

2011

# The Commander-in-Chief and the Necessities of War: A Conceptual Framework

John C. Dehn

*Loyola University Chicago, School of Law, [jdehn@luc.edu](mailto:jdehn@luc.edu)*

Follow this and additional works at: <http://lawcommons.luc.edu/facpubs>



Part of the [Military, War, and Peace Commons](#)

---

## Recommended Citation

John C. Dehn, The Commander-in-Chief and the Necessities of War: A Conceptual Framework, 83 Temp. L. Rev. 599 (2011).

This Article is brought to you for free and open access by LAW eCommons. It has been accepted for inclusion in Faculty Publications & Other Works by an authorized administrator of LAW eCommons. For more information, please contact [law-library@luc.edu](mailto:law-library@luc.edu).

---

---

# TEMPLE LAW REVIEW

© 2011 TEMPLE UNIVERSITY OF THE COMMONWEALTH SYSTEM OF HIGHER  
EDUCATION

---

**VOL. 83 NO. 3**

**SPRING 2011**

---

## ARTICLES

### THE COMMANDER-IN-CHIEF AND THE NECESSITIES OF WAR: A CONCEPTUAL FRAMEWORK

*John C. Dehn\**

*While the current Administration has largely abandoned claims of plenary presidential authority to fight the nation's wars, courts, scholars, and policy makers continue to debate the nature and scope of the powers conferred by the September 18, 2001 Authorization for Use of Military Force. This Article examines primarily Supreme Court precedent to distill the general scope and limits of the President's powers to fight the nation's international and non-international armed conflicts. It concludes that the Supreme Court has expressly endorsed and consistently observed (although inconsistently applied) two concepts of necessity attributable to the Commander-in-Chief power. The first is military necessity: the power to employ all military measures not prohibited by applicable law and reasonably calculated to defeat a national enemy. The case law is reasonably clear that "applicable law" in this context includes all domestic and international law specifically applicable to armed conflict. Military necessity also encompasses a second type of necessity: public necessity. Analogous to the common law tort doctrine, precedent reveals that, in armed conflict, public necessity permits the abrogation of private, statutory, and even certain constitutional*

---

\* Assistant Professor, Department of Law, United States Military Academy; J.S.D. Candidate, Columbia University Law School. This Article was originally submitted in partial satisfaction of the requirements for the Master of Laws degree at Columbia University Law School. The author serves in the United States Army and holds degrees from the United States Military Academy at West Point, the University of Oklahoma College of Law (with highest honors), The Judge Advocate General's Legal Center and School, and Columbia University Law School (James Kent Scholar). He is also a graduate of the Army's Command and General Staff College. The views expressed in this Article are solely the author's and do not necessarily reflect those of the Department of Defense, Department of the Army, or any other department or agency of the United States government. The author thanks Henry Monaghan, Thomas Lee, David Barron, Trevor Morrison, David Wallace, Tim Bakken, Jody Prescott, Mark Welton and Richard V. Meyer for their comments on earlier drafts. Any remaining errors are his alone.

*rights under sufficiently exigent circumstances. A third necessity related to war has been theorized but never clearly addressed by the courts: an alleged presidential power to take all actions necessary to counter an imminent threat to the nation's existence. This is best understood as an extreme form of public necessity, here termed "governmental necessity." This Article distills and relates these three forms of necessity, explaining how they inform and complicate questions regarding the President's powers to conduct war.*

## TABLE OF CONTENTS

I.	INTRODUCTION .....	601
II.	THE ORIGINAL UNDERSTANDING OF THE SEPARATION OF POWERS OVER THE ARMED FORCES .....	608
	A. <i>The Commander-in-Chief Power and the Logical Fallacy of Jackson's Third Tier</i> .....	609
	B. <i>The Constitutional Design and Military Regulation</i> .....	612
	C. <i>Practice in Great Britain and the U.S.</i> .....	613
III.	THE ORIGINAL UNDERSTANDING OF THE SEPARATION OF POWERS OVER ARMED CONFLICT .....	616
	A. <i>Identifying Public Enemies—Bas and Talbot</i> .....	616
	B. <i>Regulating the Scope of Hostilities—Little v. Berreme</i> .....	618
	C. <i>The Effect of International Law—Charming Betsy and Brown</i> .....	621
	D. <i>Interim Observations</i> .....	625
IV.	THE COMMANDER-IN-CHIEF'S WAR FIGHTING DISCRETION: THE CONCEPT OF MILITARY NECESSITY .....	626
	A. <i>Towards a Concept of Military Necessity</i> .....	626
	B. <i>The Articulation of Military Necessity</i> .....	629
	C. <i>Examining the Breadth and Limits of Military Necessity</i> .....	631
	1. <i>The Civil War</i> .....	631
	2. <i>Abrogating Rights in War—Notions of Public Necessity</i> .....	638
	3. <i>The Second World War</i> .....	641
	D. <i>More Interim Observations</i> .....	644
	E. <i>Recent Cases in the Post-9/11 Conflict</i> .....	645
	F. <i>Clarifying the Confusion Regarding the Commander-in-Chief's Authority in War</i> .....	648
V.	EXTRAORDINARY EMERGENCY POWERS—THE POLITICS OF NATIONAL SECURITY AND THE RULE OF LAW .....	651
	A. <i>Emergency Powers—Law or Politics?</i> .....	652
	B. <i>Notions of "Governmental Necessity"</i> .....	654
	C. <i>The Unclear Line Between Governmental, Public, and Military Necessity</i> .....	656
	D. <i>The Necessary Limits of Military Necessity</i> .....	658
VI.	CONCLUSION .....	662

## I. INTRODUCTION

Over a decade after the September 11, 2001 attacks, the courts appear to be only marginally closer to understanding the precise scope and limits of the authority granted to the President by Congress under the Authorization for Use of Military Force (AUMF). The AUMF empowers the President to

use all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001, or harbored such organizations or persons, in order to prevent any future acts of international terrorism against the United States by such nations, organizations or persons.<sup>1</sup>

The courts have rejected, and a new Administration has abandoned (to an increasingly uncertain extent), claims that the President has complete discretion to fight the nation's armed conflicts in any manner the President deems expedient. Public and scholarly debates about the President's war powers have centered on: the authority to use "enhanced interrogation techniques" in apparent violation of both international and domestic law;<sup>2</sup> the authority to indefinitely detain a putative enemy fighter (or "belligerent" or "combatant");<sup>3</sup> the power to conduct drone attacks beyond

---

1. Authorization for Use of Military Force (AUMF), Pub. L. No. 107-40, § 2(a), 115 Stat. 224, 224 (2001).

2. See, e.g., HUMAN RIGHTS WATCH, GETTING AWAY WITH TORTURE (2011); available at <http://www.hrw.org/en/reports/2011/07/12/getting-away-torture> (detailing alleged violations by Bush Administration officials of international and domestic laws proscribing torture); José E. Alvarez, *Torturing the Law*, 37 CASE W. RES. J. INT'L L. 175, 179-98 (2006) (summarizing ways Bush Administration "twisted" international law); Mary Ellen O'Connell, *Affirming the Ban on Harsh Interrogation*, 66 OHIO ST. L.J. 1231, 1233 (2005) (arguing Bush Administration ignored international laws banning "coercive, cruel, inhuman, and degrading" interrogation techniques); Jordan J. Paust, *Executive Plans and Authorizations to Violate International Law Concerning Treatment and Interrogation of Detainees*, 43 COLUM. J. TRANSNAT'L L. 811, 824-38 (2005) (detailing Bush Administration violations of Geneva Convention and human rights law); Eric A. Posner & Adrian Vermeule, *Should Coercive Interrogation Be Legal?*, 104 MICH. L. REV. 671, 675 (2006) (proposing legalization of coercive interrogation techniques, subject to numerous restrictions); Maj. Christopher B. Shaw, *The International Proscription Against Torture and the United States' Categorical and Qualified Responses*, 32 B.C. INT'L & COMP. L. REV. 289, 289 (2009) (arguing that, due to legal and policy failures, Bush administration engaged in torture in violation of domestic and international law due to leadership and policy failures).

3. Judges of the U.S. District Court for the District of Columbia have rendered several decisions on this topic, but have yet to address the detention of civilian security threats. For a discussion of these cases, see BENJAMIN WITTES ET AL., BROOKINGS INST., THE EMERGING LAW OF DETENTION 2.0: THE GUANTANAMO HABEAS CASES AS LAWMAKING (2011), available at [http://www.brookings.edu/papers/2011/05\\_guantanamo\\_wittes.aspx](http://www.brookings.edu/papers/2011/05_guantanamo_wittes.aspx); see also Laura M. Olson, *Guantanamo Habeas Review: Are the D.C. District Court's Decisions Consistent with IHL Internment Standards?*, 42 CASE W. RES. J. INT'L L. 197, 242 (2009) ("In their analogous application of [International Humanitarian Law], both the Administrations and the court analogize solely to the Third Geneva Convention [addressing prisoners of war]. No mention is made of the Fourth Geneva Convention [addressing civilians and civilian security threats]."). Failing to consider civilian security-threat detention creates incentives to adopt overbroad or vague standards for who may be detained as a combatant consistent with the laws of war. See Curtis A. Bradley & Jack L. Goldsmith, *Congressional Authorization and the War on Terrorism*, 118 HARV. L. REV. 2047, 2094 (2005) (arguing AUMF impliedly authorizes all

Afghanistan's borders;<sup>4</sup> and the use of, and alternatives to, military commissions.<sup>5</sup> As the opinions attending the D.C. Circuit decision in *Al-Bihani v. Obama*<sup>6</sup> make clear, all of these topics raise related questions regarding the extent to which relevant international law informs the substance or limits the scope of the presidential authority.<sup>7</sup>

Before September 11, 2001 ("9/11"), debates focused primarily on a President's ability to initiate war or military action rather than the lawfulness of measures adopted to conduct it.<sup>8</sup> This is likely because most post-Vietnam conflicts have been small, limited conflicts or military contingency operations. They presented little perceived direct threat to the nation and garnered little national attention regarding the specifics of how they were conducted. Moreover, technology did not allow the public or the

---

detentions permitted by international laws governing armed conflict without clarifying detention authorized); Robert Chesney & Jack Goldsmith, *Terrorism and the Convergence of Criminal and Military Detention Models*, 60 STAN. L. REV. 1079, 1082–87 (2008) (discussing various detention models and their weaknesses in face of terrorist threats). *But see* Ryan Goodman & Derek Jinks, *International Law, U.S. War Powers, and the Global War on Terrorism*, 118 HARV. L. REV. 2653, 2659–61 (2005) (discussing international humanitarian law requirements for internment of civilians as security threats).

4. *See* Chris Jenks, *Law from Above: Unmanned Aerial Systems, Use of Force, and the Law of Armed Conflict*, 85 N.D. L. REV. 649, 656–62 (2009) (arguing that unmanned aerial attacks of proper targets in Pakistan are lawful); Mary Ellen O'Connell, *Unlawful Killing with Combat Drones: A Case Study of Pakistan, 2004–2009*, in SHOOTING TO KILL: THE LAW GOVERNING LETHAL FORCE IN CONTEXT (forthcoming), available at <http://ssrn.com/abstract=1501144> (arguing that unmanned aerial strikes at targets in Pakistan are unlawful); Kenneth Anderson, *Predators Over Pakistan*, WEEKLY STANDARD, Mar. 8, 2010, at 26 (arguing that unmanned aerial attacks are both legal and effective); *see also* Maj. Michael D. Banks, *Addressing State (Ir-)Responsibility: The Use of Military Force as Self-Defense in International Counter-Terrorism Operations*, 200 MIL. L. REV. 54, 65–67 (2009) (arguing that, under certain conditions, a state may use military force against a non-state terrorist organization if host state within which organization is located or operating is unwilling or unable to stop it from committing terrorist attacks).

5. *See* David Glazier, *Full and Fair by What Measure?: Identifying the International Law Regulating Military Commission Procedure*, 24 B.U. INT'L L.J. 55, 121 (2006) (arguing certain provisions of international law governing armed conflict should govern military commissions); Scott L. Silliman, *Prosecuting Alleged Terrorists by Military Commission: A Prudent Option*, 42 CASE W. RES. J. INT'L L. 289, 292–97 (2009) (arguing military commissions are a legally viable and sound policy option for trying suspected terrorists when used in combination with federal district courts); Steven Vladeck, *The Laws of War as a Constitutional Limit on Military Jurisdiction*, 4 J. NAT'L SEC. L. & POL'Y 295, 298–300 (2010) (arguing that international humanitarian law provides narrow exception to constitutional assignment of power to adjudicate and punish crimes, and thereby serves as constitutional limit on executive power to try offenses and offenders by military commission). *See generally* LOUIS FISHER, *MILITARY TRIBUNALS AND PRESIDENTIAL POWER: AMERICAN REVOLUTION TO THE WAR ON TERRORISM* (2005) (recounting and critiquing evolution and use of military commissions/tribunals, primarily from a separation of powers perspective); GLENN SULMASY, *THE NATIONAL SECURITY COURT SYSTEM: A NATURAL EVOLUTION OF JUSTICE IN AN AGE OF TERROR* (2009) (proposing new court system to deal with terrorism).

6. 590 F.3d 866 (D.C. Cir. 2010), *reh'g denied en banc*, 619 F.3d 1 (D.C. Cir. 2010).

7. *See generally id.* In the denial of rehearing, D.C. Circuit judges expressed different theories about whether or how international law is relevant to the President's ability to preventively detain suspected enemy belligerents or fighters. *See Al-Bihani v. Obama*, 619 F.3d 1 (D.C. Cir. 2010) (*en banc*).

8. Members of both houses of Congress attempted to prevent the President from unilaterally committing U.S. forces to military action with regard to the first war with Iraq, *Dellums v. Bush*, 752 F. Supp. 1141, 1143 (D.D.C. 1990), and the 1999 Kosovo military intervention, *Campbell v. Clinton*, 203 F.3d 19, 20 (D.C. Cir. 2000). The books and articles on this topic are too numerous to include here. *See infra* note 16 for citations to some of the many sources that have addressed the matter.

President immediate and direct access to on-going details of military operations or other government actions, particularly those in distant lands. A U.S. President was simply not perceived as a key factor in the day-to-day conduct of troops in battle or other federal agents in the field.

Modern technologies have radically altered this dynamic. The internet and other technologies have substantially increased government access to public and private information. News organizations provide constant war coverage and commentary from around the globe. Military decisions once made by senior commanders in austere locations are now made by the President or Secretary of Defense.<sup>9</sup> Through modern technology, both elected branches—but particularly the executive—may now monitor and influence military and other actions in real time, exercising unprecedented control over the details of ongoing hostilities.<sup>10</sup> As the President's direct involvement in the details of war fighting increases, a more complete understanding of the distribution of national war powers is needed. This need was amply demonstrated by the Bush Administration's approach to legal issues surrounding the "post-9/11 conflict."<sup>11</sup>

A sense of enhanced presidential control must not cause us to forget the complexity of modern conflicts and battlefields.<sup>12</sup> The President and his subordinates necessarily require broad discretion to determine precisely how to fight and defeat an elusive and adaptive enemy in order to win our nation's armed conflicts and preserve our national security.<sup>13</sup> Express congressional authorization for or regulation of every aspect of military operations is neither practical nor desirable. The challenge is to understand and articulate the breadth of permissible executive discretion without minimizing the import of the law limiting it.

---

9. Again, there are numerous examples. For a particularly interesting account of civilian leaders exercising almost complete control over target selection during the North Atlantic Treaty Organization's 1999 military campaign in Kosovo, see WESLEY K. CLARK, *WAGING MODERN WAR* 162–344 (2002), and DAVID HALBERSTAM, *WAR IN A TIME OF PEACE: BUSH, CLINTON AND THE GENERALS* 426–80 (2001).

10. For example, counterterrorism advisor John Brennan confirmed that President Obama watched in "real time" the operation against bin Laden, in which bin Laden was killed by the U.S. military. Press Briefing by Press Secretary Jay Carney and Assistant to the President for Homeland Security and Counterterrorism John Brennan (May 2, 2011) available at <http://www.whitehouse.gov/the-press-office/2011/05/02/press-briefing-press-secretary-jay-carney-and-assistant-president-homeland>; see also HALBERSTAM, *supra* note 9, at 457–60 (showing how modern technological warfare and political stakeholders influenced military actions in Kosovo).

11. "Post-9/11 conflict" refers to military actions involving armed hostilities undertaken by the United States against al Qaeda and so-called "associated" forces around the globe, as well as to the conflict with al Qaeda and Taliban in Afghanistan. Regarding the Bush Administration's legal approach, see generally THE TORTURE PAPERS: THE ROAD TO ABU GHRAIB (Karen J. Greenberg & Joshua L. Dratel eds., 2005) [hereinafter TORTURE PAPERS].

12. See, e.g., DEP'T OF THE ARMY, *COUNTERINSURGENCY B-1* (2006) ("Soldiers and Marines spend a lot of time in suburban and urban areas interacting with the populace. This battlefield is three dimensional. Multistory buildings and underground lines of communications, such as tunnels and sewers, can be very important. Insurgents also use complex natural terrain to their advantage as well.")

13. For an example of the difficulty in distinguishing between irregular enemy fighters and civilians, see, Dexter Filkins, *Loyalties of 4 Killed in Afghan Raid Remain Unclear*, N.Y. TIMES, Jan. 22, 2010, at A4. For an example of the adaptive nature of non-state actor enemies, see Alissa J. Rubin, *Taliban Using Lighter Touch to Win Allies*, N.Y. TIMES, Jan. 21, 2010, at A1.

This Article examines the general nature and scope of the President's powers to conduct the nation's international and non-international armed conflicts.<sup>14</sup> It first examines evidence of the original understanding of the elected branches regarding their relative authority over the armed forces. It then closely analyzes key Supreme Court precedent to identify common threads in the understanding of the Commander-in-Chief power as well as the separation of powers over the nation's war fighting. It builds on the scholarship of Professors Barron and Lederman regarding the nature of the Commander-in-Chief power,<sup>15</sup> but is more narrowly focused on the powers to *conduct* war or armed conflicts through the selection of appropriate means and methods for fighting them.<sup>16</sup> It also draws upon Professor Monaghan's analysis of emergency presidential powers.<sup>17</sup>

This analysis reveals that a President's powers to conduct war in both international and non-international armed conflict are based in two concepts of necessity fully supported by precedent, and possibly a third that is sometimes discussed but is neither supported nor fairly addressed by the case law.<sup>18</sup> The first is best described as a doctrine of implied powers that has at times been referred to as "military

---

14. As used herein, "armed conflict" refers to all armed violence between the United States and other nations, as well as to any armed violence between the United States and non-state actors with sufficient magnitude to trigger application of the laws of war. Commentators generally agree that noninternational armed conflict exists when hostilities reach a minimum level of intensity between parties of sufficient organization. See, e.g., James G. Stewart, *Towards a Single Definition of Armed Conflict in International Humanitarian Law: A Critique of Internationalized Armed Conflict*, 85 INT'L REV. RED CROSS 313, 318 (2003) (citing international tribunals for the proposition that noninternational armed conflict exists when there is "protracted armed violence between governmental authorities and organised armed groups or between such armed groups" (internal quotation marks omitted)). The intensity inquiry examines "the number, duration and intensity of individual confrontations, the type of weapons and other military equipment used, the number and calibre of munitions fired, the number of persons and types of forces partaking in the fighting, the number of casualties, the extent of material destruction" among other factors. Jelena Pejic, *The Protective Scope of Common Article 3: More than Meets the Eye*, 93 INT'L REV. RED CROSS 1, 4 (2011).

15. Their work appears in two issues of the Harvard Law Review. David J. Barron & Martin S. Lederman, *The Commander in Chief at the Lowest Ebb—Framing the Problem, Doctrine, and Original Understanding*, 121 HARV. L. REV. 689 (2008) [hereinafter Barron & Lederman I]; David J. Barron & Martin S. Lederman, *The Commander in Chief at the Lowest Ebb—A Constitutional History*, 121 HARV. L. REV. 941 (2008) [hereinafter Barron & Lederman II].

16. This Article will not examine claims of general presidential authority to set foreign policy not involving the use of force that might be implemented through the military, or to *initiate* armed conflict without congressional authorization. For a range of opinions and analysis on the latter topic, see generally, LOUIS FISHER, *PRESIDENTIAL WAR POWER* (2d ed. 2004); JOHN YOO, *THE POWERS OF WAR AND PEACE: THE CONSTITUTION AND FOREIGN AFFAIRS AFTER 9/11* (2005); Henry P. Monaghan, *Presidential War-Making*, 50 B.U. L. REV. 19 (1970).

17. Henry P. Monaghan, *The Protective Power of the Presidency*, 93 COLUM. L. REV. 1 (1993). This Article will not undertake an analysis of the executive's emergency powers to protect United States instrumentalities, citizens and their property domestically or abroad as discussed in Professor Monaghan's work, and at length in *Durand v. Hollins*, 8 F. Cas. 111 (C.C.S.D.N.Y. 1860) (No. 4,186). Such inquiry would require an analysis of the power to initiate military or other defensive actions rather than the means by which to conduct them.

