.S. 713, 727 (1971) (Stewart, J., concurring). A second purpose of our study is therefore to examine the constitutional distribution of decision-making authority among the branches of government in our democracy. This has become even more important amidst concerns that an aggressive executive branch is challenging the informal understandings that have historically shaped that distribution.

Despite these developments, or perhaps because of them, the judiciary's ability and responsibility to answer questions involving national security claims has grown increasingly unpredictable, even for some questions that it squarely addressed earlier in our nation's history. In some contemporary contexts, courts seem willing to tackle fundamental questions of national security law; in others, they seem all too content to stay their hand. Congress, too, with but few exceptions, has tended to shy away from serious debate of the same questions in recent years. Ironically, it has sometimes done so by asserting that such questions are for the courts, not for Congress, to resolve. More often, it has simply avoided the questions by acquiescing in executive conduct, even while criticizing that conduct publicly. If it is true, as Justice Black said, that "[t]he word 'security' is a broad, vague generality," *id.* at 719 (Black, J., concurring),

it nonetheless has today assumed a talismanic quality that often mesmerizes the courts into inaction, quiets congressional debate, and sometimes persuades the executive to think of national security as an end in itself.

Another major purpose of this book is to demonstrate that national security is no talisman.

> [T]he concept of military necessity is seductively broad, and has a dangerous plasticity. Because they invariably have the visage of overriding importance, there is always a temptation to invoke security "necessities" to justify an encroachment upon civil liberties. For that reason, the military-security argument must be approached with a healthy skepticism. . . . [*Brown v. Glines*, 444 U.S. 348, 369 (1980) (Brennan, J., dissenting).]

We hope to encourage that skepticism by using ordinary legal skills to help find answers to questions about national security. Not all answers, of course; not always comforting answers either, because security concerns are always factors that weigh in legal analysis.

Relatively few of these answers are to be found in reported judicial opinions addressing national security. Such opinions are "rare, episodic, and afford little precedential value for subsequent cases," given their typically narrow and contextually limited holdings. *Dames & Moore v. Regan*, 453 U.S. 654, 661 (1981). We do try to demonstrate, however, that legal analysis is important and sometimes decisive outside of the courtroom and appellate opinions, and that legal questions of national security do not lose their urgency just because courts will not answer them. Legal analysis figures prominently in dialogues both within and between the political branches. In that nonjudicial setting, they are not so much answered authoritatively as temporarily negotiated. But legal analysis, with an appreciation for the constitutional framework of our system, is crucial in formulating the negotiating positions, defining terms of the dialogue, and memorializing the bargains that are struck.

The failure of courts to give authoritative answers to many questions of national security law suggests to some that public opinion is what ultimately counts in this field.

> In the absence of governmental checks and balances present in other areas of our national life, the only effective restraint upon executive policy and power in the areas of national defense and international affairs may lie in an enlightened citizenry — in an informed and critical public opinion which alone can here protect the values of democratic government. [*N.Y. Times*, 403 U.S. at 728 (Stewart, J., concurring).]

Another facet of our study is therefore to explore the law governing access to the information that would enlighten citizens (and their representatives in Congress) about matters of national security. Again, ordinary legal skills and analysis, here applied by a sometimes less reluctant judiciary, are critical in weighing rights of access against the need to protect truly sensitive information.

Finally, we intend to demonstrate not only that legal skills and analysis *can* be brought to bear on questions of national security, but that they *should* be. Our unabashed purpose here is to stimulate wider thought about the appropriate legal framework for national security decisions. Ultimately, the study of national security law is simply the study of how we can simultaneously protect both our security and the rule of law, mindful of the age-old admonition that "[d]angerous precedents occur in dangerous times," when it becomes the law's responsibility "calmly to poise

the scales of justice, unmoved by the arm of power, undisturbed by the clamor of the multitude." *United States v. Bollman*, 24 F. Cas. 1189, 1192 (C.C.D.D.C. 1807) (No. 14,622) (Cranch, C.J., dissenting).