18. The basis for the claim of substantially equal war powers in both international and non-international armed conflict will become apparent. This Article draws upon Supreme Court precedent from both types of conflicts in which it is clear that the Court has not distinguished between them in interpreting the *general* nature and scope of the powers possessed by the Commander-in-Chief and his subordinates in armed conflict.

necessity.” Military necessity is the power to employ all military measures that are not prohibited by applicable law and are reasonably calculated to defeat a national enemy. Precedent is reasonably clear that the law applicable to a given aspect of armed conflict may be domestic, international, or (most often) the relevant aspects of both.<sup>19</sup>

The concept of military necessity also encompasses powers analogous to the common law tort doctrine of public necessity. The tort doctrine supports the power to invade private property rights when strictly necessary to avert an imminent public harm.<sup>20</sup> As will be shown, the concept of public necessity related to war permits the abrogation of some private, statutory, and even constitutional rights in exigent circumstances.<sup>21</sup> In both war and tort, however, such necessity is limited to discrete exigent circumstances and does not permit the abrogation of any law clearly intended to govern the exigency at issue.

The third concept of necessity related to war is best understood as an extreme form of public necessity, here termed “governmental necessity.” Governmental necessity is theorized as a general power to counter a threat to the nation’s existence without legal constraint. It therefore includes the power to temporarily violate domestic and international laws, including those specifically applicable to armed conflict or other exigencies when justified by the dire nature of a threat, but only so long as Congress is informed of and ratifies the actions of the executive.<sup>22</sup> The mere existence of such a power under the Constitution is subject to serious doubt. It also appears to be legally unmanageable, with an uncertain relationship to concepts of congressional ratification or indemnification.

Interrelated and sometimes overlapping in practice and political discourse, these “necessities of war” naturally lead to confusion regarding the scope of the executive branch’s ability to act either in the absence of or contrary to domestic or international law. Although the Supreme Court has been neither perfectly clear nor entirely

---

19. This Article will not undertake a complete analysis of what constitutes domestic or international law specifically applicable in armed conflict. It discusses the sources of specific rules of decision supporting Supreme Court decisions. A thorough review of the topic requires a separate analysis, particularly regarding international law. Compare Bradley & Goldsmith, *supra* note 3, with Goodman & Jinks, *supra* note 3 (disagreeing over role and import of relevant international humanitarian law to military actions authorized by AUMF).

20. RESTATEMENT (SECOND) OF TORTS § 196 (1965). There does not appear to be an analogous doctrine in current drafts for the Third restatement.

21. Note that the Restatement (Second) of Torts provides:

A privilege similar to that stated in this Section has been recognized in older cases, where members of the military forces have acted to occupy, remove, or destroy property for the purpose of protection against a public enemy. Such action, in the exercise of special military power or authority in time of war or of martial law, lies beyond the scope of the ordinary law of Torts, and is therefore beyond the scope of this Restatement.

*Id.* § 196 cmt. i; see, e.g., *Respublica v. Sparhawk*, 1 U.S. (1 Dall.) 357, 362–63 (Pa. 1788) (finding Continental Congress had authority to remove and store barrels of flour to prevent their capture by enemy forces and was not required to provide compensation when those barrels were later captured).

22. Some refer to this as a president acting “extralegally.” JACK GOLDSMITH, *THE TERROR PRESIDENCY: LAW AND JUDGMENT INSIDE THE BUSH ADMINISTRATION* 80 (2007). Others use the term “extraconstitutional[.]” Barron & Lederman I, *supra* note 15, at 746. I will not here undertake to compare, contrast, or define these two terms.



consistent in its approach and analysis, these concepts of necessity are readily discernable and in some cases explicitly endorsed in the Court's opinions.<sup>23</sup>

The need for caution is clear. It is undoubtedly true that the President must have flexibility to meet complex threats to the nation's security and the near infinite variables of the modern battlefield. However, claims of plenary executive power to fight a preventive war against an enemy whose identification might be somewhat statutorily vested to the President's discretion<sup>24</sup> amplify war's historic dangers to the rule of law.

These dangers are particularly acute when the exercise of executive discretion is based on information not available to the general public. Under such circumstances, claims of plenary Commander-in-Chief power become more than a "persuasive dialectical weapon in political controversy."<sup>25</sup> They sustain an ability to act in complete secrecy on a broad range of matters, thereby avoiding political discourse that might lead to controversy until a given issue is a *fait accompli*. The debate regarding enhanced interrogation techniques, for example, did not become widely public until after the revelation of abuses at Abu Ghraib in April of 2004.<sup>26</sup> The existence of so-called "black sites" where government agents used "enhanced interrogation techniques" was not officially acknowledged until over two years later.<sup>27</sup> Although there have been multiple uncoordinated investigations of detainee abuse, Congress appears to have effectively excused many government agents from prosecution in domestic courts before all of the facts were known.<sup>28</sup>

---

23. See *infra* Part IV for a discussion of the Court's treatment of military necessity.

24. Recall that the AUMF provided the President with the authority to "use all necessary and appropriate force against those nations, organizations, or persons *he determines* planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001, or harbored such organizations or persons." AUMF, Pub. L. No. 107-40, § 2(a), 115 Stat. 224, 224-25 (2001) (emphasis added). Compare *Al-Aulaqi v. Obama*, 727 F. Supp. 2d 1, 47 (2010) (holding "merits of the President's (alleged) decision to launch an attack on a foreign target" is political question inappropriate for judicial review), with John C. Dehn, *A Proposal for Judicial Review of War Measures*, 159 U. PENN. L. REV. PENNUMBRA 176 (2011), <http://www.pennumbra.com/debates/debate.php?did=40> (arguing in favor of deferential judicial review of executive targeting decisions in armed conflict).

25. *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 647 (1952) (Jackson, J., concurring).

26. See Paust, *supra* note 2, at 838-51 (discussing critical reports and media attention concerning interrogation techniques authorized by Bush Administration).

27. See R. Jeffrey Smith & Michael Fletcher, *Bush Says Detainees Will Be Tried; He Confirms Existence of CIA Prisons*, WASH. POST, Sept. 7, 2006, at A1 (reporting on Bush's confirmation of secret detention sites and irregular interrogation methods for various terrorist suspects.)

28. The Detainee Treatment Act of 2005 contained the following provision:

In any civil action or criminal prosecution against an officer, employee, member of the Armed Forces, or other agent of the United States Government who is a United States person, arising out of the officer, employee, member of the Armed Forces, or other agent's engaging in specific operational practices, that involve detention and interrogation of aliens who the President or his designees have determined are believed to be engaged in or associated with international terrorist activity that poses a serious, continuing threat to the United States, its interests, or its allies, and that were officially authorized and determined to be lawful at the time that they were conducted, it shall be a defense that such officer, employee, member of the Armed Forces, or other agent did not know that the practices were unlawful and a person of ordinary sense and understanding would not know the practices were unlawful. Good faith reliance on advice of counsel should be an important factor, among others, to consider in assessing whether a person of ordinary sense and understanding would

This Article proceeds in four parts. Part II examines the nature and relative powers of the elected branches over the national armed forces. It questions the appropriateness of applying a core/periphery executive-powers analysis, one based in part on Justice Jackson's analytical framework in *Youngstown Sheet & Tube Co. v. Sawyer*,<sup>29</sup> to the Commander-in-Chief power.<sup>30</sup> Part III analyzes early judicial understandings of the nature and relative scope of the Commander-in-Chief and congressional powers over the nation's wars, including their objects, scope, and means. Part IV distills Supreme Court precedent to reveal the coalescence of the concept of military necessity, including its public necessity component. Although military necessity may have been first explicitly articulated in Dr. Francis Lieber's account of the laws governing armed conflict,<sup>31</sup> it appears to accurately describe the Supreme Court's long-held view of the breadth and limits of the Commander-in-Chief power and was expressly adopted as a legal term of art in at least one opinion.<sup>32</sup> Part V explores the idea that the President possesses some form of extraordinary emergency or public necessity power justifying the violation of even law specifically applicable to an armed conflict or other exigency. It addresses the probable nature and scope of any such power and how it relates to and differs from the doctrines of military and public necessity—as well as its uncertain relationship with the concept of congressional indemnification and ratification.

Though the debate ebbs and flows, the opposite ends of the spectrum are clear. At one end is the advice of Bush Administration lawyers who conceived of the Commander-in-Chief power as one of inherent, plenary powers.<sup>33</sup> In large part due to this error, these lawyers interpreted the scope of military necessity to be nearly (if not completely) co-extensive with that of governmental necessity, permitting the violation

---

have known the practices to be unlawful. Nothing in this section shall be construed to limit or extinguish any defense or protection otherwise available to any person or entity from suit, civil or criminal liability, or damages, or to provide immunity from prosecution for any criminal offense by the proper authorities.

Detainee Treatment Act of 2005, Pub. L. No. 109-163, §1404(a), 119 Stat. 3136, 3475–76 (codified in relevant portion at 42 U.S.C. § 2000dd (2006)).

29. 343 U.S. 579, 635–38 (1952) (Jackson, J., concurring).

30. See, e.g., Barron & Lederman I, *supra* note 15, at 720–50 (proposing conceptual framework for analyzing *Youngstown*-type cases); Bradley & Goldsmith, *supra* note 3, at 2050–51 (describing how Jackson's framework applies to AUMF).

31. Dr. Lieber was the principal author of what has become known as the Lieber Code that was eventually issued by President Lincoln as General Orders 100. See *generally Instructions for the Government of Armies of the United States in the Field* (1863), reprinted in THE LAWS OF ARMED CONFLICTS: A COLLECTION OF CONVENTIONS, RESOLUTIONS AND OTHER DOCUMENTS 3 (Dietrich Schindler & Jifí Toman eds., 1988) (1973) [hereinafter Lieber Code]. See *infra* notes 180–81 and accompanying text for further discussion of the Lieber Code.

32. *United States v. Pacific Railroad*, 120 U.S. 227 (1887). See *infra* notes 260–64 and accompanying text for a discussion of this case.

33. See, e.g., Memorandum from John C. Yoo, Deputy Assistant Att'y Gen., to Timothy Flanigan, Deputy Counsel to the President, The President's Constitutional Authority to Conduct Military Operations Against Terrorists and Nations Supporting Them (Sept. 25, 2001) [hereinafter Yoo Memo], in TORTURE PAPERS, *supra* note 11, at 3, 7 (“[I]t is clear that Congress's power to declare war does not constrain the President's independent and plenary constitutional authority over the use of military force.”).

of even specifically applicable law.<sup>34</sup> Although the new Administration appears to subscribe to a more judicious view of presidential power, the retrenchment has prompted equally erroneous claims by some commentators that war powers are limited to those expressly granted either in domestic legislation, or by relevant international laws regulating international or non-international armed conflict,<sup>35</sup> known as international humanitarian law.<sup>36</sup> This Article attempts a more balanced conceptual understanding of both the breadth and limits of the President's powers to conduct war.

## II. THE ORIGINAL UNDERSTANDING OF THE SEPARATION OF POWERS OVER THE ARMED FORCES

While the Constitution designates the President as Commander-in-Chief,<sup>37</sup> the powers to declare war,<sup>38</sup> as well as to raise, maintain, and make rules for the government and regulation of the armed forces are textually committed to Congress.<sup>39</sup> The Constitution appears to grant Congress authority to create, govern, and employ the military and the President the authority to command it. This arrangement was created not only to ensure that any national military would remain generally subordinate to civilian authority,<sup>40</sup> but also to prevent executive misuse of the military in both domestic and international affairs.<sup>41</sup>

---

34. See, e.g., Memorandum from Jay S. Bybee, Assistant Att'y Gen., to Alberto R. Gonzales, Counsel to the President, Standards of Conduct for Interrogation Under 18 U.S.C. §§ 2340–2340A (Aug. 1, 2002) [hereinafter Bybee Memo], in *TORTURE PAPERS*, *supra* note 11, at 172, 200 (asserting that “if an interrogation method arguably were to violate” federal criminal statute prohibiting torture “the statute would be unconstitutional if it impermissibly encroached on the President’s constitutional power to conduct a military campaign”). By some accounts, this approach appears to have been adopted not only due to the nature of the threats to the nation posed by international terrorism, but also from fear of political consequences for failing to prevent another attack. See GOLDSMITH, *supra* note 22, at 71–76 (demonstrating immense political pleasure on Bush Administration to develop defense initiative to prevent future terrorist attacks).

35. See, e.g., Marko Milanovic, *The Obama Administration’s Total Misinterpretation of IHL Regarding the Authority to Detain Suspected Terrorists*, EJIL: TALK! (March 14, 2009), <http://www.ejiltalk.org/the-obama-administrations-total-misinterpretation-of-ihl-regarding-the-authority-to-detain-suspected-terrorists/> (arguing international or domestic law must expressly authorize detention and that neither does so in non-international armed conflicts).

36. In this Article, the terms “laws of war,” “international humanitarian law,” and “international laws governing war” are used interchangeably. It will not attempt to reconcile the ongoing debate about the extent to which international human rights law supplements or complements international humanitarian law. On this topic, see generally Marco Sassòli & Laura M. Olson, *The Relationship Between International Humanitarian and Human Rights Law Where It Matters: Admissible Killing and Internment of Fighters in Non-International Armed Conflicts*, 90 INT’L REV. RED CROSS 599 (2008).

37. U.S. CONST. art. II, § 2.

38. *Id.* art. I, § 8, cl. 11.

39. *Id.* art. I, § 8, cl. 12–14.

40. Some social scientists believe that the divided nature of civilian authority detracts from ultimate civilian control. See, e.g., SAMUEL S. HUNTINGTON, *THE SOLDIER AND THE STATE* 191 (2d ed. 1985) (“The real constitutional stumbling block to objective civilian control [of the military] is the separation of powers . . . [I]ts impact is felt throughout the armed forces. Short of fundamental constitutional change, the separation of powers cannot be altered. Indeed, it is highly questionable whether, even if such change were possible, it would be worth the price.”); see also PETER D. FEAVER, *ARMED SERVANTS: AGENCY, OVERSIGHT, AND CIVIL-MILITARY RELATIONS* 294–95 (2003) (adopting principal-agent model for analyzing civilian control of

This Part briefly analyzes a primary source of the modern confusion regarding the separation of powers over the military and contrasts it with evidence of the founding era understandings. It concludes that Congress was historically understood to be the superior regulatory authority in matters involving the national armed forces.

A. *The Commander-in-Chief Power and the Logical Fallacy of Jackson's Third Tier*

Contemporary commentary on the separation of war powers often conflates executive powers rather than isolating its components.<sup>42</sup> Much of this scholarship also considers Justice Jackson's three-tiered approach to analyzing the constitutional propriety of presidential action.<sup>43</sup> Recent scholarship has shifted the focus of the

---

military and concluding that divided nature of civilian government allows military to pursue independent policy preferences through its principal of choice).

41. See THE FEDERALIST NO. 4, at 65 (John Jay) (John C. Hamilton ed., 1866) (“[A]bsolute monarchs will often make war when their nations are to get nothing by it, but for purposes and objects merely personal, such as, a thirst for military glory, revenge for personal affronts, ambition, or private compacts to aggrandize or support their particular families, or partizans.”); THE FEDERALIST NO. 8, *supra*, at 92 (Alexander Hamilton) (discussing threat to civil liberties posed by constant war and standing armies, concluding “[i]t is of the nature of war to increase the executive, at the expense of the legislative authority”); THE FEDERALIST NO. 24, *supra*, at 202 (Alexander Hamilton) (explaining importance of vesting power to raise armies in legislature such that executive does not possess “the whole power of levying troops” or ability to maintain standing armies without “evident necessity”).

42. See, e.g., MICHAEL D. RAMSEY, THE CONSTITUTION'S TEXT IN FOREIGN AFFAIRS 249 (2007) (claiming “the President has authority to conduct war to the extent of the executive power” and thus “cannot take every action that furthers the war effort”). Professor Ramsey's treatment of the matter is ambiguous precisely because he does not isolate the powers of the President. Ramsey asserts that the President “may direct the movements of the military in ways that do not attack another” nation, leaving “many controversial deployments within the President's power.” *Id.* at 247. While this may be true, it is necessary to more carefully examine and define the commander-in-chief power to prevent the presidency's accruing or being attributed the fuller foreign affairs powers of an eighteenth-century British monarch. See, e.g., YOO, *supra* note 16, at 143 (claiming “the Framers believed that separating the president's executive and commander-in-chief powers from Congress's powers over declaring war and funding would create a political system in which in [sic] each branch could use its own constitutional powers to develop foreign policy” without establishing a hierarchy in shared powers).

43. *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 635–38 (1952) (Jackson, J., concurring). In Jackson's opinion, presidential actions supported by an express or implied congressional grant of authority fall into the first or highest category of presidential power, where his authority “is at its maximum” and he “personif[ies] the federal sovereignty.” *Id.* at 635–36. Presidential actions neither supported by an express or implied congressional grant of authority, nor contrary to an express or implied congressional denial of authority, fall into an intermediate category where “there is a zone of twilight in which [the President] and Congress may have concurrent authority, or in which its distribution is uncertain.” *Id.* at 637. In the final or third category, “[w]hen the President takes measures incompatible with the expressed or implied will of Congress, his power is at its lowest ebb.” *Id.* In spite of its status as only an element of a concurring opinion, Justice Jackson's three-tiered analytical framework continues to dominate scholarship over the relative powers of Congress and the Executive in matters of war and foreign affairs. See, e.g., Barron & Lederman I, *supra* note 15, at 720–25 (establishing framework for evaluating disputes falling into Jackson's “third tier”); Bradley & Goldsmith, *supra* note 3, at 2050–52, 2096–2100 (analyzing Bush Administration's actions following 9/11 and AUMF under Jackson's three-tier frame). Its utility has been critically and appropriately questioned. See RAMSEY, *supra* note 42, at 51–73, 91–114 (arguing political history of separation of powers contradicts Jackson's analysis in *Youngstown*). But see MICHAEL J. GLENNON, CONSTITUTIONAL DIPLOMACY 42–70 (1990) (analyzing various separation of powers theories, including Justice Jackson's, and proposing a different, hierarchical methodology for resolving separation of powers disputes).

analysis from the so-called “second tier” of Jackson’s framework, under which presidential power to initiate war without affirmative congressional sanction is analyzed, to the “third tier,” under which claims of plenary presidential war-fighting authority that run counter to the express or implied will of Congress are considered.<sup>44</sup> Justice Jackson’s third tier is more completely articulated as follows:

When the President takes measures incompatible with the expressed or implied will of Congress, his power is at its lowest ebb, for then he can rely only upon his own constitutional powers minus any constitutional powers of Congress over the matter. Courts can sustain exclusive presidential control in such a case only by disabling the Congress from acting upon the subject. Presidential claim to a power at once so conclusive and preclusive must be scrutinized with caution, for what is at stake is the equilibrium established by our constitutional system.<sup>45</sup>

This third tier logically invites—but does not require—scholars to contemplate the notion of an “indefeasible” or “preclusive” core of presidential power.<sup>46</sup> In order to apply it one must first determine the constitutional validity of any congressional enactment or implied disapproval restricting the President’s action. If the relevant congressional action is a valid exercise of Congress’s express or implied powers, one must then analyze whether Congress’s preferences control the actions of a President, or if the President possesses an indefeasible residuum of power. This invites a search for a theoretical plenary or preclusive ‘core’ of presidential power not subject to regulation, the sources of which are not entirely clear.<sup>47</sup>

Jackson’s third tier certainly implies that some indefeasible core of power might exist in the President. His subtraction formulation (the President’s “constitutional powers minus any constitutional powers of Congress”) suggests that the President’s powers must either exceed those of Congress or be irreducible by Congressional enactment.<sup>48</sup> But Jackson quickly cautioned against ‘conclusive’ or ‘preclusive’ claims of presidential power and urged careful scrutiny of them. Heeding Jackson’s admonition requires close examination into the fundamental nature of congressional and executive powers relevant to a given matter that might, if not observed, threaten the ‘constitutional equilibrium.’

The analysis that follows demonstrates that it is a mistake to equate the inherent and admittedly broad authorities of the Commander-in-Chief with the existence of a

---

44. See Barron & Lederman I, *supra* note 15, at 695–96 (explaining that whether President has exclusive and preclusive powers as Commander-in-Chief has not been satisfactorily analyzed).

45. *Youngstown*, 343 U.S. at 637–38 (Jackson, J., concurring) (footnote omitted).

46. See, e.g., Barron & Lederman I, *supra* note 15, at 726–29 (presenting core/periphery approach to third-tier questions).

47. See *id.* at 726–32 (evaluating potential sources of preclusive presidential power).

48. See Saikrishna Prakash, *Regulating Presidential Powers*, 91 CORNELL L. REV. 215, 236–37 (2005) (“[T]he Constitution expressly authorizes regulation of certain presidential powers. That being the case, if we were to divide presidential powers into a regulable periphery and an unregulable core, it seems natural that the only regulable powers are those the Constitution expressly makes so.” (footnote omitted)). Barron and Lederman go to great length to show that Prakash is inconsistent on the core/periphery issue. Barron & Lederman I, *supra* note 15, at 727 n.108.

preclusive or infeasible ‘core’ within them.<sup>49</sup> Although Barron and Lederman begin their analysis of Commander-in-Chief powers with the assumption that a core might somewhere exist,<sup>50</sup> one does not necessarily follow from the other. Neither Justice Jackson’s framework nor other methods of analyzing the constitutional distribution of war powers have been used by the Supreme Court to support a decision in favor of a President as Commander-in-Chief against an applicable congressional prohibition or limitation. Although the Court ultimately adopted a somewhat modified version of Jackson’s tiers in *Dames & Moore v. Regan*,<sup>51</sup> that case dealt primarily with a general foreign affairs power to settle the claims of U.S. nationals rather than with the Commander-in-Chief power.<sup>52</sup> It also did not involve a relevant express or implied congressional disapproval.<sup>53</sup>

The executive surely possesses some measure of general foreign affairs powers through which a President may establish national policy.<sup>54</sup> A President might then implement such policy, as appropriate, through orders to the armed forces.<sup>55</sup> This analysis simply concludes that the Commander-in-Chief power does not necessarily independently add to the substance or scope of any such powers.<sup>56</sup> The remainder of this section more fully examines the fundamental nature of the Commander-in-Chief and congressional powers over the armed forces.

---

49. See Barron & Lederman I, *supra* note 15, at 726–31 (discussing notion of “core” and “peripheral” Article II powers in which core powers may not be regulated by Congress but peripheral powers may).

50. Barron and Lederman state that:

[T]he most useful way to frame the question is to draw important distinctions among the authorities that the Commander in Chief Clause conveys to the President—to identify the preclusive core, if any, of the President’s war powers and to distinguish it from the remaining, more “peripheral” Commander in Chief powers that are subject to statutory and treaty-based regulation.

*Id.* at 721. A corollary to this approach, one that was particularly prominent in the Bush Administration’s Office of Legal Counsel, is to narrowly interpret laws potentially delimiting presidential discretion to avoid “serious constitutional problems.” Trevor W. Morrison, *Constitutional Avoidance in the Executive Branch*, 106 COLUM. L. REV. 1189, 1203, 1192–96 (2006). The logical fallacy of *beginning* a legal analysis with the assumption that a serious constitutional problem must be avoided before it has been discovered should be as self-evident as starting such analyses with an assumption that a preclusive core of power might exist.

51. 453 U.S. 654, 669 (1981) (“[I]t is doubtless the case that executive action in any particular instance falls, not neatly in one of three pigeonholes, but rather at some point along a spectrum running from explicit congressional authorization to explicit congressional prohibition.”).

52. *Dames & Moore*, 453 U.S. at 654.

53. In fact, the Court indicated it would be less likely to find implied congressional disapproval in the context of foreign affairs. *Id.* at 678 (stating that “failure of Congress specifically to delegate authority does not, especially . . . in the areas of foreign policy and national security, imply congressional disapproval of action taken by the Executive” (internal quotation marks omitted)).

54. See generally RAMSEY, *supra* note 42, at 51–131.

55. See *supra* note 42 for a discussion of the President’s power to direct the armed forces.

56. Conflating these two powers appears to have been a preferred approach of former executive branch attorneys. See, e.g., Yoo Memo, *supra* note 33, at 3–4 (“[T]he Constitution vests the President with the plenary authority, as Commander in Chief and the sole organ of the Nation in its foreign relations, to use military force abroad.”).

B. *The Constitutional Design and Military Regulation*

There is little question that the Framers adopted a new approach to command and control of national armed forces. By vesting Commander-in-Chief authority in the President while placing the authority to raise, maintain, govern, and regulate the military in Congress, the Constitution broke with the condition then existing in Great Britain. Alexander Hamilton described the difference as follows:

The president is to be commander in chief of the army and navy of the United States. In this respect his authority would be nominally the same with that of the king of Great Britain, but in substance much inferior to it. It would amount to nothing more than the supreme command and direction of the military and naval forces, as first general and admiral of the confederacy; while that of the British king extends to the *declaring* of war, and to the *raising* and *regulating* of fleets and armies; all which, by the constitution under consideration, would appertain to the legislature.<sup>57</sup>

While some commentary has suggested that this relative vesting of constitutional powers over the military implies that the President has no power to regulate the military,<sup>58</sup> this is clearly inaccurate. The directive authority of military command equates to a near infinite power of internal regulation.<sup>59</sup> A commander need not repeatedly issue the same order to assert his or her directive authority over routine tasks. Effective command requires that many directives be made generally applicable and remain in effect until rescinded or superseded.<sup>60</sup> Therefore, some power to establish standing orders, or regulations, must necessarily exist.<sup>61</sup> As Madison explained, “[n]o axiom is more clearly established in law, or in reason, than that wherever the end is required, the means are authorized; wherever a general power to do a thing is given, every particular power necessary for doing it is included.”<sup>62</sup> This understanding was later echoed by Chief Justice Marshall in *McCulloch v. Maryland*.<sup>63</sup>

---

57. THE FEDERALIST No. 69, *supra* note 41, at 515–16 (Alexander Hamilton).

58. See, e.g., Richard A. Epstein, *Executive Power, the Commander in Chief, and the Militia Clause*, 34 HOFSTRA L. REV. 317, 321 (2005) (arguing that grant of power to Congress implies lack of such power in the President).

59. This directive authority is potentially only one *essential* legal attribute of command. See 10 U.S.C. § 3583 (2006) (establishing several general and affirmative responsibilities of military commanders); DEP’T OF THE ARMY, REG. 600–20, ARMY COMMAND POLICY, subsec. 1–5 (rev. ed. 2010) (2008) (describing military command as essentially a fiduciary relationship, by which authority over others creates corresponding responsibilities).

60. Congress has endorsed this principle in the Uniform Code of Military Justice (UCMJ) (codified at 10 U.S.C. §§ 801–941 (2006)). See 10 U.S.C. § 892(1) (permitting punishment for violation of “any lawful *general order* or regulation.” (emphasis added)).

61. *Id.*

62. THE FEDERALIST No. 44, *supra* note 41, at 354 (James Madison).

63. 17 U.S. (4 Wheat.) 316, 407 (1819). Justice Marshall famously stated that the Constitution marks “only its great outlines” and designates only “important objects,” but “the minor ingredients which compose those objects [must] be deduced from the nature of the objects themselves.” *Id.* at 407. Marshall continued:

But it may with great reason be contended, that a government, entrusted with such ample powers, on the due execution of which the happiness and prosperity of the nation so vitally depends, must also be entrusted with ample means for their execution. The power being given, it is the interest of the nation to facilitate its execution. It can never be their interest, and cannot be presumed to have been their intention, to clog and embarrass its execution by withholding the most appropriate means.

Equally clear was both Madison and Marshall's belief that these 'necessary' powers are implied from the nature of the power expressly granted.<sup>64</sup> The general directive authority intrinsic to "military command" is undoubtedly why the Supreme Court has consistently upheld the *internal* regulatory authority of the Commander-in-Chief and his subordinate commanders.<sup>65</sup>

C. *Practice in Great Britain and the U.S.*

On the other hand, military command authority, including the authority of a commander-in-chief, has always been subject to a superior authority. A superior authority may set affirmative requirements or establish limits that cabin a subordinate's discretion. Indeed, merely designating a specific scope of command is itself a limit on that subordinate's discretion.

Subjecting the supreme national military commander to the control of a superior political authority is reflected in both British and American practice. As noted by Barron and Lederman, when Great Britain designated a commander-in-chief, it not only set specific, if broad, goals or limits for the military objects of his command but also declared him subject to both Parliament and the Sovereign for the duration of his appointment.<sup>66</sup> It was "a purely military post under the command of political superiors."<sup>67</sup> Specific regulations governing the conduct, care, and discipline of a commander's soldiers were articulated by the British Sovereign in Articles of War.<sup>68</sup> Likewise, from the beginning of the Union, Congress has imposed obligations and placed limits on the military and its commanders. The Continental Congress adapted Articles of War from the British and enacted them in 1775 when it raised an army to protect the colonists.<sup>69</sup> After the ratification of the Constitution, the Articles, with

---

*Id.* at 408.

64. Madison explained that "all the particular powers requisite as means of executing the general powers [granted the Federal government] would . . . result to the government, by unavoidable implication." THE FEDERALIST No. 44, *supra* note 41, at 354 (James Madison); *see also McCulloch*, 317 U.S. at 409–10 ("The government which has a right to do an act, and has imposed on it the duty of performing that act, must, according to the dictates of reason, be allowed to select the means.").

65. *See Kurtz v. Moffitt*, 115 U.S. 487, 503 (1885) ("Army Regulations derive their force from the power of the President as commander-in-chief, and are binding upon all within the sphere of his legal and constitutional authority."); *Gratiot v. United States*, 45 U.S. (4 How.) 80, 117–18 (1846) ("As to the army regulations, this court has too repeatedly said, that they have the force of law, to make it proper to discuss that point anew, and such of them as were assailed in the case by counsel, as not warranted by law, the court think are as obligatory as any of the rest."); *United States v. Freeman*, 44 U.S. (3 How.) 556, 567 (1845) ("Army Regulations, when sanctioned by the President, have the force of law, because it is done by him by the authority of law."); *United States v. Eliason*, 41 U.S. (16 Pet.) 291, 301 (1842) ("The power of the executive to establish rules and regulations for the government of the army, is undoubted.").

66. Barron & Lederman I, *supra* note 15, at 772–73.

67. *Id.* at 772 (citing 1 CHARLES M. CLODE, THE MILITARY FORCES OF THE CROWN: THEIR ADMINISTRATION AND GOVERNMENT 425–59 (London, John Murray 1869)).

68. *E.g.*, Articles of War of James II (1688), *reprinted in* 2 WILLIAM WINTHROP, MILITARY LAW AND PRECEDENTS 1434 (1886).

69. 1 MILITARY LAW AND PRECEDENTS, *supra* note 68, at 11–12; *see also* American Articles of War of 1775, *reprinted in* 2 MILITARY LAW AND PRECEDENTS, *supra* note 68, at 1478.



interim modifications, were adopted by Congress and later completely reenacted in 1806.<sup>70</sup>

The Articles regulated military forces in very specific ways that one might not expect. They encouraged attendance at “divine service” and permitted the punishment of any indecent or irreverent behavior at such services.<sup>71</sup> They provided specific guidance on ministerial tasks such as the inventory and forwarding of the personal effects of officers and soldiers who died in service.<sup>72</sup> The Articles required commanding officers to punish soldiers under their command for “abuses or disorders” affecting the public and to make reparations for any damages done.<sup>73</sup> A failure to do so subjected the responsible commanding officer to punishment.<sup>74</sup> The 1806 Articles also placed specific limits on the disciplinary authority of all military commanders, including certain minimal prepunishment procedures, as well as limits on the types and amounts of punishment.<sup>75</sup> Through the Articles, Congress exercised detailed control over the day-to-day discipline and operation of the armed forces.

The circumstances surrounding the adoption of the Articles, as well as the content and progression of their terms, also reveal something about the original understanding of Congress’s relationship to the military. The pre-constitutional 1775 Articles punished “contempt or disrespect towards the general or generals, or commanders in chief of the continental forces.”<sup>76</sup> In the post-ratification 1806 Articles, these were separate provisions. One article punished contempt toward the President, Vice President, and Congress, and another punished contempt toward commanding officers.<sup>77</sup> From this it seems that Congress replaced the respect due to the ‘generals’ or ‘commanders in chief,’ with a broad view of their constitutional successors—successors not limited to the President.

If the Continental Congress was both executive and legislative in nature, then it enacted the 1775 Articles as the appropriate sovereign political authority, just as had the monarch in Britain. Congress’s post-ratification adoption and 1806 reenactment of

---

70. 1 MILITARY LAW AND PRECEDENTS, *supra* note 68, at 14.

71. American Articles of War of 1775, art. II, *supra* note 69, at 1478–79; American Articles of War of 1776, § 1, art. 2, *reprinted in* 2 MILITARY LAW AND PRECEDENTS, *supra* note 68, at 1489, 1489; American Articles of War of 1806, § 1, art. 2, *reprinted in* 2 MILITARY LAW AND PRECEDENTS, *supra* note 68, at 1509, 1509.

72. American Articles of War of 1806, § 1, arts. 94–95, *supra* note 71, at 1521.

73. *Id.* § 1, art. 32, at 1513.

74. *Id.*

75. *E.g., id.* § 1, arts. 4–9, 12–14, at 1509–11 (articles 4–9 detail limits to authority; 12–14 detail types of punishment).

76. American Articles of War of 1775, art. IV, *supra* note 69, at 1479.

77. American Articles of War of 1806, § 1, arts. 5–6, *supra* note 71, at 1509–10. The provision punishing contempt toward high government officials also punished contempt toward “the Chief Magistrate or Legislature of any of the United States, in which he may be quartered.” *Id.* § 1, art. 5, at 1509. Hence, respect for state executives and legislatures—in command of their local militias before being called into federal service—was apparently perceived as important to military discipline as respect for the political branches of the national government.

the Articles demonstrates its understanding that it retained this regulatory element of what had been executive authority in Great Britain, precisely as Hamilton articulated.<sup>78</sup>

Congress did not shrink from subjecting the military and its Commander-in-Chief to its regulatory authority, addressing anything it thought proper. This included matters not only of military conduct, as discussed above, but also matters of more general military governance, such as recruitment, armaments, and even specific rations.<sup>79</sup> A dearth of provisions in the 1806 Articles vested or recognized specific powers in the President as Commander-in-Chief. One such provision, Article 100, empowered the President “to prescribe the uniform of the army.”<sup>80</sup> The 1806 Articles vested certain commanders, but not the President, with the power to convene courts-martial and to “pardon or mitigate any punishment” with exceptions regarding the sentence of death, which could be suspended until the “pleasure of the President of the United States can be known.”<sup>81</sup>

One additional feature of the Articles is of note. Article 10 required non-commissioned officers and soldiers enlisting in the “service of the United States” to swear an oath to “observe and obey the orders of the President of the United States, and the orders of the officers appointed over me, according to the Rules and Articles for the government of the armies of the United States.”<sup>82</sup> While this oath recognized the authority of the President over the nation’s military, it also conveyed a superior regulatory authority in Congress.

It is against this history that G. Norman Lieber,<sup>83</sup> in describing the relative powers of Congress and the President to regulate the armed forces, stated

no distinct line can be drawn separating the President’s constitutional power to make [regulations] from the constitutional power of Congress “to make rules for the government and regulation” of the land forces. Regulations are, when they relate to subjects within the constitutional jurisdiction of Congress, unquestionably of a legislative character, and if it were practicable for Congress completely to regulate the methods of military administration, it might, under the Constitution, do so. But it is entirely impracticable, and therefore it is in a great measure left to the President to do it. So far as Congress chooses to exercise its jurisdiction in this respect it occupies the field, and the President can not encroach on it.<sup>84</sup>

---

78. See *supra* note 57 and accompanying text for a discussion of the respective scope of executive powers in the United States and Britain.

79. Barron & Lederman have identified a substantial array of early statutes that regulate everything from the physical characteristics of recruits, to the number and type of armaments aboard naval vessels, to requirements for food rations, including on which days they should be served. See Barron & Lederman II, *supra* note 15, at 957–58.

80. American Articles of War of 1806, § 1, art. 100, *supra* note 71, at 1522.

81. *Id.* § 1, art. 89, at 1520. The potential for an inherent presidential power to convene courts-martial was addressed in *Swaim v. United States*, 165 U.S. 553, 557–58 (1897).

82. American Articles of War of 1806, § 1, art. 10, *supra* note 71, at 1510 (emphasis added).

83. G. Norman Lieber is the son of Dr. Francis Lieber, discussed *supra* note 31, and a former Head Professor of Law at the United States Military Academy.

84. G. NORMAN LIEBER, REMARKS ON THE ARMY REGULATIONS AND EXECUTIVE REGULATIONS IN GENERAL 11–16 (War Dep’t 1898).

The logic of this position is clear and virtually indisputable. Congress's regulatory authority is express. The Commander-in-Chief's is implied from the nature of military command. To the extent they are exercised in harmony, they co-exist and are equally binding on the armed forces. In the event of conflict, the entity possessing the express power, Congress, prevails over that with merely implied power.

This brief review reveals an original understanding that Congress was the supreme authority in matters of military governance and regulation. The Commander-in-Chief Clause was not understood to vest the independent authorities of the British monarch. It appears, instead, to contain the much different authority of a supreme field commander, subject to the complete political control of Congress.

Other congressional powers address the nation's conduct in war, such as the powers to make rules for captures on land and water<sup>85</sup> and to define and punish offenses against the laws of nations.<sup>86</sup> Congress's power to regulate the national armed forces is legally sufficient to govern their conduct in both peace and war. When other constitutional powers are employed, the remaining analysis reveals that there is no doubt that they also cabin the Commander-in-Chief's discretion in armed conflict. They are only necessary, however, to govern matters beyond the military's control or purview—i.e., to prescribe national policy applicable both within and beyond the military.<sup>87</sup>

### III. THE ORIGINAL UNDERSTANDING OF THE SEPARATION OF POWERS OVER ARMED CONFLICT

The Supreme Court recognized Congress's superior authority over the nation's wars in the oft-cited early nineteenth century cases of *Bas v. Tingy*,<sup>88</sup> *Talbot v. Seeman*,<sup>89</sup> *Little v. Barreme*,<sup>90</sup> *Murray v. The Schooner Charming Betsy*,<sup>91</sup> and *Brown v. United States*,<sup>92</sup> among others. Because of their proximity to constitutional ratification and the fundamental principles they clarify, these cases require detailed consideration. While the Court was not always clear regarding which of Congress's war- or military-related powers were at issue, a firm understanding of Congress's supreme powers over war, including its objects, scope, and means, is readily apparent.

#### A. Identifying Public Enemies—*Bas* and *Talbot*

*Bas v. Tingy*, decided in 1800, is unremarkable for its precise holding. The seriatim opinions of the Justices, however, reveal an important early unanimity of

---

85. U.S. CONST. art. I, § 8, cl. 14.

86. *Id.* art. I, § 8, cl. 10; see also J. Andrew Kent, *Congress's Under-Appreciated Power to Define and Punish Offenses Against the Law of Nations*, 85 TEX. L. REV. 843 (2007) (arguing Congress's define and punish power could be used to punish individuals or states).

87. See generally Kent, *supra* note 86.

88. 4 U.S. (4 Dall.) 37 (1800).

89. 5 U.S. (1 Cranch) 1 (1801).

90. 6 U.S. (2 Cranch) 170 (1804).

91. (*Charming Betsy*), 6 U.S. (2 Cranch) 64 (1804).

92. 12 U.S. (8 Cranch) 110 (1814).

understanding regarding Congress's war powers. The relevant statute in *Bas* was enacted during what is often referred to as a limited or quasi-war with France.

Justice Chase summarized the relevant facts and legal issue: "An *American* public vessel of war re-captures an *American* merchant vessel from a *French* privateer, after 96 hours possession, and the question is stated, what salvage ought to be allowed?"<sup>93</sup> There were two potentially applicable statutes "by the first of which, only one-eighth of the value of the re-captured property is allowed; but by the second, the re-captor [was] entitled to [half]."<sup>94</sup> The correct statute to be applied depended upon whether France was an enemy nation at the time of capture.<sup>95</sup> If France was properly considered an enemy, then the re-captor was entitled to half the value of the ship and its cargo.<sup>96</sup>

At no time prior to the second statute's reference to an "enemy" had the United States or France declared war. However, each Justice's opinion concurred that France was properly considered an enemy based solely on congressional enactments authorizing various, limited hostilities against it.<sup>97</sup> In addition, each Justice affirmed in the course of his opinion that, especially given the limited nature of the conflict, Congress possessed the power to dictate both the general scope and precise means of executing the war.<sup>98</sup>

The next year, the Court reiterated the primacy of Congress's war powers in clearer and stronger terms. *Talbot v. Seeman* involved a vessel belonging to a citizen of the then-sovereign city of Hamburg, neutral as to the limited conflict then existing between the United States and France.<sup>99</sup> The vessel had been recaptured from the French by the *USS Constitution*, commanded by Captain Talbot.<sup>100</sup> The central issue was whether Captain Talbot could present a claim for compensation (known as "salvage") and if so, for how much.<sup>101</sup>

A newly-minted Chief Justice, John Marshall, delivered the Court's opinion. In determining the relative rights of the parties, he began by recognizing that:

The whole powers of war being, by the constitution of the United States, vested in congress, the acts of that body can alone be resorted to as our guides in this enquiry. It is not denied, nor in the course of the argument has it been denied, that congress may authorize general hostilities, in which case the general laws of war apply to our situation; or partial hostilities, in which case the laws of war, so far as they actually apply to our situation, must be noticed.

To determine the real situation of America in regard to France, the acts of congress are to be inspected.<sup>102</sup>

---

93. *Bas*, 4 U.S. (4 Dall.) at 43 (Chase, J.).

94. *Id.*

95. *Id.*

96. *Id.*

97. *Id.* at 39 (Moore, J.); *id.* at 42 (Washington, J.); *id.* at 44–45 (Chase, J.); *id.* at 45 (Paterson, J.).

98. *Id.* at 39 (Moore, J.); *id.* at 41 (Washington, J.); *id.* at 43 (Chase, J.); *id.* at 45 (Paterson, J.).

99. *Talbot v. Seeman*, 5 U.S. (1 Cranch) 1, 27 (1801).

100. *Id.* at 26–27.

101. *Id.* at 27–28.

102. *Id.* at 28–29. Marshall's words are similar to those of Justice Chase in *Bas*, where he opined that:

Marshall then meticulously navigated the congressional enactments authorizing various hostilities in the limited, undeclared war. One key element of his inquiry was whether the capture of the vessel was consistent with *any* congressional authorization. Finding that Talbot had probable cause to believe that the vessel was subject to capture under one of the many acts governing the conflict, Marshall concluded that it was.<sup>103</sup>

After determining that Congress had not spoken to the precise issue of compensation for the recapture of a neutral vessel, Marshall examined the law of nations, relevant French prize law, and even general principles of law.<sup>104</sup> He ultimately concluded that Talbot, although not expressly entitled to salvage under any congressional enactment, was entitled to salvage under general principles of law for a benefit rendered to the vessel's owner.<sup>105</sup>

When considering the legality of the capture, Marshall did not address the content or form of any orders from the President pursuant to which Captain Talbot acted. Presumably, they were not relevant because the capture itself was reasonably within both the scope of relevant acts of Congress and any orders to Captain Talbot as well. However, the court would later have occasion to consider what would result if the case had been otherwise.