B. ORGANIZATION

In Part I we establish a legal framework for the study of particular national security subjects in later chapters. Starting with the text of the U.S. Constitution, we see that two centuries of interpretation have lent meaning to the often cryptic language of the founding document, but that questions still outnumber answers. We systematically examine the role that each branch of the government plays in national security matters. Separate chapters address the creation and application of international law to domestic national security law, the extraterritorial application of our law, and the content of international laws concerning resort to war and the conduct of war.

Part II of the book explores our use of force abroad. Beginning with a case study of the Vietnam War, this part of the book then successively considers collective self-defense, unilateral self-defense, targeted killings, peace operations and humanitarian interventions, cyber operations, and nuclear war. Part III deals with intelligence operations, intelligence collection, electronic surveillance, and screening for security, related subjects that sometimes bring the President and Congress into conflict, but that, especially after the 2013 disclosures of controversial NSA surveillance programs by Edward Snowden, drive home the oft-intractable tension between security and privacy. Part IV addresses the detention of terrorist suspects, while Part V concerns the rules for interrogation of suspects in custody. In Part VI we consider criminal prosecution of terrorists in civilian and military courts. Part VII analyzes plans for responding to another major terrorist attack on the U.S. homeland and the domestic role of the military more generally. Finally, Part VIII addresses access to and protection of national security information, including the classification system, public access to such information by statute and other means, "leaks," and censorship.

Our hope is to provide you with a well-rounded, albeit far from comprehensive, introduction to this very dynamic field. For even after more than two centuries of experience, the field of national security law is still evolving rapidly. Patterns for controlling the nation's defense apparatus change from one presidential administration to the next, and sometimes *within* a single administration, while some of the most fundamental questions about allocation of authority remain unanswered. There are nevertheless some constant analytic approaches and underlying principles in the field. We believe that mastery of these will provide the knowledge, skills, and experience you need to play a role in the future development and refinement of U.S. national security law and policy.

PART I FRAMEWORK

2

Providing for the "Common Defence": The Original Understanding

The purpose of this chapter is to plumb the original understanding of the Constitution's allocation of national security powers. Because the text alone furnishes an incomplete record, our search for the Framers' intent requires a brief review of English history and European political theory that probably influenced the Framers, the American experience with government prior to the Constitution, records of the 1787 Convention, and the subsequent ratification debates. *See* Louis Fisher, *Presidential War Power* 1-16 (2d ed. 2004). We nevertheless begin with the text, as we must in any quest for the meaning of a written constitution.

A. THE CONSTITUTIONAL TEXT

Read the excerpts from Articles I-IV of the Constitution found in the Appendix. Try to suppress what you know about our nation's history since 1787. What are your first impressions? How is the responsibility to "provide for the common defence" allocated among the three branches of government?

Judging simply by the proportion of words, the extensive national security powers given Congress in Article I appear to overwhelm the meager listing for the President in Article II. Article I gives Congress authority to "declare War, grant Letters of Marque and Reprisal, and make Rules concerning Captures on Land and Water," which indicates some legislative role in the commitment of American armed forces to combat. Congress also is empowered to "raise and support" the armed forces (and must reappropriate funds for them at least every two years) and to "make Rules for the Government and Regulation of the land and naval Forces." In addition, Congress is authorized to "regulate Commerce with foreign Nations," to provide for the militia and for calling it forth "to execute the Laws of the Union, suppress

Insurrections, and repel Invasions," and "to make all Laws which shall be necessary and proper" for executing any power conferred by the Constitution. Other provisions, particularly the one for impeachment of the President, also suggest legislative dominance. Congress escapes subservience to the Executive by the guarantee of meeting "at least once in every Year," by the grant of immunity from arrest during a legislative session and from questioning in any other place about any speech or debate, and by the assignment to each House of control over its membership.

By contrast, the President is provided only one obvious national security power by being designated the "Commander in Chief." Moreover, the President is directed to command the armed forces only when they are "called into the actual Service of the United States." National security powers may be allocated to the President as part of the mandate to "take Care that the Laws be faithfully executed." The other Article II grants that may concern national security seem modest in comparison to powers conferred upon Congress: to appoint and receive ambassadors and ministers, to appoint other executive officers, and to make treaties (powers that are each shared with the Senate).

We now know that the judiciary may have a role in resolving disputes between the other two branches. However, aside from the reference in Article III, section 3, to the crime of treason, and the more general reference in Article III, section 2 to federal jurisdiction over all cases arising under the Constitution or other federal laws, there is no indication in the constitutional text that the judiciary is to be involved in decisions about the national defense.

Yet both the executive and the courts have played powerful roles in providing for our national security over the last two centuries. How can this history be reconciled with the language of the Constitution? Closer examination of the text reveals the potential for the allocation of national security powers actually reflected in our history. It also demonstrates the futility of trying to divine the Framers' intent from the text alone.

First, Articles I and II assign overlapping functions. For example, the President becomes a legislator of sorts when recommending to Congress "such measures as he shall judge necessary and expedient" and when vetoing bills and resolutions, subject to a two-thirds override by each chamber of Congress. Further, although Congress may tax to "provide for the common Defence" and direct how monies are spent, the President may argue that the "take Care" Clause permits him to act alone in an emergency, using unappropriated or otherwise obligated funds from the Treasury. Similarly, because the President is required to give Congress information "from time to time," he must have been expected to obtain information of interest to Congress. He may obtain the opinion in writing of the principal officer in each of the executive departments, including the Department of Defense, concerning that department's duties. Finally, while the declaration of war is textually committed to Congress, the Commander-in-Chief power could be read to enable the President to use the military to defend against an attack on the United States. Because Article I, section 10, allows a state to "engage in War" if "actually invaded, or in such imminent Danger as will not admit of delay," it seems reasonable to claim as much power for the President if the nation is attacked, when consultation with Congress is not possible or practical.

Second, the text itself is anything but precise. Many of its words are general, not self-defining, and are capable of supporting multiple meanings. Consider the power to "declare War." While the language clearly allocates control over some important aspects of national security decision making to Congress, the text does not say what

constitutes a "war" or, for that matter, what it means to "declare" one. Does "war" include small-scale skirmishes, purposefully limited in duration? Does the "Marque and Reprisal" power instead cover these limited hostilities? Or should "Marque and Reprisal" be thought of as an anachronism, referring to long-abandoned state-sponsored private battles with pirates? Should "to declare" be read to give Congress merely a right to recognize an existing state of war? Or is that language intended to confer the general control over initiating war? Or something in between these polar extremes? What about uses of the military that do not create or perpetuate a state of war? To what extent does the clause giving Congress the power to "make Rules concerning Captures on Land and Water" enable Congress to control detention of persons and property during wartime? And what is the meaning of the text that empowers Congress "[t]o make Rules for the Government and Regulation" of the military? There is similar textual uncertainty about the reach of congressional fiscal powers. May Congress exercise its appropriation powers to limit executive powers? To what extent must Congress provide basic operating funds for the Executive? May funding be conditioned on compliance with congressional wishes?

Concerning presidential authority, there is also vagueness in the language of Article II, most notably the Commander-in-Chief Clause. A narrow reading of that provision indicates no policy-making authority and relegates the President to the status of first general. A broad reading of Article II, on the other hand, combined with a restrictive reading of Article I — the Declaration, Marque and Reprisal, and Rules and Regulation Clauses — would expand the Commander-in-Chief power to include all military actions not unequivocally given to Congress. A similar range of constructions may be afforded the "take Care" language, the power to "receive Ambassadors and other public Ministers," and the statement in Article II, section 1, vesting "[t]he executive Power" in the President. Because the parallel Article I language vests in Congress "[a]ll legislative Powers herein granted," the omission of the words "herein granted" from the text of Article II could be construed to allow the President to do virtually anything "executive" in nature, so long as such action is not assigned exclusively to Congress by explicit Article I language. *See* Alexander Hamilton, *Pacificus No. 1*, Gazette of the United States (Philadelphia), June 29, 1793, *reprinted in* 15 *The Papers of Alexander Hamilton* 33-43 (Harold C. Syrett ed., 1969).