*B. Regulating the Scope of Hostilities—Little v. Berreme*

Three years later, in *Little v. Berreme*, the Court addressed another situation involving limited hostilities with France, and resolved a conflict between the President and Congress. To implement a policy prohibiting commercial intercourse, Congress authorized *only* the seizure of American ships bound *to* French ports.<sup>106</sup> Pursuant to more liberal orders from the President,<sup>107</sup> a United States naval commander, Captain Little, seized and sought condemnation of a Danish ship (on the suspicion that it was American) traveling *from* a French to a Danish port.<sup>108</sup> Although Captain Little's actions complied with the President's orders, they violated the terms of the statute.<sup>109</sup>

---

Congress has not declared war in general terms; but congress has authorised hostilities on the high seas by certain persons in certain cases. There is no authority given to commit hostilities on land; to capture unarmed French vessels, nor even to capture French armed vessels lying in a French port; and the authority is not given, indiscriminately, to every citizen of America, against every citizen of France; but only to citizens appointed by commissions, or exposed to immediate outrage and violence. So far it is, unquestionably, a partial war; but, nevertheles [sic], it is a public war, on account of the public authority from which it emanates.

*Bas*, 4 U.S. (4 Dall.) at 43 (Chase, J.) (italics omitted). This idea was also present in the opinion of the other justices, particularly Justice Paterson. *Id.* at 45 (Paterson, J.) ("As far as congress tolerated and authorised the war on our part, so far may we proceed in hostile operations.").

103. *Talbot*, 5 U.S. (1 Cranch) at 36.

104. *Id.* at 36–43.

105. *Id.* at 41–43.

106. *Little v. Berreme*, 6 U.S. (2 Cranch) 170, 177–78 (1804).

107. *Id.* at 178.

108. *Id.*

109. *Id.* at 179. The Court emphasized that the vessel could not have been seized consistently with the statute even if it had been American. *Id.*

For that reason the Court, in another opinion authored by Chief Justice Marshall, found the seizure unlawful and held Captain Little liable for damages.<sup>110</sup>

Noticeably absent from the *Little* opinion is any hint of a constitutional review of the power of Congress to enact either the substantive or restrictive-implementing measures of its non-intercourse policy in the face of a conflicting presidential order. It is not clear pursuant to which constitutional power(s) Congress enacted them. The overarching purpose of the non-intercourse law would seem to potentially fall within Congress's power over commerce with foreign nations.<sup>111</sup> However, the law's forfeiture provisions and limited authorization to seize and condemn only certain *American* ships is more properly viewed as within one or more of Congress's war powers, such as its power to declare war and to make rules for captures.<sup>112</sup>

In any case, the relative powers of the President and Congress over the matter were not analyzed, nor were the President's powers clearly articulated. Marshall only gives us a clue as to his thinking on separation of powers issues when he states that:

It is by no means clear that the president of the United States whose high duty it is to "take care that the laws be faithfully executed," and who is commander in chief of the armies and navies of the United States, might not, without any special authority for that purpose, in the then existing state of things, have empowered the officers commanding the armed vessels of the United States, to seize and send into port for adjudication, American vessels which were forfeited by being engaged in this illicit commerce.<sup>113</sup>

The meaning of this passage is unclear. Some commentators assert that Marshall implies that the President might have independently established a non-intercourse and forfeiture policy.<sup>114</sup> However, Marshall's reference to the Take Care Clause, and to the President empowering military officers to seize vessels that had engaged in illicit

---

110. *Id.*

111. *See* U.S. CONST. art. I, § 8, cl. 3.

112. *See id.* art. I, § 8, cl. 11. The law seems to reflect a desire by Congress to adopt the law of nations principle that states may terminate and punish intercourse between its nationals and public enemies. *See, e.g.,* FRANCIS H. UPTON, THE LAW OF NATIONS AFFECTING COMMERCE DURING WAR: WITH A REVIEW OF THE JURISDICTION, PRACTICE AND PROCEEDINGS OF PRIZE COURTS 6–7 (1863). For additional information, see Lieber Code, *supra* note 31, art. 86 which provides that in war

[a]ll intercourse between the territories occupied by belligerent armies, whether by traffic, by letter, by travel, or in any other way, ceases. This is the general rule, to be observed without special proclamation.

Exceptions to this rule, whether by safe-conduct, or permission to trade on a small or large scale, or by exchanging mails, or by travel from one territory into the other, can take place only according to agreement approved by the government, or by the highest military authority.

This principle would deem an American citizen's property to be enemy property subject to capture and forfeiture. *See also infra* notes 193–212 and accompanying text for a discussion of the *Prize Cases*, 67 U.S. (2 Black) 635 (1863) and *infra* notes 255–59 and accompanying text for a discussion of *Juragua Iron Co. v. United States*, 212 U.S. 297 (1908).

113. *Little*, 6 U.S. (2 Cranch) at 177 (italics omitted).

114. *See* RAMSEY, *supra* note 42, at 255 (believing that Marshall left aside the issue of "whether the President could order such seizures without authorization"); Barron & Lederman II, *supra* note 15, at 969 (equating the quoted passage to Marshall's alleged belief that "the President might well have had the inherent constitutional power to issue such an order *in the absence of a statute*" (emphasis added)).

commerce indicates that Marshall is referring to the policy then in existence, not to one that might be independently established.

Marshall does not address whether commercial intercourse in a limited rather than a general state of war was presumptively terminated under the international law of that era. That seems unlikely given the very nature of a limited war. In light of Marshall's usual reference to relevant international law, as well as his above-quoted opinion in *Talbot* regarding the limited applicability of the laws of war to a limited war,<sup>115</sup> the absence of this discussion indicates that this commerce was not deemed illicit by relevant international law.

Marshall must, therefore, be referring to Congress's designation of this commerce as illicit, and not to any inherent presidential authority to prohibit and punish it. If so, the above passage referred only to whether the President would have implied authority—given the Take Care and Commander-in-Chief Clauses—to employ the armed vessels of the United States to *implement* the non-intercourse policy enacted by Congress without express authority to do so.

The difference between implementing an existing, congressional non-intercourse policy and any alleged authority to independently establish such a policy is clearly an important one. In this context, it relates to whether the President has independent, national policy-making authority in identifying the scope or means of a limited war rather than merely discretionary implementation authority. A narrower reading is more consistent with Marshall's opinion in *Talbot*, recognizing the broad powers of Congress over war and the limited applicability of the international laws of war in a limited or imperfect war.<sup>116</sup>

What is very clear is that Marshall did not search for a preclusive core of presidential or Commander-in-Chief power over the navy, over national wartime policy, or over the conduct of the non-intercourse 'campaign.' This despite the fact that he recognized that the President's order was probably better calculated to achieve Congress's overarching non-intercourse policy.<sup>117</sup> Instead, Marshall found that Congress's targeted enforcement and specific limitations delimited the permissible scope of Captain Little's actions notwithstanding the President's order.<sup>118</sup> The only difficulty Marshall expressed with the case was whether it was proper to hold Captain Little liable for damages even though he had complied with an order from his Commander-in-Chief.<sup>119</sup> As Michael Glennon has noted, "[Marshall's] decision seems

---

115. See *supra* note 102 and accompanying text for Marshall's recognition in *Talbot* that the applicability of international laws of war depended on the nature of the conflict.

116. See *supra* note 102 and accompanying text.

117. *Little*, 6 U.S. (2 Cranch) at 178.

118. *Id.* at 177–79.

119. *Id.* at 178–79. Marshall acknowledged that, "[the] implicit obedience which military men usually pay to the orders of their superiors, which indeed is indispensably necessary to every military system, appeared to me strongly to imply the principle that those orders, if not to perform a prohibited act, ought to justify the person whose general duty it is to obey them." *Id.* at 179.

to presuppose that congressional authorization of a specific scope of executive action is an implicit denial to the President of authority to order action outside that scope.”<sup>120</sup>

C. *The Effect of International Law—Charming Betsy and Brown*

That international law was to be observed by courts deciding cases involving the nation’s armed conflicts had been made clear by Marshall’s earlier referenced opinion in *Talbot* declaring that such laws “*must* be noticed.”<sup>121</sup> The Supreme Court consistently adhered to this approach in its early cases, two of the more prominent of which are analyzed here.

Decided the same year as *Little, Murray v. The Schooner Charming Betsy* involved a law prohibiting all forms of commercial intercourse between the United States and France (passed after the capture at issue in *Little*, which had been adjudicated under an earlier statute).<sup>122</sup> The *USS Constellation* recaptured the *Charming Betsy* from the French. Although she had been sold by American citizens to an American-born Danish burgher engaged in commerce with France,<sup>123</sup> the vessel had been captured by a French privateer.<sup>124</sup> This capture supported the apparent view of the *Constellation*’s commander that the sale was a sham and that the true owner was actually an American engaged in prohibited commerce.<sup>125</sup>

The Court found that the burgher owned the vessel and that he was properly considered a subject of Denmark—a neutral party to the limited conflict between France and the United States.<sup>126</sup> Marshall then observed, “the building of vessels in the United States for sale to neutrals, in the islands, is, during war, a profitable business, which Congress cannot be intended to have prohibited, unless that intent be manifested by express words or a very plain and necessary implication.”<sup>127</sup> Marshall later concluded “that an act of Congress ought never to be construed to violate the law of nations if any other possible construction remains.”<sup>128</sup> This phrase, now commonly referred to as the *Charming Betsy* canon of statutory interpretation and applied in a variety of contexts,<sup>129</sup> was first used to narrow the executive’s discretion in war.

---

120. GLENNON, *supra* note 43, at 7. Glennon also noted that Marshall did not find the case to be a political question unsuitable for judicial resolution, even though he had announced the principle less than one year earlier in *Marbury v. Madison*. *Id.*

121. *Talbot v. Seeman*, 5 U.S. (1 Cranch) 1, 28 (1801). See *supra* notes 93–98 and accompanying text for a discussion of *Talbot*.

122. *Charming Betsy*, 6 U.S. (2 Cranch) 64, 116 (1804).

123. *Id.*

124. *Id.* at 116–17. There would be no logical reason for the French to capture the vessel except on the belief that it was American, and hence “enemy” property.

125. *Id.* at 116.

126. *Id.* at 120–21. This may have been because a Danish consul advanced the claim on the burgher’s behalf. *Id.* at 116.

127. *Id.* at 118 (italics omitted).

128. *Id.*

129. See, e.g., Curtis A. Bradley, *The Charming Betsy Canon and Separation of Powers: Rethinking the Interpretive Role of International Law*, 86 GEO. L.J. 479, 488–91 (1998) (outlining various ways in which *Charming Betsy* canon has been used as interpretive tool to avoid construing statutes as violating or permitting violation of various treaty and customary international law obligations).



Applying this canon, the Court interpreted an act of Congress authorizing certain hostilities to exclude acts prohibited by international law pertaining to neutrals.<sup>130</sup>

In the context of this case and Marshall's prior opinions, this canon is based upon three key understandings regarding the nation's conduct of war. First, similar to *Little*, it strongly implies that only Congress can dictate the scope and means of hostilities in which the United States will engage.<sup>131</sup> Second, it indicates that the courts (and implicitly the executive) are required to interpret any such statutory authority with respect to relevant international law in order to preserve Congress's prerogatives.<sup>132</sup> Third, it clarifies that the courts, as the Supreme Court had done in *Bas* and *Little*, may review factual and/or legal determinations of the executive branch regarding whether individuals or property are within the scope of hostilities authorized by Congress.<sup>133</sup>

*Brown v. United States* provides a similar view of congressional authority over the executive's adoption of war measures in a declared (or "perfected") general war. Soon after Congress declared a general state of war with Great Britain in 1812, timber belonging to a British company was seized and a district attorney acting on his own initiative sought its condemnation as enemy property.<sup>134</sup> The district court's dismissal of the case was reversed by the circuit court, which condemned the property as enemy property forfeited to the United States.<sup>135</sup>

The Supreme Court reversed the circuit court, but Marshall's opinion is not a model of clarity. He initially stated that seizing property of enemy nationals was a sovereign right of war.<sup>136</sup> Overlooked by many commentators, however, is the fact that Marshall immediately qualified this statement by noting that "[t]he *mitigations* of this rigid rule, which the humane and wise policy of modern times has introduced into practice, *will more or less affect the exercise of this right*, but cannot impair the right

---

130. *Charming Betsy*, 6 U.S. (2 Cranch) at 119.

131. See Anthony J. Bellia, Jr. & Bradford R. Clark, *The Federal Common Law of Nations*, 109 COLUM. L. REV. 1, 63 (2009) (arguing that by using this canon of construction, "Marshall ensured that Congress, rather than the Court, would determine whether the [U.S.] should risk foreign conflict").

132. *Id.* at 63–64. Under the law of nations, the property of nationals of neutral countries was not subject to capture if engaged in international trade in ports not subject to blockade. Doing so would have been considered an act of war against the neutral nation. See UPTON, *supra* note 112, at 259–77 (providing overview of prize law).

133. Another example of the judiciary closely supervising the executive branch's understanding and application of congressionally sanctioned hostilities is *The Nereide*, 13 U.S. (9 Cranch) 388, 431 (1815), in which the Court exempted the goods of a Spanish (neutral) national on an English (enemy) vessel from capture. These decisions undermine recent assertions that the President must necessarily have or is constitutionally vested with broad, unreviewable discretion in this area. See Hamdi v. Rumsfeld, 542 U.S. 507, 579 (2004) (Thomas, J., dissenting) (asserting that because President "determined that Yaser Hamdi is an enemy combatant and should be detained" and the "detention falls squarely within the Federal Government's war powers," the Court lacks "expertise and capacity to second-guess that decision"); Al-Aulaqi v. Obama, 727 F. Supp. 2d 1, 46 (2010) (holding that claim by father of U.S. citizen targeted for killing by executive branch could not be heard because claim presented nonjusticiable political question).

134. *Brown v. United States*, 12 U.S. (8 Cranch) 110, 121–22 (1814). Although the property had been sold to an American citizen, the Court proceeded on the belief that the sale did not change the status of the property for purposes of its analysis. *Id.* at 122.

135. *Id.* at 122.

136. *Id.*

itself.”<sup>137</sup> Thus, though Marshall found the right to exist, he also clearly indicated that its exercise was qualified by modern practice.

Marshall later discussed the emerging practice of allowing enemy nationals the right to remove commercial property upon the outbreak of war.<sup>138</sup> After briefly reviewing recent treaty practice and scholarly treatises, Marshall stated that “[t]he modern rule then would seem to be, that tangible property belonging to an enemy and found in the country at the commencement of war, ought not to be *immediately* confiscated.”<sup>139</sup> Referring to this emerging international custom at odds with the confiscation and condemnation at issue, and to Congress’s unexercised power to make rules for captures, Marshall found the condemnation improper without express authorization from Congress.<sup>140</sup>

While some claim that *Brown* affirmatively rejects the notion that the President may exercise war powers domestically without express congressional authorization,<sup>141</sup> this is an overstatement. While that is a reasonable interpretation of one aspect of the opinion read in isolation,<sup>142</sup> Marshall elsewhere noted that it did “not appear that this

137. *Id.* at 122–23 (emphases added).

138. *Id.* at 126–29.

139. *Id.* at 125 (emphasis added). Marshall also equated the confiscation of property to the confiscation of debts, a practice which had already become obsolete. *Id.* at 123–24.

140. *Id.* at 125–29.

141. See, e.g., GLENNON, *supra* note 43, at 242 (stating that *Brown* Court held President lacked power to seize plaintiff’s property without congressional authorization); RAMSEY, *supra* note 42, at 249 (“Marshall concluded that the President could not seize an enemy alien’s property in the United States without Congress’s authorization, even in support of a formally declared war.”); Bellia & Clark, *supra* note 131, at 72 (asserting that *Brown* “reserved to Congress the power to create or escalate foreign conflict by engaging in an act that the law of nations *permitted*”); Bradley & Goldsmith, *supra* note 3, at 2093 (“The Court further held that the authorization to use force did not support the confiscation, reasoning that the President could not seize enemy property in the United States without *specific* authorization from Congress.”).

142. Later in the opinion, Marshall stated that:

It is urged that, in executing the laws of war, the executive may seize and the Courts condemn all property which, according to the modern law of nations, is subject to confiscation, although it might require an act of the legislature to justify the condemnation of that property which, *according to modern usage, ought not to be confiscated.*

This argument must assume for its basis the position that *modern usage* constitutes a rule which acts directly upon the thing itself by its own force, and not through the sovereign power. This position is not allowed. *This usage* is a guide which the sovereign follows or abandons at his will. The rule, like other precepts of morality, of humanity, and even of wisdom, is addressed to the judgment of the sovereign; and although it cannot be disregarded by him without obloquy, yet it may be disregarded.

*Brown*, 12 U.S. (8 Cranch) at 128 (emphases added). The emphasized language again highlights the fact that Marshall’s principle concern was that the seizure was inconsistent with an emerging rule—or “modern usage”—that qualified the right to *immediately* seize the property of an enemy national. Marshall does not indicate whether the President could supply the necessary sovereign act. Given that, in Marshall’s view, the modern usage prohibited the seizure, this aspect of the opinion only reemphasizes Congress’s general supremacy in matters of war, one which does not necessarily depend upon the location where war powers are exercised. This understanding of Marshall’s opinion is supported by his near-contemporaneous concurring opinion in *The Venus*, 12 U.S. (8 Cranch) 253 (1814). Regarding the characterization of an American merchant’s property as “enemy” property because he remained in British territory after the commencement of the war, Marshall wrote:

seizure was made under any instructions from the president of the United States; nor is there any evidence of its having his sanction, unless the libels being filed and prosecuted by the law officer who represents the government, must imply that sanction.”<sup>143</sup> Marshall also believed that certain relevant acts of Congress were contrary to an implied executive authority to immediately seize commercial property.<sup>144</sup> Thus, Marshall had no occasion to consider what he would decide if the President had expressly authorized this seizure and condemnation without express legislative support.<sup>145</sup> In addition, Marshall clarified that the case involved the divestment of private property rights, not with more typical war measures against enemy nationals or forces.<sup>146</sup> These diverse bases for Marshall’s decision caution against drawing any general conclusions regarding Marshall’s view on the constitutional separation of war powers.

Justice Story’s dissent supports this more nuanced reading of Marshall’s opinion. Story believed that the declaration of war impliedly authorized the President to wage war “against the vessels, goods and effects of the British government and its subjects; and to use the whole land and naval force of the United States to carry the war into effect.”<sup>147</sup> At the same time, he recognized that the Court must determine “*whether congress* (for with them rests the sovereignty of the nation as to the right of making war, and declaring its limits and effects) have authorized the seizure of enemies’ property.”<sup>148</sup> On that point, Story’s view was that the general declaration of war

---

A merchant residing abroad for commercial purposes may certainly intend to continue in the foreign country so long as peace shall exist, provided his commercial objects shall detain him so long, but to leave it the instant war shall break out between that country and his own. This intention, it is not necessary to manifest during peace; and when war shall commence, the belligerent cruizer may find his property on the ocean, and may capture it, before he knows that war exists. The question whether this be enemy property or not, depends, in my judgment, not exclusively on the residence of the owner at the time, but on his residence taken in connexion with his national character as a citizen, and with his intention to continue or to discontinue his commercial domicile in the event of war.

*Id.* at 288.

143. *Brown*, 12 U.S. (8 Cranch) at 121–22.

144. *Id.* at 126–27.

145. Marshall’s discussion does not indicate whether an act of the President, rather than lower executive official, might be an adequate “sovereign” act because, as Marshall earlier recognized, “it is admitted that the seizure was made by an individual, and the libel filed at his instance, by the district attorney *who acted from his own impressions of what appertained to his duty.*” *Id.* at 122 (emphasis added). Given the facts of the case, Marshall appears only to be referring to the executive branch generally, and to leave open the question of whether the President could provide the requisite “sovereign” act to which Marshall refers. See, e.g., *The Paquete Habana*, 175 U.S. 677, 700 (1900) (reasoning that “resort must be had to the customs and usages of civilized nations” only “where there is no treaty, and no controlling *executive or legislative* act or judicial decision” (emphasis added)).

146. See *Brown*, 12 U.S. (8 Cranch) at 125–26 (“[T]he declaration of war has only the effect of placing the two nations in a state of hostility, of producing a state of war, of giving those rights which war confers; but not of operating, by its own force, any of those results, *such as a transfer of property, which are usually produced by ulterior measures of government.*” (emphasis added)).

147. *Id.* at 137 (Story, J., dissenting).

148. *Id.* at 145 (emphasis added).

implicitly vested the President with this power under the laws of war in the absence of congressional indication to the contrary.<sup>149</sup>

After a review of international authorities, Story did not believe that there existed any doubt regarding the ability to confiscate an enemy national's property under the circumstances of this case.<sup>150</sup> He therefore concluded that the seizure was impliedly authorized by the declaration of war.<sup>151</sup> Justice Story also noted, however, that the confiscation of debts due to enemy subjects was "so justly deemed odious in modern times, and is so generally discountenanced, that nothing but an express act of congress would satisfy my mind that it ought to be included among the fair objects of warfare."<sup>152</sup>

Thus read, Marshall and Story appear to have a very similar basic understanding of the Commander-in-Chief power. Both recognized the complete authority of Congress over the conduct of even a declared war. They disagreed only as to whether the power to *immediately* confiscate an enemy national's property upon the declaration of war was permitted by the law of nations, and thereby impliedly authorized by Congress's declaration of war. As Story's discussion of debt confiscation makes clear, Story and Marshall also agreed that when the law of nations prohibits or qualifies a certain war measure, Congress must speak clearly as to the Executive's authority to act in violation of it. This is precisely what *Charming Betsy* would require.