Third, the text fails altogether to prescribe or allocate power over some important areas of national security. For example, while Article I, section 9, forbids suspending the privilege of the writ of habeas corpus "unless when in Cases of Rebellion or Invasion the public Safety may require it," the text does not say who possesses the power to suspend the writ or to assess when the prescribed conditions are satisfied. In addition, the meager text is by itself inadequate for deciding the scope and locus of authority for deploying American troops abroad or in defense of the homeland, contracting for private or foreign fighting forces, engaging in covert paramilitary actions (or, for that matter, any intelligence activities), interdicting convoys, engaging in airlifts or blockades, or threatening or promising to do any of the above.

May Congress delegate power to the President? In part because there is no explicit rule in the text forbidding congressional delegations to the executive, such delegations have been routinely upheld. But how far may Congress go in delegating its own powers? May the power to declare war be delegated, or would such a wholesale transfer violate the Constitution? The text itself provides little guidance, although the structure of the Constitution may be read to forbid such a sweeping delegation. When Congress merely remains silent while the President takes some national

security initiative committed by the Constitution to Congress, is the President acting legally? The answer depends on the construction given to the vague text, since the Constitution fails to describe the effect of legislative inaction. What if the President acts unilaterally in an area not explicitly prescribed or allocated by the Constitution to any branch?

All these uncertainties provoke spirited debates at both ends of Pennsylvania Avenue and among academics. Most national security disputes are resolved in the political process. But when persuasion fails, and the political process will not yield a clear or generally acceptable answer, these disputes end up in court, where the Framers arguably meant for them to be resolved.

Fortunately, the three branches have usually cooperated in making and carrying out national security policy. The practical need for effective administration provides an incentive for Congress to nurture executive branch cooperation. Further, the President's participation in the legislative process is textually assured through his powers to call Congress into special session, to recommend legislation, to provide information about the state of the Union, and to veto any legislative measure. At the same time, any tendency of the President to seek autonomy in the wording of ambiguous text is confined by some explicit and crucial grants to Congress — appropriations and declaration of war to name just two.

Thus, the original understanding of the allocation of national security powers cannot be derived solely from the text of the Constitution. We must broaden our search and consider what is likely to have influenced the delegates to the Philadelphia Convention: British history and European political theory, as well as seminal American events such as the Revolutionary War and earlier efforts at self-government. While the effect of these influences cannot be measured precisely in the Constitution or in the views of any single delegate, it is generally accepted that a combination of theory and practical experience weighed heavily in the plan for a new government.

B. PRE-CONSTITUTIONAL HISTORY AND POLITICAL THEORY IN EUROPE

Many of the Philadelphia delegates were well read in history and political philosophy — from ancient Greece and Rome to contemporary Continental Europe. As erstwhile Englishmen, however, the Framers turned to English ideas and experiences above all others.

It is nonetheless difficult to calculate the British influence on the Constitution and on its national security provisions in particular. The allocation of war-making and foreign affairs powers fluctuated widely in England between the fifteenth and eighteenth centuries, and the unwritten British constitution simply reflected rather than guided these changes.

In general, the Crown dominated all foreign and military affairs until the seventeenth century, when Parliament began successfully to assert its constitutional claims to power. John Locke described the early "royal prerogative" expansively:

> Where the Legislative and Executive Power are in distinct hands, . . . there the good of the Society requires, that several things should be left to the discretion of him, that has the Executive Power. For the Legislators not being able to foresee, and provide, by Laws, for all, that may be useful to the Community, the Executor of the Laws, having the power in

> his hands, has by the common Law of Nature, a right to make use of it, for the good of the Society, in many Cases, where the municipal Law has given no direction, till the Legislative can conveniently be Assembled to provide for it. . . .
>
> This Power to act according to discretion, for the publick good, without the prescription of the Law, and sometimes even against it, *is* that which is called *Prerogative*. For since in some Governments the Law-making Power is not always in being, and is usually too numerous, and so too slow, for the dispatch requisite to Execution . . . there is a latitude left to the Executive power, to do many things of choice, which the Laws do not prescribe. . . .
>
> The old Question will be asked in this matter of *Prerogative,* But *who shall be Judge* when this Power is made a right use of? I Answer: Between an Executive Power in being, with such a Prerogative, and a Legislative that depends upon his will for their convening, there can be no *Judge on Earth:* As there can be none, between the Legislative, and the People, should either the Executive, or the Legislative, when they have got the Power in their hands, design, or go about to enslave, or destroy them. The People have no other remedy in this, as in all other cases where they have no Judge on Earth, but to *appeal to Heaven*. [John Locke, *Two Treatises of Government* 392-393, 397 (Peter Laslett ed., 1967).]

Thus, before the seventeenth-century surge in parliamentary strength, the "prerogative" powers of the Crown permitted it to exercise unilaterally, among other things, most national security powers — declaring wars, issuing letters of marque and reprisal, making treaties and appointments, and raising armies and navies. The prerogative powers were generally accepted as being free from limitation by Parliament or the courts.

From the mid-seventeenth century onward, Parliament and the Crown alternately dominated decision making about national security matters. When Parliament asserted itself it often relied on its control of the purse and its ability to obtain information from the executive. The Parliament taxed for military programs, controlled the raising and keeping of standing armies in times of peace, and successfully placed restrictive conditions on military appropriations. If the Crown ignored legislation restricting a foreign affairs initiative, the Parliament could and on occasion did resort to impeachment, dismissal, or execution. On the other hand, if Parliament was uncooperative, the Crown might secure funding for its ventures from local governments or by borrowing, and it could dismiss Parliament for any reason — if Parliament had not acted first. Further, secret initiatives were sometimes undertaken, and information was often withheld from Parliament under a claim of executive discretion.

In addition to their legacy of shifting royal and parliamentary powers, which had so affected war-making and foreign affairs, the British brought with them theoretical principles central to their own constitutional development that greatly influenced the Americans. The most important intellectual contribution was the idea of separation of powers. The theory of separation assigned different powers to different institutions and persons in government in order to forestall tyranny, to promote the government's legitimacy, and to make government more efficient. John Locke, writing between 1679 and 1683, relied on his theory of separation to advance the argument for the Whig view of government. His ideas significantly influenced constitutional development in England and in America.

> In all Cases, whilst the Government subsists, *the Legislative is the Supream Power*. For what can give Laws to another, must needs be superiour to him. . . .
>
> But because the Laws, that are at once, and in a short time made, have a constant and lasting force, and need a *perpetual Execution,* or an attendance thereunto: Therefore 'tis

necessary there should be a *Power always in being*, which should see to the *Execution* of the Laws that are made, and remain in force. And thus the *Legislative* and *Executive Power* come often to be separated.

There is another *Power* in every Commonwealth, which one may call *natural*, because it is that which answers to the Power every Man naturally had before he entered into Society. For though in a Commonwealth the Members of it are distinct Persons still in reference to one another, and as such are governed by the Laws of Society; yet in reference to the rest of Mankind, they make one Body, which is, as every Member of it before was, still in the State of Nature with the rest of Mankind. Hence it is, that the Controversies that happen between any Man of the Society with those that are out of it, are managed by the publick; and an injury done to a Member of their Body, engages the whole in the reparation of it. So that under this Consideration, the whole Community is one Body in the State of Nature, in respect of all other States or Persons out of its Community.

This therefore contains the Power of War and Peace, Leagues and Alliances, and all the Transactions, with all Persons and Communities without the Commonwealth, and may be called *Federative,* if any one pleases. So the thing be understood, I am indifferent to the Name.

These two Powers, *Executive* and *Federative,* though they be really distinct in themselves, yet one comprehending the *Execution* of the Municipal Laws of the Society *within* its self, upon all that are parts of it; the other the management of the *security and interest of the publick without,* with all those that it may receive benefit or damage from, yet they are always almost united. And though this *federative Power* in the well or ill management of it be of great moment to the Commonwealth, yet it is much less capable to be directed by antecedent, standing, positive Laws, than the *Executive;* and so must necessarily be left to the Prudence and Wisdom of those whose hands it is in, to be managed for the publick good. For the *Laws* that concern Subjects one amongst another, being to direct their actions, may well enough *precede* them. But what is to be done in reference to *Foreigners*, depending much upon their actions, and the variation of designs and interests, must be *left* in great part *to* the *Prudence* of those who have this Power committed to them, to be managed by the best of their Skill, for the advantage of the Commonwealth.