#### D. *Interim Observations*

Fairly comprehensive but not indisputable, these early decisions suggest a reasonably uniform understanding that Congress is the supreme political authority in the nation's conduct of both perfect and imperfect war. Congress's complete authority to regulate the objects, scope, and general means of conducting the nation's wars was a key aspect of each opinion.

The Court's uniform treatment of the Commander-in-Chief power was that of implied powers subordinate to those of Congress. When Congress declared general war or authorized specific hostilities in a limited war, these opinions implied from such authorization a scope of authority consistent with the congressional authorization and relevant international law. Indeed, the application of the *Charming Betsy* canon to a congressional declaration of war or other authorization to engage in hostilities necessarily yields this result.

---

149. *See id.* ("[A]s the executive of the nation, [the President] must, as an incident of the office, have a right to employ all the usual and customary means acknowledged in war, to carry it into effect. . . . In cases where no grant is made by congress, all such captures, made under the authority of the executive, must enure to the use of the government.")

150. *See id.* at 143 ("In respect to the *goods* of an enemy found within the dominions of a belligerent power, the right of confiscation is most amply admitted by Grotius, and Puffendorf, and Bynkershock, and Burlamaqui, and Rutherford and Vattel.")

151. *Id.* at 145.

152. *Id.* at 145–46.

---

---

IV. THE COMMANDER-IN-CHIEF'S WAR FIGHTING DISCRETION: THE CONCEPT OF MILITARY NECESSITY

Although the above decisions dealt with limits on executive discretion in armed conflict, they did not—with the exception of Justice Story's dissent in *Brown v. United States*<sup>153</sup>—speak clearly to the breadth of presidential discretion within congressionally defined limits. The above opinions conveyed the idea that congressionally authorized war, general or partial, vests the Commander-in-Chief and his military commanders with war powers both specifically granted by Congress and clearly implied, and thereby limited, by the law of nations relevant to the hostilities authorized. These general powers and limits included not only basic war powers to capture enemy property and destroy enemy forces,<sup>154</sup> but also powers affecting individual rights, such as the property rights of neutrals, or the confiscation of the property or debts of enemy nationals.

Recognizing that these general powers and limits exist, however, does not fully account for the conduct of war. The power to capture, kill, or gather intelligence regarding an enemy does not fully speak to the means that may be employed to do so. In *Little v. Barreme*,<sup>155</sup> for example, Congress did not address whether the vessels to be captured could be fired upon or threatened with force, or whether they should be approached from the port or starboard, bow or stern. So long as a ship was American and traveling to a French port, the President and his subordinate commanders were left to determine specifically how, when, and where to affect its capture.<sup>156</sup>

The regulation of such details, once the realm of customs rooted in religion, morality, or chivalry, and observed by honorable warriors, has gradually become the subject of international laws of war, now known as international humanitarian law.<sup>157</sup> The discretion to choose among permissible means and methods of war, within the limits of these laws, remains largely within the discretion of military commanders, including the Commander-in-Chief. This section will demonstrate how this notion is reflected in Supreme Court precedent and in the term “military necessity.” It will then explore its breadth and limits.

A. *Towards a Concept of Military Necessity*

While the cases discussed earlier focused primarily on the powers of Congress, *Fleming v. Page*<sup>158</sup> articulates the broad scope and outer limits of the Commander-in-Chief's discretion to adopt war measures. *Fleming* involved a duty imposed on goods from the port of Tampico, a Mexican port then under U.S. military occupation as the

---

153. 12 U.S. (8 Cranch) 110 (1814).

154. See *infra* Part IV.D for discussion of the President's implied power to detain enemy forces in the wake of *Hamdi v. Rumsfeld*.

155. 6 U.S. (2 Cranch) 170 (1804).

156. *Little*, 6 U.S. (2 Cranch) at 177–79.

157. MORRIS GREENSPAN, *THE MODERN LAW OF LAND WARFARE* 4 (1959). See generally *THE LAWS OF WAR: CONSTRAINTS ON WARFARE IN THE WESTERN WORLD* (Michael Howard, George J. Andreopoulos & Mark R. Shulman, eds. 1994) (collecting essays documenting the development and origins of constraints on warfare in various historical eras).

158. 50 U.S. (9 How.) 603 (1850).

result of a war authorized by Congress.<sup>159</sup> The essential question before the Court was whether Tampico was still a foreign port, rendering the goods “foreign goods” subject to the duty.<sup>160</sup>

Explaining why Tampico was still properly considered a foreign port, Chief Justice Taney clarified that declared wars could not be understood to “be waged for the purpose of conquest or the acquisition of territory; nor does the law declaring the war imply an authority to the President to enlarge the limits of the United States by subjugating the enemy’s country.”<sup>161</sup> He observed, “this can be done only by the treaty-making power or the legislative authority, and is not a part of the power conferred upon the President by the declaration of war.”<sup>162</sup>

Taney then described the President’s war powers as “*purely military*,” noting that “[a]s commander-in-chief, he is authorized to direct the movements of the naval and military forces placed by law at his command, and to employ them in the manner he may deem most effectual to harass and conquer and subdue the enemy.”<sup>163</sup> He noted that the President “may invade the hostile country, and subject it to the sovereignty and authority of the United States. But his conquests do not enlarge the boundaries of this Union, nor extend the operation of our institutions and laws beyond the limits before assigned to them by the legislative power.”<sup>164</sup>

In the context of this case, Taney’s discussion reveals two fundamental aspects of the Commander-in-Chief power. First, he clarifies that the Commander-in-Chief’s implied powers are broad and include all military measures necessary to defeat and subdue an enemy designated by Congress. Second, he makes clear that the scope of these implied powers does not include those constitutionally dedicated to another branch of the United States government.<sup>165</sup>

The breadth of the Commander-in-Chief’s military discretion is reflected not only in Taney’s discussion in *Fleming* and Justice Story’s in *Brown*,<sup>166</sup> but also in the means of war that have been adopted and ultimately approved by the Supreme Court. Military commissions, used to punish both common crimes and violations of international laws governing war, grew out of the necessities of war and military occupation.<sup>167</sup> The

---

159. *Fleming*, 50 U.S. (9 How.) at 614.

160. *Id.*

161. *Id.*

162. *Id.* at 615.

163. *Id.* (emphasis added).

164. *Id.* In the context of enemy occupation of U.S. territory, the Court had similarly held that while the territory did not become foreign territory, U.S. laws were considered suspended while the territory was subject to the sovereignty of the enemy nation. *United States v. Rice*, 17 U.S. (4 Wheat.) 246, 254 (1819).

165. Note, though, Taney’s implicit understanding that the “institutions and laws” of the United States are usually limited to the territory of the United States. The Court has recently reiterated a presumption against extraterritorial application of federal law. *See Morrison v. National Australia Bank*, 130 S. Ct. 2869, 2877 (2010) (“It is a longstanding principle of American law that legislation of Congress, unless a contrary intent appears, is meant to apply only within the territorial jurisdiction of the United States.” (internal quotation marks omitted)).

166. *See supra* notes 147–52 and accompanying text for a discussion of Justice Story’s dissent in *Brown v. United States*.

167. *Hamdan v. Rumsfeld*, 548 U.S. 557, 589–90 (2006); 2 MILITARY LAW AND PRECEDENTS, *supra* note 68, at 831; *see also* David Glazier, *Precedents Lost: The Neglected History of the Military Commission*,

Supreme Court addressed the constitutional status of these purely military tribunals in *Jecker v. Montgomery*.<sup>168</sup>

In *Jecker*, the Court addressed the constitutionality of military prize courts that had been established, along with the other military commissions and councils, during the occupation of Mexico.<sup>169</sup> Regarding the constitutional allocation of this power, Taney observed that “[a]ll captures *jure belli* are for the benefit of the sovereign under whose authority they are made; and the validity of the seizure and the question of prize or no prize can be determined in his own courts only, upon which he has conferred jurisdiction to try the question.”<sup>170</sup> He then determined that “under the Constitution of the United States the judicial power of the general government is vested in one Supreme Court” and the inferior courts established by Congress.<sup>171</sup> Taney also determined that “[e]very court of the United States . . . must derive its jurisdiction and judicial authority from the Constitution or the laws of the United States.”<sup>172</sup>

Concluding that prize cases could only be adjudicated in the federal courts, Taney distinguished military prize courts from other military tribunals.

The courts, established or sanctioned in Mexico during the war by the commanders of the American forces, were nothing more than the agents of the military power, to assist it in preserving order in the conquered territory, and to protect the inhabitants in their persons and property while it was occupied by the American arms. They were subject to the military power, and their decisions under its control, whenever the commanding officer thought proper to interfere. *They were not courts of the United States*, and had no right to adjudicate upon a question of prize or no prize. And the sentence of condemnation in the court at Monterey is a nullity, and can have no effect upon the rights of any party.<sup>173</sup>

In other words, Taney concluded that military tribunals have no authority to adjudicate matters within the jurisdiction of our national courts. In this case, the Constitution’s allocation of admiralty (and thereby prize) questions to Article III courts imposed an applicable limit on the scope of permissible military war measures. When consistent with international and domestic laws governing war,<sup>174</sup> however, military commissions

---

46 VA. J. INT’L L. 5 (2005) (describing origins and use of military commissions in various conflicts throughout U.S. history).

168. 54 U.S. (13 How.) 498 (1851).

169. See 2 MILITARY LAW AND PRECEDENTS, *supra* note 68, at 831–34 (discussing use of military commissions to try common crimes and councils of war to try violations of laws of war).

170. *Jecker*, 54 U.S. (13 How.) at 515.

171. *Id.*

172. *Id.*

173. *Id.* (emphasis added).

174. See *Hamdan v. Rumsfeld*, 548 U.S. 557, 627–34 (2006) (concluding that military commissions ordered by President failed to comply with Article 21 of Uniform Code of Military Justice, 10 U.S.C. § 821 (2006), because they were not tribunals permitted by the law of war, as required under that section); *In re Yamashita*, 327 U.S. 1, 20 (1946) (“Congress gave sanction, as we held in *Ex parte Quirin*, to any use of the military commission contemplated by the common law of war.”); see also *Madsen v. Kinsella*, 343 U.S. 341, 342–43 (1952) (upholding jurisdiction of a military commission to convict a U.S. citizen civilian accused of murdering her military husband in occupied Germany).

have been upheld as valid war measures that do not exercise Article III judicial power.<sup>175</sup>

Supreme Court case law during the Mexican War is consistent with this understanding of the broad nature of the Commander-in-Chief's implied powers. In *Cross v. Harrison*,<sup>176</sup> the Court upheld the imposition of a port tax at San Francisco by U.S. military authorities occupying "all of Upper California" after defeating the Mexican government there.<sup>177</sup> It found the tax to be within the belligerent rights of a conqueror and authorized by the "constitutional commander-in-chief" even though Congress had "had not passed an act to extend the collection of tonnage and import duties to the ports of California."<sup>178</sup> In other words, until Congress established U.S. authority over occupied territory, the Commander-in-Chief's powers were informed and limited by relevant international law and not the Constitution's allocation of the governmental power being exercised. For this reason, the Court also upheld occupation laws and military courts in New Mexico until "revoked or modified . . . either by direct legislation on the part of Congress, or by that of the Territorial Government in the exercise of powers delegated by Congress," as the power to do so was consistent with the applicable law of nations.<sup>179</sup> Thus, the principle of broad presidential discretion informed and limited by applicable domestic or international law seems to have been well established by the time of the U.S. Civil War.

#### B. *The Articulation of Military Necessity*

The Lieber Code, adopted by President Lincoln as General Orders 100 during the Civil War, explicitly articulated "military necessity" as a concept of discretionary, implied powers.<sup>180</sup> Drafted by Professor Francis Lieber along with other military experts, the Lieber Code explained the scope of military necessity in three articles:

Art. 14. Military necessity, as understood by modern civilized nations, consists in the necessity of those measures which are indispensable for securing the ends of the war, and which are lawful according to the modern law and usages of war.

---

175. See *Yamashita*, 327 U.S. at 8 (finding that "military tribunals which Congress has sanctioned by the Articles of War are not courts whose rulings and judgments are made subject to review by this Court"); *Ex parte Quirin*, 317 U.S. 1, 39 (1942) (finding that military commissions "are not courts in the sense of the Judiciary Article"). A full exposition of the legal theory underlying the constitutional status and governing law of military commissions is beyond the scope of this Article. Compare FISHER, *supra* note 5 (recounting and critiquing evolution and use of military commissions/tribunals, primarily from separation of powers perspective), and Neal K. Katyal & Laurence H. Tribe, *Waging War, Deciding Guilt: Trying the Military Tribunals*, 111 YALE L.J. 1259 (2002) (arguing that, although not unconstitutional in every circumstance, establishment of military tribunals for the trial of terrorists by presidential order is "flatly unconstitutional"), with John M. Bickers, *Military Commissions Are Constitutionally Sound: A Response to Professors Katyal and Tribe*, 34 TEX. TECH L. REV. 899 (2003) (arguing that "military commission is a quasi-judicial tribunal that a military commander can use to make legal determinations in a martial law setting, to function as a court in an occupation military government, or to determine the guilt or innocence of an accused as a war criminal").

176. 57 U.S. (16 How.) 164 (1853).

177. *Cross*, 57 U.S. (16 How.) at 189–90.

178. *Id.*

179. *Leitensdorfer v. Webb*, 61 U.S. (20 How.) 176, 177–78 (1857).

180. Lieber Code, *supra* note 31, arts. 14–16.



Art. 15. Military necessity admits of all direct destruction of life or limb of *armed* enemies, and of other persons whose destruction is incidentally *unavoidable* in the armed contests of the war; it allows of the capturing of every armed enemy, and every enemy of importance to the hostile government, or of peculiar danger to the captor; it allows of all destruction of property, and obstruction of the ways and channels of traffic, travel, or communication, and of all withholding of sustenance or means of life from the enemy; of the appropriation of whatever an enemy's country affords necessary for the subsistence and safety of the army, and of such deception as does not involve the breaking of good faith either positively pledged, regarding agreements entered into during the war, or supposed by the modern law of war to exist. Men who take up arms against one another in public war do not cease on this account to be moral beings, responsible to one another and to God.

Art. 16. Military necessity does not admit of cruelty—that is, the infliction of suffering for the sake of suffering or for revenge, nor of maiming or wounding except in fight, nor of torture to extort confessions. It does not admit of the use of poison in any way, nor of the wanton devastation of a district. It admits of deception, but disclaims acts of perfidy; and, in general, military necessity does not include any act of hostility which makes the return to peace unnecessarily difficult.<sup>181</sup>

These broad outlines of military necessity were largely incorporated in the customary and conventional international laws governing war. The 1899 and 1907 Hague Conventions adopted the principle that “[t]he right of belligerents to adopt means of injuring the enemy is not unlimited.”<sup>182</sup> They then listed conduct specifically prohibited in war,<sup>183</sup> including a declaration that it is especially prohibited “[t]o destroy or seize the enemy's property, unless such destruction or seizure be imperatively demanded by the necessities of war.”<sup>184</sup> Although the United States is only a signatory and not a party, Additional Protocol I to the Geneva Conventions repeatedly refers to the concepts of necessity and military necessity as both enabling and limiting principles.<sup>185</sup> Indeed, military necessity is one of the fundamental principles upon which the United States military structures its understanding of the laws of war.<sup>186</sup>

---

181. *Id.* These articles are still cited by modern international humanitarian law scholars. THE HANDBOOK OF INTERNATIONAL HUMANITARIAN LAW 35 (Dieter Fleck, ed., 2d ed. 2008) [hereinafter HUMANITARIAN HANDBOOK].

182. Convention Respecting the Laws and Customs of War on Land, Annex, art. 22, Oct. 18, 1907, 36 Stat. 2277, 2301 (Fourth Hague Convention).

183. *Id.* arts. 23–28, at 2301–03.

184. *Id.* arts. 23(g), at 2302.

185. See Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts, arts. 14(3)(b), 34(4)(b), 54(5), 62(1), 63(5)(b), 67(4), 70(3)(c), 71(3), June 8, 1977, 1125 U.N.T.S. 3 [hereinafter Protocol I].

186. See DEP'T OF THE ARMY, THE LAW OF LAND WARFARE, paras. 3, 16, 207, 234, 315, 350, 502 (1956) (discussing concept of military necessity as both an enabling and limiting principle); INT'L & OPERATIONAL LAW DEP'T, THE JUDGE ADVOCATE GENERAL'S LEGAL CENTER & SCHOOL, U.S. ARMY,

The basic concept of military necessity as consisting of “those measures which are indispensable for securing the ends of the war, and which are lawful according to the modern law and usages of war”<sup>187</sup> appears to accurately describe the Supreme Court’s traditional understanding of the President’s power to conduct war. The early cases, particularly Marshall’s opinions in *Talbot* and *Charming Betsy*, as well as Story’s dissenting opinion in *Brown*, adopted the notion that the congressional authorization to conduct armed hostilities actuates both the powers and limits of applicable international laws—limits that could only be expanded by express authority from Congress.<sup>188</sup> Clearly, the laws of war and acts of Congress did not and could not regulate every detail of war. However, it is equally clear that where they did, those regulations restricted the permissible scope of the President’s military discretion. *Fleming* and *Jecker* also clarify that the limits of permissible military measures include any applicable law of nations and relevant provisions of the Constitution,<sup>189</sup> while at the same time recognizing the breadth of discretion that remains.

C. *Examining the Breadth and Limits of Military Necessity*

1. The Civil War

The Civil War brought the concept of military necessity sharply into focus. Fighting a war on the soil of the United States required examination of the permissible scope of military measures in the constitutional order. The seminal cases in which the Supreme Court addressed the scope of military necessity are the *Prize Cases*<sup>190</sup> and *Ex parte Milligan*.<sup>191</sup> These cases generally adhered to the concept as it had been articulated in earlier opinions,<sup>192</sup> but further clarified the constitutional rights of enemy nationals and suspected enemy sympathizers.

---

OPERATIONAL LAW HANDBOOK 12–13 (2008) (discussing military necessity as first principle upon which law of war rests).

187. Lieber Code, *supra* note 31, art. 14.

188. *But see* Bradley & Goldsmith, *supra* note 3, at 2091–2100 (arguing that international humanitarian law informs the military powers granted by AUMF and “can inform the boundaries of such powers,” but that AUMF cannot be interpreted as imposing prohibitions of international law on the Executive). Unfortunately, Bradley and Goldsmith do not articulate a meaningful legal distinction between the intrinsic boundaries of affirmative war powers and independent prohibitions on such powers. For example, presumably they would support the notion that the President may detain enemy fighters at least until the close of hostilities, as is generally accepted in relevant international law. In such a case, international law “informs” the nature and boundaries of the power. However, it is doubtful that Bradley and Goldsmith would accept the position that independent international prohibitions applicable to such detention—such as those proscribing torture or cruel, inhuman, and degrading treatment—impose any limit on the President’s implied detention power. If relevant international law informs the nature of an implied power, it is unclear why it would not also delimit it.

189. Taney never touched on the applicability of the Bill of Rights, an issue prominent in current debates regarding the classification, detention, and trial of those detained in the post-9/11 conflict. This Article does not attempt to resolve all such questions, but contains further discussion of this relationship *infra* Part IV.C.2.

190. 67 U.S. (2 Black) 635 (1862).

191. 71 U.S. (4 Wall.) 2 (1866).

192. See *supra* Part III for a discussion of these earlier decisions.

In the *Prize Cases*, the Supreme Court considered the legality of a blockade unilaterally instituted by President Lincoln after the attack on Fort Sumter.<sup>193</sup> Both the blockade and the subsequent seizure of ships occurred before any express congressional authority to conduct a war against seceding states existed. In the course of determining that the blockade was legally valid,<sup>194</sup> the Court addressed the scope of military measures the President may adopt in response to armed attacks on the nation.

The Court began by concluding that civil wars were governed by international laws of war, including laws related to blockade and prize capture.<sup>195</sup> It next clarified that the President “has *no power* to initiate or declare a war either against a foreign nation or a domestic State.”<sup>196</sup> It nevertheless found that “by the Acts . . . of February 28th, 1795, and 3d of March, 1807,” the President was “authorized to call[ ] out the militia and use the military and naval forces . . . in case of invasion by foreign nations, and to suppress insurrection against the government of a State or of the United States.”<sup>197</sup>

Related to these statutory grants of authority, the Court declared:

Whether the President in fulfilling his duties, as Commander in-chief, in suppressing an insurrection, has met with such armed hostile resistance, and a civil war of such alarming proportions as will compel him to accord to them the character of belligerents, is a question to be decided *by him*, and this Court must be governed by the decisions and acts of the political department of the Government to which this power was entrusted.<sup>198</sup>

Thus, the Court implied the scope of the President’s authority to respond to a military attack from acts of Congress.<sup>199</sup> It implied the discretion to determine the nature of conflict and the permissible military responses not from the Commander-in-Chief Clause alone, but from a grant of congressional authority and from international law.<sup>200</sup>

193. *Prize Cases*, 67 U.S. (2 Black) at 640–42.

194. *Id.* at 671.

195. *Id.* at 667–68 (concluding that, “[w]hen the regular course of justice is interrupted by revolt, rebellion, or insurrection, so that the Courts of Justice cannot be kept open, *civil war exists* and hostilities may be prosecuted on the same footing as if those opposing the Government were foreign enemies invading the land”); *see also* *The Venice*, 69 U.S. (2 Wall.) 258, 274 (1864) (“The rule which declares that war makes all the citizens or subjects of one belligerent enemies of the Government and of all the citizens or subjects of the other, applies equally to civil and to international wars.” citing *Prize Cases*, 67 U.S. (2 Black) at 666, 687–88 (Nelson, J., dissenting)).

196. *Prize Cases*, 67 U.S. (2 Black) at 668 (emphasis added).

197. *Id.*

198. *Id.* at 670 (emphasis added).

199. While at the Justice Department, Professor Yoo divorced this language from its context and paraphrased it to justify his assertion that “[t]he President’s *complete discretion* in exercising the Commander-in-Chief power has also been recognized by the courts.” Yoo Memo, *supra* note 33, at 5 (emphasis added).

200. *Prize Cases*, 67 U.S. (2 Black) at 669–70. *But see* Thomas H. Lee & Michael D. Ramsey, *The Story of the Prize Cases: Executive Action and Judicial Review in Wartime*, in *PRESIDENTIAL POWER STORIES* 53, 75 (Christopher H. Schroeder & Curtis A. Bradley eds., 2009) (arguing that statutes referenced by the Court were “inapposite to the armed force at issue in the *Prize Cases*” but “presumably supplied a statutory basis for Lincoln’s call-up of land and naval forces to apply armed force[] against active rebels”). With due respect to Professors Ramsey and Lee, the logic of their position is quite tenuous. Even in their extensive description of the history of the case, the “call-up” itself was not placed in issue by the arguments of either party. Additionally, the statutes referenced by the Court were not limited solely to the 1795 act giving the President

The Court then concluded that the property of citizens of the states in rebellion was properly deemed “enemy property” subject to capture under international laws governing war while indicating that usual constitutional protections were inapplicable given their enemy status.<sup>201</sup> It then applied international laws regulating blockade and prize capture to determine the rights of the parties concerning captured vessels and property.<sup>202</sup> Thus, the Court again recognized that the breadth of the President’s military discretion was subject to limits imposed by applicable domestic and international law.<sup>203</sup>

Justice Nelson’s dissent, joined by Chief Justice Taney and two others, differed from the majority on one significant detail. Justice Nelson believed that Congress had empowered the President to respond to an invasion, insurrection, or rebellion only under existing domestic (“municipal”) law rather than international laws of war unless or until Congress activated the war powers of the government.<sup>204</sup> Regarding the use of the military under these acts, he wrote: “The whole military and naval power of the country is put under the control of the President to meet the emergency. He may call out a force in proportion to its necessities, one regiment or fifty, one ship-of-war or any number at his discretion.”<sup>205</sup> The important caveat was that whatever numbers were used “the nature of the power is the same. It is the exercise of a power *under the municipal laws of the country* and not under the law of nations” until action by “Congress, who can, if it be deemed necessary, bring into operation the war power, and thus change the nature and character of the contest.”<sup>206</sup>

---

power to call forth the militia, but also included the 1807 act to suppress insurrections. It is therefore odd for them to suggest that the Court did not intend to support the resolution of the actual issues in the case—the validity of the President’s unilateral resort to the war powers of blockade and prize capture—by reference to these statutes. In dissent, Justice Nelson appeared to agree with the interpretation here proffered regarding the importance of these statutes to the majority’s reasoning. *See infra* notes 207–09 and accompanying text for Judge Nelson’s discussion of the distinction between the authority to respond to acts of war under municipal law and the authority to respond under the laws of nations.

Also important, the Court’s opinion regarding presidential discretion bears a striking resemblance to an earlier decision (not cited by the court) discussing the 1795 Act and a presidential determination of the existence of armed conflict.

The power itself is confided to the Executive of the Union . . . who is, by the constitution, “the commander in chief of the militia, when called into the actual service of the United States,” whose duty it is to “take care that the laws be faithfully executed” . . . . He is necessarily constituted the judge of the existence of the exigency in the first instance, and is bound to act according to his belief of the facts. . . . Whenever a *statute* gives a discretionary power to any person, to be exercised by him upon his own opinion of certain facts, it is a sound rule of construction, that the statute constitutes him the sole and exclusive judge of the existence of those facts.

Martin v. Mott, 25 U.S. (12 Wheat.) 19, 31–32 (1827) (emphasis added).

201. *Prize Cases*, 67 U.S. (2 Black) at 671–74.

202. *Id.* at 674–82.

203. *Id.* at 669–70. *C.f.* Lee & Ramsey, *supra* note 200, at 89 (arguing that majority opinion “seemed to assume—for reasons not entirely articulated—that captures *not* conforming to international law would *not* be valid”).

204. *Prize Cases*, 67 U.S. (2 Black) at 693 (Nelson, J. dissenting).

205. *Id.* at 692.

206. *Id.* (emphasis added).

In Nelson's opinion, this congressional act was needed to ensure that "instead of being carried on under the municipal law of 1795," the exercise of military power "would be under the law of nations, and the Acts of Congress as war measures with all the rights of war."<sup>207</sup> Without such clear authorization from Congress to engage the threat with war powers, Justice Nelson felt the majority had erred in finding the acts of the President to rest in international laws of war rather than domestic law.<sup>208</sup> Indeed, he indicated that even the President had made no such claim.<sup>209</sup>

While there is a fundamental disagreement on the sources of law applicable to the President's actions prior to congressional action, the level of agreement between these opinions is also important. Both the majority and dissenting opinions endorsed the view that, pursuant to appropriate acts of Congress, an invasion or significant rebellion, coupled with congressional authority, impliedly vests the President with the power to respond with the military measures he deems necessary to counter the attack.<sup>210</sup> Their disagreement related only to whether he could resort to war powers under international law—with their attendant effects on the private rights of citizens of seceding states and on the rights and interests of other nations and their nationals—without a declaration of war from Congress.<sup>211</sup> Both opinions also appeared to agree that international laws regulating blockade and captured property would apply if the resort to war powers was appropriate.<sup>212</sup>

While the *Prize Cases* addressed military necessity with regard to the powers of war against seceding "enemy" states and their citizens, *Ex parte Milligan* focused on the permissible scope of military necessity in Indiana, a loyal state facing a general threat of invasion.<sup>213</sup> Lambdin P. Milligan, a citizen of the United States and twenty-year resident of the State of Indiana, petitioned for a writ of habeas corpus to the Circuit Court of the United States for the District of Indiana "to be discharged from an

---

207. *Id.*

208. *Id.* at 693 ("The Acts of 1795 and 1807 did not, and could not under the Constitution, confer on the President the power of declaring war against a State of this Union, or of deciding that war existed, and upon that ground authorize the capture and confiscation of the property of every citizen of the State whenever it was found on the waters.")

209. *Id.* at 686 ("It is remarkable, also, that both the President and the Secretary, in referring to the blockade, treat the measure, not as a blockade under the law of nations, but as a restraint upon commerce at the interdicted ports under the municipal laws of the Government.")

210. Nelson cited *Brown v. United States*, which is discussed *supra* Part III for the proposition that congressional power was required to call into force the powers of war. *Id.* at 687–88 (Nelson, J. dissenting).

211. Justice Nelson viewed the war as "personal" in nature until Congress acted. He believed that the war carried on by the President against the insurrectionary districts in the Southern States, as in the case of the King of Great Britain in the American Revolution, was a personal war against those in rebellion, and with encouragement and support of loyal citizens with a view to their co-operation and aid in suppressing the insurgents, with this difference, as the war-making power belonged to the King, he might have recognized or declared the war at the beginning to be a civil war which would draw after it all the rights of a belligerent, but in the case of the President no such power existed: the war therefore from necessity was a personal war, until Congress assembled and acted upon this state of things.

*Id.* at 694–95. This raises interesting and alarming questions regarding the scope of the President's powers to conduct such domestic, "personal" wars against insurrections.

212. *But see* Lee & Ramsey, *supra* note 200, at 88–89.

213. *Ex Parte Milligan*, 71 U.S. (4 Wall.) 2, 6–7 (1866).

alleged unlawful imprisonment.”<sup>214</sup> Although he had never served in the army or navy, Milligan had been arrested from his home in October of 1864 and was tried before a military commission.<sup>215</sup> Both events were by order of General Hovey, the commander of the military district of Indiana.<sup>216</sup> Milligan was found guilty and sentenced to be hanged.<sup>217</sup>

At the Supreme Court, the question presented was whether Milligan was properly subject to the jurisdiction of the military commission even though Congress had directed that those so situated be delivered to the local federal district court.<sup>218</sup> The Court began by rejecting the notion that:

In a time of war the commander of an armed force (if in his opinion the exigencies of the country demand it, and of which he is to judge), has the power, within the lines of his military district, to suspend all civil rights and their remedies, and subject citizens as well as soldiers to the rule of *his will*; and in the exercise of his lawful authority cannot be restrained, except by his superior officer or the President of the United States.<sup>219</sup>

Instead, the Court focused on what military measures could be adopted in an area where it found “the Federal authority was always unopposed, and its courts always open to hear criminal accusations and redress grievances.”<sup>220</sup>

Importantly, the Court emphasized that the case did not involve “a question of the power to proclaim martial law, when war exists in a community and the courts and civil authorities are overthrown.”<sup>221</sup> Nor did the Court believe it involved “a question [of] what rule a military commander, at the head of his army, can impose on states in rebellion to cripple their resources and quell the insurrection.”<sup>222</sup> In other words, the Court clarified that this was not a typical case of simple military necessity.

Instead, the Court concluded that “[m]artial law cannot arise from a *threatened* invasion. The necessity must be actual and present; the invasion . . . effectually closes the courts and deposes the civil administration.”<sup>223</sup> The Court noted that Milligan

---

214. *Id.* at 107.

215. *Id.*

216. *Id.*

217. *Id.*

218. *Id.* at 121.

219. *Id.* at 124.

220. *Id.* at 121.

221. *Id.* at 126.

222. *Id.*

223. *Id.* at 127. Justice Field expressed a similar opinion regarding the nature of military jurisdiction over civilians in a later case:

It may be true, also, that on the actual theatre of military operations what is termed martial law, but which would be better called martial rule, for it is little else than the will of the commanding general, applies to all persons, whether in the military service or civilians. It may be true that no one, whatever his station or occupation, can there interfere with or obstruct any of the measures deemed essential for the success of the army, without subjecting himself to immediate arrest and summary punishment. The ordinary laws of the land are there superseded by the laws of war. The jurisdiction of the civil magistrate is there suspended, and military authority and force are substituted. The success of the army is the controlling consideration, and to that every thing else is required to bend.

should have been delivered to the local federal court as required by Congress<sup>224</sup> and that not even Congress could have authorized trial by military commission under the circumstances.<sup>225</sup> In essence, the Court determined that the perceived necessities of war could not generally displace or supersede applicable domestic law, at least not in territory still under the control of the government, so long as civil authorities remained available to enforce it.

Concurring in the judgment, Chief Justice Chase focused on the statutory requirements and separation of powers issues. In spite of commentary indicating otherwise, his opinion endorsed a concept of military necessity consisting of implied powers authorized by Congress, not of inherent, plenary presidential authority.<sup>226</sup>

Chase began his analysis by concluding that “Milligan was imprisoned under the authority of the President, and was not a prisoner of war.”<sup>227</sup> He noted that “[n]o list of prisoners had been furnished to the judges, either of the District or Circuit Courts, as required by [an applicable act of Congress].”<sup>228</sup> He further noted that “[a] grand jury had attended the Circuit Courts of the Indiana district, while Milligan was there imprisoned, and had closed its session without finding any indictment or presentment or otherwise proceeding against the prisoner.”<sup>229</sup> Therefore, Chase found that Milligan’s “case was thus brought within the precise letter and intent of the act of Congress.”<sup>230</sup> It was this failure to comply with an applicable act of Congress that caused Chase to agree with the majority on the need to issue the writ of habeas corpus.<sup>231</sup> Importantly, Chase thereby agreed that the law enacted by Congress

Beckwith v. Bean, 98 U.S. 266, 293 (1878) (Field, J., dissenting).

224. *Milligan*, 71 U.S. (4 Wall.) at 122. The importance of this statute to the majority’s reasoning is debatable given the majority’s reliance on a “closed courts” standard for the abrogation of Article III jurisdiction and Bill of Rights protections.

225. *Id.* at 121–22.

226. *See, e.g.*, Barron & Lederman II, *supra* note 15, at 1018–19 (characterizing Chase’s opinion as “first judicial expression of the theory of the substantive Commander in Chief preclusive power that is now the centerpiece of the Department of Justice’s defense of the Bush Administration’s views”). Barron and Lederman collected numerous scholarly works that have interpreted Chase’s opinion in a similar manner. *Id.* at 1019 n.307.

227. *Milligan*, 71 U.S. (4 Wall.) at 134 (Chase, C.J., concurring).

228. *Id.* More fully, Chase was referring to the Act of Congress of March 3, 1863, the second section of which:

required that lists of all persons, being citizens of states in which the administration of the laws had continued unimpaired in the Federal courts, who were then held or might thereafter be held as prisoners of the United States, under the authority of the President, otherwise than as prisoners of war, should be furnished to the judges of the Circuit and District Courts. . . . And it was required, in cases where the grand jury in attendance upon any of these courts should terminate its session without proceeding by indictment or otherwise against any prisoner named in the list, that the judge of the court should forthwith make an order that such prisoner. . . be discharged, on entering into recognizance, if required, to keep the peace and for good behavior, or to appear, as the court might direct, to be further dealt with according to law.

*Id.* at 133.

229. *Id.* at 134.

230. *Id.*

231. *See id.* at 135–36 (arguing that it is unnecessary to look beyond directions of Congress).

governed General Hovey's actions even though he assumed Hovey to be acting on the authority of the President.<sup>232</sup>

Chase's disagreement with the majority related only to whether *Congress* could authorize the military tribunals at issue, and for that reason indemnify the officers who convened and composed them from potential individual liability.<sup>233</sup> It was in this narrow context that Chase provided the following analysis:

Congress has the power not only to raise and support and govern armies but to declare war. It has, therefore, the power to provide by law for carrying on war. This power necessarily extends to all legislation essential to the prosecution of war with vigor and success, except such as interferes with the command of the forces and the conduct of campaigns. That power and duty belong to the President as commander-in-chief. Both these powers are derived from the Constitution, but neither is defined by that instrument. Their extent must be determined by their nature, and by the principles of our institutions.

The power to make the necessary laws is in Congress; the power to execute in the President. Both powers imply many subordinate and auxiliary powers. Each includes all authorities essential to its due exercise. But neither can the President, in war more than in peace, intrude upon the proper authority of Congress, nor Congress upon the proper authority of the President. Both are servants of the people, whose will is expressed in the fundamental law. Congress cannot direct the conduct of campaigns, nor can the President, or any commander under him, without the sanction of Congress, institute tribunals for the trial and punishment of offences, either of soldiers or civilians, unless in cases of a controlling necessity, which justifies what it compels, or at least insures acts of indemnity from the justice of the legislature.<sup>234</sup>

Chase concluded with the view that "*it is within the power of Congress to determine in what states or districts such great and imminent public danger exists as justifies the authorization of military tribunals for the trial of crimes and offences against the discipline or security of the army or against the public safety.*"<sup>235</sup>

The precise meaning of Chase's statements regarding the relative war powers of Congress and the President is somewhat debatable. Placed in the full context of his opinion, however, Chase does not appear to have supported preclusive presidential authority over the conduct of war. His opinion more readily supports a much narrower view of presidential power as one of implied powers to direct the employment of military forces, subject to applicable laws. Chase's acknowledgement of Congress's powers to "provide by law for carrying on war" and to enact "all legislation essential to the *prosecution* of war with vigor and success"<sup>236</sup> appears to recognize a substantial role for Congress in both initiating and regulating war. If so, Chase's reference to

---

232. *Id.* at 134.

233. *Id.* at 136.

234. *Id.* at 139–40.

235. *Id.* at 140 (emphasis added).

236. *Id.* at 139 (emphasis added).



Congress's inability to "interfere[] with the command of the forces"<sup>237</sup> means only that Congress could not affirmatively direct the precise employment or series of actions military units might take to defeat an enemy, not to a plenary presidential power of expediency. Likewise, Chase's reference to Congress's inability to "direct the conduct of campaigns"<sup>238</sup> would not preclude general regulation of the objects, means, or methods of those campaigns, as the earlier aspects of his opinion clearly indicated. Any broader reading of these phrases would be at odds with his reference to Congress's broad powers to legislate for the "prosecution" of war.

Chase's later reference to the need for legislative indemnification of certain Presidential actions absent "controlling necessity, which justifies what it compels,"<sup>239</sup> unmistakably indicates that Chase believed Congress has a significant role in regulating executive actions in war. Why would it be necessary for Congress to indemnify acts constitutionally vested to the President's discretion?

Fairly read, Chase appears to have understood the Commander-in-Chief power to be one of express and implied powers conferred by Congress to conduct war. He simply found that a statute dictated an action other than what General Hovey ordered. His view that Congress could have authorized Milligan's military tribunal based on its finding an imminent public danger, as well as his conclusion that Milligan's habeas writ must issue for failure to comply with an act of Congress, substantially undermines the notion that he was asserting the existence of preclusive Commander-in-Chief powers. He did, however, create confusion regarding the scope of the President's implied powers with his reference to "cases of a controlling necessity, which justifies what it compels, or at least insures acts of indemnity from the justice of the legislature."<sup>240</sup> A related line of precedent sheds light on this reference.

## 2. Abrogating Rights in War—Notions of Public Necessity

The *Milligan* majority and concurring opinions both conclude that individual rights, including constitutional rights unavailable at trial by military commission, may be abrogated in armed conflict. They merely disagreed on the conditions that permit it. Both opinions appear to have suggested that the standard varies depending on the location and circumstances, with the majority requiring a demonstrable factual or imperative necessity and Chase endorsing greater legislative discretion.

A general notion of an overriding public necessity in armed conflict seems logical enough given that the Constitution expressly preserved this possibility with regard to the writ of habeas corpus. Recall that "[t]he Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it."<sup>241</sup> Thus, even this fundamental individual privilege may yield to the imperative necessities of war.

---

237. *Id.*

238. *Id.*

239. *Id.* at 140.

240. *Id.*

241. U.S. CONST. art. I, § 9, cl. 2.

The notion of a public necessity in war is also logical given that armed conflict results in both intended and unavoidable, incidental loss of life and property, as indicated by Article 15 of the Lieber Code.<sup>242</sup> This concept is preserved in modern international humanitarian law. Prohibited attacks include those “which may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, *which would be excessive* in relation to the concrete and direct military advantage anticipated.”<sup>243</sup> In other words, the laws of war embrace a utilitarian principle: that some innocent civilian lives may be taken, some property destroyed, when *not* excessive to the military advantage to be gained.

The Supreme Court has accepted this concept in principle, though its application has sometimes varied. In *Mitchell v. Harmony*,<sup>244</sup> the Supreme Court considered whether a military commander could destroy the property of a U.S. merchant who had accompanied the military unit to Mexico.<sup>245</sup> The commander did so ostensibly to prevent the merchant’s property from falling into enemy hands.<sup>246</sup> The Court upheld a jury verdict against the officer for the loss of the merchant’s property.<sup>247</sup> It found that the instruction to the jury regarding the exigent circumstances required to justify the commander’s actions accurately reflected the law and that—through its verdict—the jury found the standard was not met.<sup>248</sup> Although the commander had argued for a measure of deference to his judgment in a distant theater of war, the Court concluded:

There are, without doubt, occasions in which private property may lawfully be taken possession of or destroyed to prevent it from falling into the hands of the public enemy; and also where a military officer, charged with a particular duty, may impress private property into the public service or take it for public use. Unquestionably, in such cases, the government is bound to make full compensation to the owner; but the officer is not a trespasser.

But we are clearly of opinion, that in all of these cases the danger must be immediate and impending; or the necessity urgent for the public service, such as will not admit of delay, and where the action of the civil authority would be too late in providing the means which the occasion calls for. It is impossible to define the particular circumstances of danger or necessity in which this power may be lawfully exercised. Every case must depend on its own circumstances. It is the emergency that gives the right, and the emergency must be shown to exist before the taking can be justified.<sup>249</sup>

Here, the Court plainly clarifies that private rights of even loyal U.S. nationals may be abridged when required by an imperative necessity of war. Commanders faced with dire circumstances may take and use, or destroy and thereby deny enemy access to, private property. Although the extant necessity permits such action without Fifth

---

242. Lieber Code, *supra* note 31, arts. 14–16, at 6

243. Protocol I, *supra* note 182, art. 51(5)(b), at 26 (emphasis added).

244. 54 U.S. (13 How.) 115 (1851).

245. *Mitchell*, 54 U.S. (13 How.) at 133.

246. *Id.* at 117.

247. *Id.* at 137.

248. *Id.* at 133–35.

249. *Id.* at 134.

Amendment due process, it does not relieve the government of Just Compensation Clause requirements. Thus, only rights that must give way under the circumstances may be abrogated. Although the standard to justify such action appears to be quite high, it is not unattainable.