Though, as I said, the *Executive* and *Federative Power* of every Community be really distinct in themselves, yet they are hardly to be separated, and placed, at the same time, in the hands of distinct Persons. For both of them requiring the force of the Society for their exercise, it is almost impracticable to place the Force of the Commonwealth in distinct, and not subordinate hands; or that the *Executive* and *Federative Power* should be *placed* in Persons that might act separately, whereby the Force of the Publick would be under different Commands: which would be apt sometime or other to cause disorder and ruine. [Locke, *supra*, at 382-386.]

The judicial power was born as the third real power in England when Parliament assured the independence of the judges from the King's previously unfettered control over their removal. Yet the judges still were viewed as executive officers while in office. It was Montesquieu in his *Spirit of Laws*, published in 1748, who provided the theoretical challenge to the distinct federative power of the executive described by Locke. Montesquieu's theory subdivided the federative and the law enforcement powers of the executive, treated the judiciary as a distinct branch, and offered the tripartite separation that is reflected in the American Constitution. For Montesquieu, the preservation of liberty required such a separation:

When the legislative and executive powers are united in the same person, or in the same body of magistracy, there can be no liberty; because apprehensions may arise, lest the same monarch or senate should enact tyrannical laws, to execute them in a tyrannical manner.

> Again, there is no liberty, if the power of judging be not separated from the legislative and executive powers. Were it joined with the legislative, the life and liberty of the subject would be exposed to arbitrary control; for the judge would be then the legislator. Were it joined to the executive power, the judge might behave with all the violence of an oppressor. [Charles Louis de Secondat, Baron de Montesquieu, *The Spirit of Laws* 202 (David Wallace Carrithers ed., 1977).]

The problem with the separation of powers theory, however, was that it failed to account for the real class conflicts and overlapping authority that actually characterized the British system. A second theory, that of mixed government, helped to harmonize theory and practice. According to mixed government theory, balance in government could be maintained by mixing classes and institutions of society — kings, lords, and commoners — and combining various primary forms of government, namely monarchy, aristocracy, and democracy. A systematic attempt at creating "counterpoisal pressures . . . might keep the system stable and healthy." Bernard Bailyn, *The Origins of American Politics* 20 (1970). Thus, separated branches would share all the government's powers, checking against abuses by any single group in society or in government. For example, broad prerogative powers did not necessarily always belong to the King unchecked by the Parliament. The King or his ministers could be criticized or even impeached for their misuse of power. Moreover, either branch could initiate or exercise a prerogative power.

Locke recognized the importance of balancing and mixing powers when he conceded that many things must be left to executive discretion, subject to nullification or modification by legislation. For Locke, both separation of powers and mixed government served to make the King subject to the representative Parliament. Thus, assuming that both the separation and mixed government theories of Locke and Montesquieu influenced the U.S. Constitution, the ambiguities of the American text might be quite intentional reflections of the essential fluidity of these concepts.

General theories of government were not the only European notions to influence the text of the Constitution. The Framers' views of war and peace, in their declared and undeclared forms, seem to be derived especially from Grotius, Pufendorf, Vattel, and Burlamaqui, scholars of the law of nations. Charles A. Lofgren, *War-Making Under the Constitution: The Original Understanding*, 81 Yale L.J. 672, 689-697 (1972). For Grotius, declared wars were "perfect," involving committed nations in opposition. Undeclared wars were "imperfect," and occurred in situations where the sovereign authorized private reprisals aimed at claiming property held by subjects of another sovereign. Hugo Grotius, *The Rights of Wars and Peace* 538-549 (Jean Barbeyrac trans., 1738) (1625). Burlamaqui argued that imperfect war and reprisals were often one and the same, but that a sovereign might itself engage in reprisals using its own forces:

> A perfect war is that, which entirely interrupts the tranquillity of the state, and lays a foundation for all possible acts of hostility. An imperfect war, on the contrary, is that, which does not entirely interrupt the peace, but only in certain particulars, the public tranquillity being in other respects undisturbed.
>
> This last species of war is generally called reprisals, of the nature which we shall here give some account. By reprisals then we mean that imperfect kind of war, or those acts of hostility, which sovereigns exercise against each other, or, with their consent, their subjects, by seizing the persons or effects of the subjects of a foreign commonwealth, that