In *United States v. Russell*,<sup>250</sup> which arose during the Civil War, the military commandeered privately-owned steamboats to support military operations, “impress[ing] private property into the public service”<sup>251</sup> just as the *Mitchell* Court had suggested.<sup>252</sup> The Supreme Court found that

a taking of private property by the government, when the emergency of the public service in time of war or impending public danger is too urgent to admit of delay, is everywhere regarded as justified, if the necessity for the use of the property is imperative and immediate, and the danger, as heretofore described, is impending . . . [I]t is equally clear that the taking of such property under such circumstances creates an obligation on the part of the government to reimburse the owner to the full value of the service. Private rights, under such extreme and imperious circumstances, must give way for the time to the public good, but the government must make full restitution for the sacrifice.<sup>253</sup>

The approaches in these cases clearly reflect the common law tort doctrine of public necessity. A public officer may invade private property interests, but only when urgently necessary for the public good.<sup>254</sup> As *Milligan* makes clear, the rights which might properly be infringed are not limited to property interests, but also include constitutional rights unenforceable when the courts are closed. Logically then, the application of such a concept to battlefield conduct both adds to and further delimits the President’s Commander-in-Chief authority.

It is also important to note that such imperative public necessity appears to be required only in cases involving the rights of U.S. citizens not classified as an enemy. In *Juragua Iron Co. v. United States*,<sup>255</sup> the Supreme Court determined that the government need not compensate for the destruction of the property of an American business operating in enemy territory and (apparently) supporting that enemy’s war effort.<sup>256</sup> The Court did not conduct a public necessity analysis. It found that, under these circumstances, the American company’s property constituted enemy property

---

250. 80 U.S. (13 Wall.) 623 (1871).

251. *Russell*, 80 U.S. (13 Wall.) at 628–29.

252. *Id.* at 629 (alteration in original) (quoting *Mitchell*, 54 U.S. (13 How.) at 134).

253. *Id.*

254. RESTATEMENT (SECOND) OF TORTS § 196, cmt. b (1965). Note that the Restatement provides that: A privilege similar to that stated in this Section has been recognized in older cases, where members of the military forces have acted to occupy, remove, or destroy property for the purpose of protection against a public enemy. Such action, in the exercise of special military power or authority in time of war or of martial law, lies beyond the scope of the ordinary law of Torts, and is therefore beyond the scope of this Restatement.

*Id.* cmt. i; see also *Respublica v. Sparhawk*, 1 U.S. (1 Dall.) 357, 363 (Pa. 1788) (finding Continental Congress had authority to remove and store barrels of flour to prevent their capture by enemy and was not required to provide compensation when those barrels were later captured).

255. 212 U.S. 297 (1909).

256. *Juragua Iron*, 212 U.S. at 297, 302, 311.

lawfully subject to capture or destruction in war.<sup>257</sup> *Juragua Iron*, like the *Prize Cases* and others,<sup>258</sup> supports the general proposition that those properly considered public enemies, whether citizens or foreign nationals, may not claim the protections of the Bill of Rights against a proper use of war or military occupation powers. An enemy's rights are governed only by the laws of war and military necessity rather than by requirements for an imperative public necessity justifying the abrogation of otherwise applicable constitutional rights.<sup>259</sup>

The first Supreme Court decision adopting "military necessity" as a descriptive legal term was the Civil War case of *United States v. Pacific Railroad*.<sup>260</sup> The Court considered whether the government could charge railroad companies for the reconstruction of railroad bridges on the companies' property in Missouri.<sup>261</sup> The government had earlier destroyed the bridges to prevent the advance of Confederate troops and later rebuilt them after reestablishing their defenses.<sup>262</sup> The local commander deemed both actions to be matters of urgent military necessity.<sup>263</sup> Not surprisingly, the Court concluded that "[m]ilitary necessity will justify the destruction of property, but will not compel private parties to erect on their own lands works needed by the government, or to pay for such works when erected by the government."<sup>264</sup> Thus, the Court again recognized the proposition that the public necessity component of military necessity may justify abrogating private property rights in an active theater of war.

### 3. The Second World War

The Second World War presented the greatest threat of full-scale conventional war that the continental United States has faced in the last century. It is not surprising, then, that the concept of military necessity again became an important, if more controversial, part of our constitutional tradition at that time.

The Supreme Court referred to military necessity when upholding a curfew order imposed against Japanese Americans in certain West Coast areas in *Hirabayashi v.*

---

257. *Id.* at 309–11; *see also* *Dow v. Johnson*, 100 U.S. 158, 170 (1879) (directing verdict in favor of a brigadier general in damages action against him for private property seized in Louisiana on grounds that Louisiana was enemy property under military occupation and the property had been seized for military maintenance).

258. *See, e.g.*, *The Grapeshot*, 76 U.S. (9 Wall.) 129 (1869) (upholding the jurisdiction of presidentially established courts in occupied Louisiana until replaced by Congress after the close of hostilities); *The Venice*, 69 U.S. (2 Wall.) 258 (1864) (addressing property rights of citizens of formerly rebellious state once military order was established).

259. Professor Monaghan asserts that "[a]s [*Youngstown*] makes plain, executive officials ordinarily must point to the presence of legislative authority, not to its absence, to justify conduct that burdens private rights." Monaghan, *supra* note 17, at 39. While this may be the ordinary case, clear exceptions for military necessity in a theater of war and the less than clear exception for martial law where the operation of government has been disrupted appear to exist in both domestic and international law. It is the scope and limits to those exceptions that are at issue generally in armed conflict, particularly in the post-9/11 conflict.

260. 120 U.S. 227 (1887).

261. *Pac. R.R.*, 120 U.S. at 229.

262. *Id.*

263. *Id.*

264. *Id.* at 239.

*United States*.<sup>265</sup> It also upheld the exclusion of Japanese Americans from certain parts of the West Coast in *Korematsu v. United States*.<sup>266</sup> Both orders were sustained based upon the existence of broad congressional and executive authorization coupled with a military commander's determination of their local necessity.<sup>267</sup> Although both decisions are rightly criticized because of their failure to address the readily apparent discrimination which motivated the categorical application of these measures to those of Japanese ancestry,<sup>268</sup> the need for some military action based on the perceived threat was at least arguable.<sup>269</sup>

Given that these cases involved substantial rights of U.S. citizens in U.S. territory, they are most properly viewed as an erroneous application of the public necessity component of military necessity. The Court noted that "the properly constituted military authorities feared an invasion of our West Coast and felt constrained to take proper security measures."<sup>270</sup> According to the Court, "[t]here was evidence of disloyalty on the part of some" and "military authorities considered that the need for action was great, and time was short."<sup>271</sup> The Court was thus much more deferential to military determinations regarding the proper application and scope of emergency measures than it had been in *Mitchell* and *Russell*. It simply failed to require clear proof of an imperative necessity and the narrow responsive measures that it had earlier required to abrogate the rights of loyal U.S. citizens.

Different considerations underlie the Court's decision in *Ex parte Quirin*.<sup>272</sup> In *Quirin*, the Court upheld the President's order to try Nazi saboteurs—including a putative U.S. citizen—by military commission in the United States even though civil courts were open.<sup>273</sup> Distinguishing *Milligan*, the court found that these commissions were consistent with relevant international law and specifically authorized by Congress in the Articles of War.<sup>274</sup> For these reasons, the Court did not require compliance with

---

265. 320 U.S. 81 (1943).

266. 323 U.S. 214 (1944).

267. *Hirabayashi*, 320 U.S. at 103–04; *Korematsu*, 323 U.S. at 217–18.

268. *But see Korematsu*, 323 U.S. at 223 ("Our task would be simple, our duty clear, were this a case involving the imprisonment of a loyal citizen in a concentration camp because of racial prejudice . . . . To cast this case into outlines of racial prejudice, without reference to the real military dangers which were presented, merely confuses the issue. *Korematsu* was not excluded from the Military Area because of hostility to him or his race.").

269. It has been noted that at the time of the order at issue in *Korematsu*, the government asserted that "the Japanese Navy was regularly sinking ships off the west coast and firing upon land facilities in California and Oregon, and there was intelligence information suggesting that a Japanese invasion of the west coast was imminent, and was being facilitated by Japanese-Americans in the United States." CURTIS A. BRADLEY & JACK L. GOLDSMITH, *FOREIGN RELATIONS LAW* 266 (2003) (citing U.S. DEP'T OF WAR, FINAL REPORT: JAPANESE EVACUATION FROM THE WEST COAST 1942 (1978)). *But see* David G. Savage, *U.S. Official Cites Official Misconduct in Japanese American Internment Cases*, L.A. TIMES, May 24, 2011, <http://www.latimes.com/news/nationworld/nation/la-na-japanese-americans-20110525,0,3517138.story> (reporting that government attorneys "deliberately hid from the court a report from the Office of Naval Intelligence that concluded the Japanese Americans on the West Coast did not pose a military threat").

270. *Korematsu*, 323 U.S. at 223–24.

271. *Id.*

272. 317 U.S. 1 (1942).

273. *Quirin*, 317 U.S. at 18–24, 48.

274. *Id.* at 28–29. According to the Court,

*Milligan*'s "closed courts"—or one might say "imperative necessity"—standard. It implicitly found, as it had in the *Prize Cases* and *Juragua Iron*, that only the laws of war govern the rights of enemies in armed conflict with the United States.<sup>275</sup>

While some commentary claims that other factors may have influenced the outcome in *Quirin*,<sup>276</sup> the Court's decision appears to have clearly rested on: (1) congressional authorization for the use of such tribunals;<sup>277</sup> (2) the saboteurs' undisputed status as enemy combatants;<sup>278</sup> (3) the fact that military commissions and the punishment they imposed were believed to be consistent with international laws governing war;<sup>279</sup> and (4) the lack of constitutional protections afforded a public enemy, whether citizen or alien, triable by military tribunal.<sup>280</sup> In other words, the Court again found that simple rather than imperative military necessity supported the use of war measures against a clearly identified enemy in armed conflict.

The World War II-era Supreme Court also limited some claims of military necessity. In *Duncan v. Kahanamoku*,<sup>281</sup> the Court overturned convictions by martial law military tribunals in Hawaii. These tribunals had been established in the days following the attacks on Pearl Harbor and in accordance with the Territorial Governor's

---

[a]n important incident to the conduct of war is the adoption of measures by the military command not only to repel and defeat the enemy, but to seize and subject to disciplinary measures those enemies who in their attempt to thwart or impede our military effort have violated the law of war. It is unnecessary for present purposes to determine to what extent the President as Commander in Chief has constitutional power to create military commissions without the support of Congressional legislation . . . [f]or here Congress has authorized trial of offenses against the law of war before such commissions.

*Id.*

275. *Id.* at 31. Other Supreme Court precedent might also support treating at least some international law as a separate governing body of law, neither truly state nor truly federal, providing a rule of decision in appropriate cases in a conflicts-of-laws fashion. *See, e.g.*, *Am. Ins. Co. v. Canter*, 26 U.S. (1 Pet.) 511, 545–46 (1828) (concluding that cases in admiralty are not "cases arising under the laws and Constitution of the United States" but nevertheless that "the law, admiralty and maritime, as it has existed for ages, is applied by our Courts to the cases as they arise"). Both Francis Lieber and William Winthrop appear to have believed this to be true of the laws governing war. The Lieber Code provided:

Art. 40. There exists no law or body of authoritative rules of action between hostile armies, except that branch of the law of nature and nations which is called the law and usage of war on land.

Art. 41. All municipal law of the ground on which the armies stand, or of the countries to which they belong, is silent and of no effect between armies in the field.

Lieber Code, *supra* note 31, arts. 40–41, at 9. Winthrop stated that the law governing war "prescribes the rights and obligations of belligerents, or—more broadly—those principles and usages which, in time of war, define the status and relations . . . of enemies" and then continued to further say that "the Law of War may, in its exercise, substantially supersede for the time even the Constitution itself." 2 MILITARY LAW AND PRECEDENTS, *supra* note 68, at 1203–04.

276. Professor Goldsmith asserts that political realities may have had something to do with the Court's decision. GOLDSMITH, *supra* note 22, at 50–52.

277. *Quirin*, 317 U.S. at 29.

278. *Id.* at 31–38.

279. *Id.* at 29–31; *see also* John C. Dehn, *The Hamdan Case and the Application of a Municipal Offence: The Common Law Origins of 'Murder in Violation of the Law of War,'* 7 J. INT'L CRIM. JUST. 63, 79–81 (2009) (analyzing the *Quirin* Court's references to relevant international law).

280. *Quirin*, 317 U.S. at 38–46.

281. 327 U.S. 304 (1946).

declaration of martial law—a declaration that had been ratified by the President.<sup>282</sup> The tribunals, which convicted defendants over eight months after the attacks in one case and over two years later in another, were found to have exceeded both the temporal and substantive scope of their necessity because Hawaiian courts were open and again functioning.<sup>283</sup> In *Ex parte Endo*,<sup>284</sup> the Court granted relief to a Japanese-American woman whose forced internment was based solely on her ancestry and without adequate proof she posed a threat to security.<sup>285</sup> In other words, the Court found that neither simple military nor imperative public necessity justified her continued detention.<sup>286</sup>

*D. More Interim Observations*

The Court has adopted a calibrated approach to the necessities of war. First, it has embraced the concept of military necessity: a doctrine of implied powers to adopt military measures against enemy combatants or foreign/enemy populations that are not prohibited by the Constitution, an applicable statute, or international laws governing war. Second, it endorses the concept that military necessity encompasses a public or imperative necessity component that permits abrogating private, statutory, and constitutional rights in some exigent circumstances. The key caveat is that any such imperative necessity justifies abrogating only those rights that must yield under the circumstances. The Civil War- and World War II-era cases demonstrated the difficulty of balancing these simple and imperative necessities of war with individual rights preserved by the Constitution and at common law.<sup>287</sup>

What emerges from this analysis is that there are three factors which determine the level or nature of necessity required to lawfully adopt a given war measure: (1) the status of the person or property—enemy, friendly (citizen), or neutral (foreign national), (2) the specifically applicable international and domestic law, and (3) within U.S. territory, generally applicable domestic law and the governing capacity of civil authorities. Regarding decisions to attack, detain, or try by military tribunal those properly considered an enemy, the President and his military commanders must comply only with specifically applicable international or domestic laws. They otherwise maintain broad discretion in the conduct of hostilities against the nation's enemies. The courts have required a compelling, imperative public necessity before permitting invasion of private rights of loyal U.S. residents or nationals without typical constitutional protections.

---

282. *Duncan*, 327 U.S. at 307–09.

283. *Id.* at 309–10, 324.

284. 323 U.S. 283 (1944).

285. *Endo*, 323 U.S. at 302–04.

286. *See id.* at 300–04 (finding that any detention deemed necessary to prevent espionage or sabotage does not extend to loyal citizens).

287. It is also important to note that these cases stand for the general legal principles of the necessities of war. Statutes now delimit damage remedies against government officials and the United States for actions taken in war or other military operations. Foremost among these are the Foreign Claims Act (codified at 10 U.S.C. § 2734 (2006)) and the Westfall Act (codified as amended at 28 U.S.C. § 2679 (2006)). The Westfall Act amended the Federal Tort Claims Acts (codified at 28 U.S.C. §§ 2671–2680 (2006)). *See infra* note 388 for further discussion of the Federal Tort Claims Act and the Westfall Act.

E. *Recent Cases in the Post-9/11 Conflict*

When confronted with the post-9/11 conflict, the courts (with the exception of a panel of the D.C. Circuit)<sup>288</sup> have intuitively, albeit implicitly, continued to follow this conceptual framework. In *Hamdi v. Rumsfeld*,<sup>289</sup> a plurality of the Court found that the President could detain Hamdi—a U.S. citizen captured on a foreign battlefield and believed to have been a part or acting in substantial support of armed forces hostile to the United States.<sup>290</sup> The plurality found that the AUMF allowed the President to exercise war powers, and that those powers included detention of a suspected enemy in a foreign theater of war even if that enemy was a U.S. citizen.<sup>291</sup> Although Congress had enacted a general prohibition against detention “except pursuant to an Act of Congress,”<sup>292</sup> the Court found that this most basic measure of war was impliedly authorized by the AUMF,<sup>293</sup> one which either superseded or provided an exception to the non-detention statute.

The plurality also found that the Fifth Amendment Due Process Clause entitled Hamdi, who contested his status as an enemy combatant, to “notice of the factual basis for his classification, and a fair opportunity to rebut the Government’s factual assertions [supporting his detention] before a neutral decisionmaker.”<sup>294</sup> In other words, the executive’s authority to use force implicitly included this measure of simple military necessity. Because of the fundamental change in the nature of rights afforded public enemies, however, the Court found that the Constitution required an adequate determination of Hamdi’s enemy status.

*Hamdan v. Rumsfeld*<sup>295</sup> reflects a similar relationship between the Commander-in-Chief’s power and applicable acts of Congress. Hamdan, a Yemeni national, was alleged to have been complicit in the criminal activities of al Qaeda, including being Osama bin Laden’s driver.<sup>296</sup> He had been charged<sup>297</sup> and was awaiting trial by a

---

288. *Al-Bihani v. Obama*, 590 F.3d 866, 871 (D.C. Cir. 2010), *reh’g denied en banc*, 619 F.3d 1 (D.C. Cir. 2010) (rejecting “premise that the war powers granted by the AUMF and other statutes are limited by the international laws of war” because “[t]here is no indication in the AUMF, the Detainee Treatment Act of 2005 . . . , or the MCA of 2006 or 2009, that Congress intended the international laws of war to act as extra-textual limiting principles for the President’s war powers under the AUMF”).

289. 542 U.S. 507 (2004).

290. *Hamdi*, 542 U.S. at 509–13 (plurality opinion).

291. *Id.* at 519 (“Because detention to prevent a combatant’s return to the battlefield is a fundamental incident of waging war, in permitting the use of ‘necessary and appropriate force,’ Congress has clearly and unmistakably authorized detention in the narrow circumstances considered here.”).

292. 18 U.S.C. § 4001(a) (2006).

293. *See Hamdi*, 542 U.S. at 519 (concluding that lack of specific language in statute is of no concern because Congress authorized “necessary and appropriate” measures).

294. *Id.* at 533. This decision is not inconsistent with the Court’s earlier decision that Haupt, a putative U.S. citizen and one of the *Quirin* saboteurs, was an “enemy” triable by military commission because his status as an enemy was, for relevant purposes, undisputed. *See Ex parte Quirin*, 317 U.S. 1, 37–38 (1942) (“Citizens who associate themselves with the military arm of the enemy government, and with its aid, guidance and direction enter this country bent on hostile acts, are enemy belligerents within the meaning of the Hague Convention and the law of war.”).

295. 548 U.S. 557 (2006).

296. *See* Dep’t of Defense, MC Form 458, Charge Sheet Pertaining to Salim Ahmed Hamdan 5 (Apr. 5, 2007), available at [http://www.defenselink.mil/news/May2007/Hamdan\\_Charges.pdf](http://www.defenselink.mil/news/May2007/Hamdan_Charges.pdf).



military commission established pursuant to a presidential order (hereinafter Military Commissions Order).<sup>298</sup> He challenged the legality of the Military Commissions Order on several grounds.

The Supreme Court ruled that the Military Commissions Order was fatally defective for failure to comply with specifically applicable domestic statutes.<sup>299</sup> First, the Court found insufficient justification for departures from the rules and procedures applicable at courts-martial, as required by Article 36(b) of the Uniform Code of Military Justice (UCMJ).<sup>300</sup> Second, the Court determined that the commissions failed to comply with Article 21 of the UCMJ because they were not tribunals permitted by the laws of war, as required by that Article.<sup>301</sup> Based primarily on the Order's failure to comply with Article 36(b), the Court found that the Order did not comply with a provision in Article 3 common to all four Geneva Conventions of 1949 (known as "Common Article 3")<sup>302</sup> prohibiting the "passing of sentences and the carrying out of executions without previous judgment pronounced by a regularly constituted court affording all the judicial guarantees which are recognized as indispensable by civilized peoples."<sup>303</sup> The Court found that, at a minimum, Common Article 3 applied to the conflict between the United States and al Qaeda,<sup>304</sup> and therefore was an applicable "law of war" with which the President was required to comply to satisfy the requirements of Article 21.<sup>305</sup>

A plurality of the *Hamdan* Court also found that Hamdan's military commission was not supported by certain elements of military necessity associated with military

---

297. To view the original charges, see Charges Pertaining to Salim Ahmed Hamdan, *available at* <http://www.defenselink.mil/news/Jul2004/d20040714hcc.pdf> (last visited June 13, 2011).

298. See Military Order of Nov. 13, 2001: Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism, 66 Fed. Reg. 57833 (2001) (authorizing detention and trial by military tribunal for terrorist suspects and ordering conformity of tribunals to prior law only as far as "practicable").

299. *Hamdan*, 548 U.S. at 622–25, 627–31.

300. *Id.* at 622 (citing 10 U.S.C. § 836(b) (2000)). The UCMJ is codified at 10 U.S.C. §§ 801–946 (2006).

301. *Hamdan*, 548 U.S. at 627–28 (citing 10 U.S.C. § 821 (2000)). The Military Commissions Act of 2006 (MCA), Pub. L. No. 109-366, 120 Stat. 2600 (codified at 10 U.S.C. §§ 948(a)–950(w) (Supp. 2010)), amended this provision. Section 4(a)(2) of the MCA amended 10 U.S.C. § 821 by adding "[t]his section does not apply to a military commission established under chapter 47A [that is, a military commission established by the MCA] of this title." *Id.* § 4(a)(2), at 2631. Arguably then, this was the express legislative authorization required by the *Charming Betsy* to violate the laws governing war if inconsistent with the MCA. See John C. Dehn, *Why Article 5 Status Determinations Are Not 'Required' at Guantánamo*, 6 J. INT'L CRIM. JUST. 371, 380–83 (2008) (arguing that this amendment and other provisions of MCA are inconsistent with relevant provisions of Geneva Conventions and must be applied as later-in-time domestic law).

302. Of the four Geneva Conventions, the two most relevant to military commissions are the Geneva Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949, 75 U.N.T.S. 135 [hereinafter GPW], and the Geneva Convention Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, 75 U.N.T.S. 287.

303. GPW, *supra* note 297, art. 3(1)(d), at 136, 138.

304. *Hamdan*, 548 U.S. at 629–31.

305. *Id.* Note also that the Court once again considered the AUMF to have activated the President's war powers, including the power to convene military commissions, but did not read the AUMF or any other enactment as authority to ignore the requirements of Article 21 of the UCMJ. *Id.* at 594.

tribunals.<sup>306</sup> Although the specifics of that analysis are not essential to this discussion, it is important to again note the Court's express recognition of a military necessity concept subject to congressional acts delimiting executive discretion in war.

*Boumediene v. Bush*<sup>307</sup> provides an example of the complexity involved in determining the applicability of constitutional provisions to the nation's enemies. The Court determined that the Suspension Clause, pertaining to the writ of habeas corpus, applies to *putative* public enemies in a functional manner.<sup>308</sup> After noting the length of some of the detentions at issue and the detainees' denial of enemy status, the court concluded that

at least three factors are relevant in determining the reach of the Suspension Clause: (1) *the citizenship and status of the detainee and the adequacy of the process through which that status determination was made*; (2) the nature of the sites where apprehension and then detention took place; and (3) the practical obstacles inherent in resolving the prisoner's entitlement to the writ.<sup>309</sup>

Putting aside the issue of whether the Court was correct to extend the privilege of the writ of habeas corpus to non-citizens detained extraterritorially,<sup>310</sup> the factors it adopted are clearly based on the three factors outlined in Part IV.D above. The factors account for enemy status, citizenship, and location, all important to determining applicable international and domestic law. They also require consideration of "practical obstacles," which would arguably include the availability and capacity of civil authorities and other factors influencing imperative necessity determinations.

Post-*Boumediene* district court decisions examining the scope of the President's authority to indefinitely detain individuals captured in the post-9/11 conflict have also followed this conceptual framework. These courts have thus far agreed that the AUMF authorizes the President to detain members of an armed enemy organization as permitted by international humanitarian law.<sup>311</sup> Decisions regarding the types of individuals subject to detention have varied only slightly, essentially focusing on whether an individual is "part of" an enemy organization in armed conflict with the United States.<sup>312</sup> In one case a court found that a detained individual could not possibly

---

306. *See id.* at 597–613 (plurality opinion) (discussing historical context of military tribunals).

307. 553 U.S. 723 (2008).

308. *Boumediene*, 553 U.S. at 733.

309. *Id.* at 766 (emphasis added).

310. Even if *Boumediene* is correct on this point, it does not necessarily follow that individuals held as enemies or prosecuted for law-of-war violations must be afforded protections of the Bill of Rights.

311. *E.g.*, *Al Gingo v. Obama*, 626 F. Supp. 2d 123, 126–27 (D.D.C. 2009); *Mattan v. Obama*, 618 F. Supp. 2d 24, 26 (D.D.C. 2009); *Hamlily v. Obama*, 616 F. Supp. 2d 63, 77 (D.D.C. 2009); *Gherebi v. Obama*, 609 F. Supp. 2d 43, 70–71 (D.D.C. 2009).

312. In *Gherebi*, the court distinguished between those who provide only indirect support to hostilities by a loosely-networked armed enemy organization and those who are "part of" such an organization, concluding "the substantial support model advanced by the government is restricted to those individuals that are effectively part of the [armed] force[s] of the enemy." *Gherebi*, 609 F. Supp. 2d at 69 (alterations in the original) (internal quotation marks omitted). In *Hamlily* and *Mattan*, the courts adopted a functionally equivalent standard, best represented by the *Mattan* court's statement that, "the Court will adopt [the government's] proposed definition except for the two 'support'-related elements . . . . However, the Court will still consider support of Taliban, al Qaeda, or associated enemy forces in determining whether a detainee

be considered “part of” the Taliban or al Qaeda forces or otherwise within the scope of the AUMF.<sup>313</sup> These courts have also derived the scope and limits of the Commander-in-Chief’s detention authority from their view of the applicable (or analogous) international laws of war and the AUMF.<sup>314</sup>

*F. Clarifying the Confusion Regarding the Commander-in-Chief’s Authority in War*

The confusion regarding the President’s Commander-in-Chief power stems in large part from a fundamental misunderstanding of the nature of military command. While military commanders possess broad and inherent directive authority, the above analysis makes clear that the scope of that authority is always implied and subordinate rather than plenary and independent. The sheer breadth of matters to which a military commander’s implied authority extends is sometimes mistaken for virtually unlimited power.<sup>315</sup>

This fundamental misunderstanding results in confusion regarding what it means to “direct the conduct of military campaigns” and similar phrases describing command authority in the case law.<sup>316</sup> If Congress could not “interfere with the command” of the military or with the “conduct of campaigns” in the broadest possible sense of such phrases, its powers over war and to make rules for the government and regulation of the armed forces would be a nullity. Such an understanding is not supportable textually,

---

should be considered ‘part of’ those forces.” *Mattan*, 618 F. Supp. 2d at 26; *see also* *Anam v. Obama*, 653 F. Supp. 2d 62, 64 & n.2 (D.D.C. 2009) (finding *Hamli* “not inconsistent” with *Gherebi*, describing the differences to be “of form rather than substance”). For a broader review and analysis of post-*Boumediene* habeas decisions, *see generally* WITTES ET AL., *supra* note 3.

313. *Al Gingo*, 626 F. Supp. 2d at 129–30.

314. But *see supra* note 7 for a discussion of *Al-Bhiani* and whether international law is relevant to the inquiry.

315. An example is Professors Barron and Lederman’s belief that there exists a general “preclusive prerogative of superintendence” in the Commander-in-Chief power. Barron & Lederman II, *supra* note 15, at 1040. To the extent that this implies Congress—despite its broad powers of government and regulation—cannot regulate anything within its purview, Barron and Lederman are, with respect, in error. They appear to confuse the extremely broad nature of military matters subject to command discretion with a plenary authority to exercise that discretion. While the impracticability of Congress’s regulating the minutia of day-to-day military matters leaves broad discretion to the President and his subordinate military commanders, it cannot be said that there thereby exists a preclusive power in law, though one might exist to some extent in practice. One wonders how much of Title 10 of the United States Code (governing the armed forces) Barron and Lederman might find to be incompatible with this alleged prerogative. Interestingly, when expressing a belief in the existence of this preclusive power, Barron and Lederman rely on other clauses in Article II and cases interpreting them. *Id.* at 1102 n.651. This reinforces the claim that, even assuming a preclusive core of power might exist in some executive powers outlined in Article II, this does not necessarily implicate the same of the Commander-in-Chief Clause. That Barron and Lederman could point to no judicial decision which rested upon a preclusive core of the Commander-in-Chief power is most telling and unsurprising given Congress’s broad express and implied constitutional powers to raise, govern, and regulate the military. *See Chappell v. Wallace*, 462 U.S. 296, 301 (1983) (“It is clear that the Constitution contemplated that the Legislative Branch have plenary control over rights, duties, and responsibilities in the framework of the Military Establishment, including regulations, procedures, and remedies related to military discipline.”).

316. *See Fleming v. Page*, 50 U.S. (9 How.) 603, 615 (1850) (stating that President as Commander in Chief “is authorized to direct the movements of the naval and military forces placed by law at his command, and to employ them in the manner he may deem most effectual to harass and conquer and subdue the enemy”); *LIEBER*, *supra* note 84, at 18 (concluding Congress may not direct troop movements).

historically, or as a matter of precedent, properly analyzed and interpreted. Once the concept of military necessity and the nature of command authority are properly conceived, one readily recognizes that such references relate only to the President's authority to direct the precise employment of armed forces against an enemy, not to a plenary power to dictate either the objects of war or the means or methods those forces will use.

A general example is helpful here. When conducting military campaigns, the President and his subordinate commanders must evaluate the strategic and tactical disposition of enemy military power to determine how, when, and where to degrade or destroy it in order to achieve the nation's desired strategic ends.<sup>317</sup> They then determine the amount, types, methods, and means of military power that will be brought to bear.<sup>318</sup> After the inception of the war with Japan, for example, the President and his military leaders determined how, when, and where to engage Japanese forces by air, land, and sea. Their decisions included not only broad military objectives, such as neutralizing the Japanese naval fleet,<sup>319</sup> but specific actions, by specific ships, using specific tactics at particular times and places.<sup>320</sup> Each subordinate commander then implemented these decisions within the limits established by their superiors and according to the actual facts and circumstances presented. There is undoubtedly substantial discretion involved in these decisions. The cases reviewed above make clear, however, that this discretion is not absolute and is subject to applicable limits of a superior authority.

Far from articulating a "preclusive core" of Commander-in-Chief power, statements regarding the "conduct of campaigns" and the like are but unfortunate attempts to articulate an absence of congressional power. Congress simply possesses no express or implied power to command the military—more specifically, Congress possesses no power to direct the precise employment of military forces against an enemy. Once such terms are used, however, they appeal to the primordial lawyerly need to explore or advocate the full implications of the language chosen.<sup>321</sup> It is

---

317. See generally JOINT CHIEFS OF STAFF, JOINT PUB. 3-0, JOINT OPERATIONS (2008); JACK D. KEM, CAMPAIGN PLANNING: TOOLS OF THE TRADE (3d ed. 2009); U.S. DEP'T OF ARMY, FIELD MANUAL 3-0, OPERATIONS, ch. 6 (2008). This Article will not address the issue of which branch(es) defines the strategic political ends because that entails a broader discussion of the Declare War Clause and whether presidential foreign affairs powers include the power to initiate foreign hostilities.

318. See KEM, *supra* note 317, at 15–24 (discussing how President and his commanders determine availability and usage of military power).

319. See DAN VAN DER VAT, THE PACIFIC CAMPAIGN: THE U.S.-JAPANESE NAVAL WAR 1941–45, at 140–41 (1991) (describing immediate military reaction to bombing of Pearl Harbor).

320. See *id.* at 170–98 (providing examples of such actions).

321. Professors Barron and Lederman state the problem more generally by recognizing that:

Given the inherent indefiniteness of the proposition that the President has preclusive power over the conduct of campaigns, an apparent judicial endorsement of that proposition is bound to invite executive branch assertions that are both more expansive than the courts intended to countenance and unlikely ever to be subject to judicial scrutiny.

Barron & Lederman II, *supra* note 15, at 1107. Indeed, this is exactly what former Office of Legal Counsel (OLC) head Jack Goldsmith observed. GOLDSMITH, *supra* note 22, at 37 (noting that "all OLC lawyers and Attorneys General over many decades" for Presidents of both parties are "driven by the outlook and exigencies

therefore not surprising that in expressing the absence of Congress's powers over war and the military, the attempt at a positive description ultimately leads to the impression that the description used portrays something autonomous, which then accrues its own content and meaning.

The nature of the problem is similar to the earlier-discussed logical fallacy of Justice Jackson's third tier. By describing the relative powers of the elected branches as the president's "powers minus any powers of Congress,"<sup>322</sup> Jackson implied that a preclusive core of presidential power might exist. Its existence, however, is implied by the analytical model itself rather than the nature of the relevant executive and congressional powers at issue. The tenacity with which Professors Barron and Lederman adhere to and defend the core/periphery approach to presidential powers<sup>323</sup> in this context demonstrates the difficulty of dispensing with such notions once they have formed and taken root.

Jackson's model could also simply refer to an incomplete overlap of powers. This is what exists in the shared powers over the nation's military and the conduct of war. Because the nature of the Commander-in-Chief power is one of implied powers that are both derived from and subject to applicable law, it is more appropriate to analyze the scope of Congress's express and implied powers over war and the armed forces. Congress has the power "to *make Rules* for the Government and Regulation" of the military<sup>324</sup> and other legislative powers over war. As the Supreme Court found, when denying a *Bivens* remedy<sup>325</sup> to members of the armed forces, "[i]t is clear that the Constitution contemplated that the Legislative Branch have plenary control over rights, duties, and responsibilities in the framework of the Military Establishment, including regulations, procedures, and remedies related to military discipline."<sup>326</sup> In other words, Congress can regulate military conduct to preserve good order and discipline. And this remains true even in war.

An attempt by Congress to affirmatively direct the disposition of armed forces at war would not be a "rule" for their government or regulation. It would be a specific directive, applicable at a specific time or place, and therefore beyond Congress's express and implied powers.<sup>327</sup> Coincidentally, it would also be an unconstitutional usurpation of the Commander-in-Chief's command authority. Nonetheless, Congress may, pursuant to its enumerated war powers, establish general rules cabining the Commander-in-Chief's strategic or tactical discretion. Such rules might even result in an excessively narrow scope of authority for the President, as was arguably the case in *Little v. Barreme*.<sup>328</sup>

---

of the presidency to assert more robust presidential powers, especially during a war or crisis, than ha[s] been officially approved by the Supreme Court or than is generally accepted in the legal academy or by Congress").

322. *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 637 (1952) (Jackson, J., concurring).

323. See *supra* note 226 for Barron and Lederman's commentary on preclusive power.

324. U.S. CONST. art. I, § 8, cl. 14 (emphasis added).

325. See generally *Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388 (1971) (permitting civil remedy against government officials for certain constitutional violations).

326. *Chappell v. Wallace*, 462 U.S. 296, 301 (1983).

327. See RAMSEY, *supra* note 42, at 254–55 (concluding that it is likely congressional regulations "must be generalized standards of conduct, not tactical directions addressed to specific command situations").

328. 6 U.S. (2 Cranch) 170, 177–78 (1804).

While Congress cannot direct the President to attack a specific enemy position at a certain time, from the north or south, by land or air, with tanks or riflemen, or by frontal assault, flank attack, or envelopment, it can regulate how the armed forces must treat a captured enemy and place other general limits on command discretion in matters of war and military discipline. The checks on Congress's regulatory powers are primarily practical and political, with the Constitution establishing their outer legal limits.

What has changed since the Civil War is not the nature of the Commander-in-Chief power, but rather the nature and variety of threats to our national security in a world increasingly interconnected by technology and interdependent on dwindling resources.<sup>329</sup> These new and emerging threats certainly increase the actual scope of issues and events that might affect our national security and increase the perceived necessity of a powerful executive able to efficiently respond to them.<sup>330</sup> The Commander-in-Chief Clause provides a politically and legally convenient point from which to base such claims. It also avoids the need to discuss whether other emergency executive powers exist, and if so, under what circumstances they might be exercised.<sup>331</sup>

#### V. EXTRAORDINARY EMERGENCY POWERS—THE POLITICS OF NATIONAL SECURITY AND THE RULE OF LAW

Whether the President independently possesses extraordinary emergency or protective powers, and if so under what circumstances they may be exercised, is not clear. Chase's suggestion in *Milligan* that the President could convene military

329. See DEP'T OF DEFENSE, NATIONAL DEFENSE STRATEGY 4–5 (2008) (“Globalization and growing economic interdependence . . . create a web of interrelated vulnerabilities and spread risks even further, increasing sensitivity to crises and shocks around the globe and generating more uncertainty regarding their speed and effect.”).

330. See ERIC A. POSNER & ADRIAN VERMUELE, *THE EXECUTIVE UNBOUND: AFTER THE MADISONIAN REPUBLIC* (2010) (arguing that Madisonian separation of powers framework is obsolete and that modern constraints on executive are political, not legal). Other commentary touts the functional advantages of the presidency, particularly in foreign affairs. See, e.g., Julian Ku & John Yoo, *Hamdam v. Rumsfeld: The Functional Case for Foreign Affairs Deference to the Executive*, 23 CONST. COMMENTARY 179 (2006) (arguing superior competencies of executive branch warrant judicial deference in foreign affairs matters); Julian Ku & John Yoo, *Beyond Formalism in Foreign Affairs: A Functional Approach to the Alien Tort Statute*, 2004 Sup. Ct. Rev. 153, 154 (arguing executive branch has superior institutional capacity vis-à-vis the courts to achieve purposes underlying Alien Tort Statute).

331. Professor Goldsmith recounts a story from his time at the Justice Department where he proposed to senior Administration lawyers that the President could act “extralegally” and “throw himself on the justice of his country.” GOLDSMITH, *supra* note 22, at 80–81 (internal quotation marks and citation omitted). He claims that the Administration was “not remotely interested in this view.” *Id.* at 81. The Administration lawyers believed their actions were lawful, and even if they didn’t, they could not confess error publicly . . . because doing so would tip off the enemy . . . . It [also] wasn’t feasible . . . . The post-Watergate hyper-legalization of warfare, and the attendant proliferation of criminal investigators, had become so ingrained and threatening that the very idea of acting extralegally was simply off the table, even in times of crisis. The President had to do what he had to do to protect the country. *And the lawyers had to find some way to make what he did legal.*

*Id.* (emphasis added). Goldsmith’s claim that Watergate led to an alleged “hyper-legalization of warfare” is, for me, overblown. Watergate was only one of many abuses of executive power that forced congressional regulation to prevent further abuses.

tribunals to try United States citizen civilians in cases of “controlling necessity,” coupled with his suggestion that Congress could indemnify erroneous assertions of such authority,<sup>332</sup> indicates a belief that the President as well as Congress can ignore requirements of Article III and the Fifth and Sixth Amendments under certain exigent or compelling circumstances.<sup>333</sup> The *Milligan* majority would have also allowed for such military jurisdiction if non-military courts were closed. Thus, there was agreement that some portion of the Constitution and laws of the United States are subject to what might be called situational strict scrutiny. So long as a compelling public interest exists and the means chosen are narrowly tailored to achieving that interest, the government’s actions are constitutionally permissible, or at the very least excusable by Congress. This section explores this theory and its implications for the rule of law.

A. *Emergency Powers—Law or Politics?*

Justice Chase’s endorsement of presidential emergency power which either “justifies what it compels” or which “at least insures acts of indemnity from the justice of the legislature” suggests an assertion of political power rather than legal authority.<sup>334</sup> In other words, Chase implied that in cases of true necessity, Congress will reliably ratify or indemnify the acts of the executive.<sup>335</sup> He did not imply that those acts are “legal” in the first instance or that they are subject to any specific legal constraints. Under the theory as articulated, it appears that the primary authority responsible for conducting post hoc scrutiny is Congress, not the courts. The standard therefore appears to be political, not legal. The courts apparently apply whatever “rule” Congress creates or adopts through its action in response to the actions of the executive branch.

It is impossible to define in advance the boundaries of such a power, assuming it exists.<sup>336</sup> One cannot predict with certainty the circumstances under which Congress might ratify or indemnify executive acts. Professor Monaghan expressed the belief that a requirement for congressional ratification “seems to provide the least intrusive *presidential* authority needed to cope with the emergency.”<sup>337</sup> He further asserts that “[t]his requirement would seem to induce caution in the executive, while not being so onerous as to deter the President from acting when necessity warrants.”<sup>338</sup>

A requirement for post hoc ratification is only effective, however, if it is truly a requirement. It would at least require an opportunity to obtain third-party review of executive actions taken in the face of an alleged emergency to determine if the law was

---

332. See *supra* note 229–30 and accompanying text.

333. See Vladeck, *supra* note 5. For an interesting historical analysis of “military necessity” supporting jurisdiction over civilians accompanying the armed forces, see Wm. C. Peters, *On Law, Wars, and Mercenaries: The Case for Courts-Martial Jurisdiction Over Civilian Contractor Misconduct in Iraq*, 2006 BYU L. REV. 367.

334. *Ex parte Milligan*, 71 U.S. (4 Wall.) 2, 140 (1866) (Chase, C.J., concurring).

335. See Monaghan, *supra* note 17, at 38 (“If we assume that the President can act in an emergency, our constitutional theory would suggest that subsequent congressional approval is necessary.”).

336. As Professor Monaghan notes, “judicial recognition of a general, inherent presidential ‘emergency’ power would result in authority both indefinite in description and uncontainable in practice; the result would threaten separation-of-power and civil liberties values.” *Id.* at 35.

337. *Id.* at 38.

338. *Id.*

properly disregarded. Political and legal realities have been different. After examining executive practice in a myriad of national security and foreign affairs matters in the post-Vietnam era, Harold Koh concluded:

The broader lesson that emerges from this study of executive initiative, congressional acquiescence, and judicial tolerance . . . is that under virtually every scenario the president wins. If the executive branch possesses statutory or constitutional authority to act and Congress acquiesces, the president wins. If Congress does not acquiesce in the president's act, but lacks the political will either to cut off appropriations or to pass an objecting statute and override a veto, the president again wins. If a member of Congress or a private individual sues to challenge the president's action, the judiciary will likely refuse to hear that challenge on the ground that the plaintiff lacks standing; the defendant is immune; the question is political, not ripe, or moot; or that relief is inappropriate.<sup>339</sup>

In order to sustain a ratification or indemnification approach, Congress must act, or a court must have jurisdiction to undertake a public necessity analysis, or both. Although one cannot interpret congressional inaction to mean legal acquiescence, it is at least temporary political acquiescence.<sup>340</sup> At what point should the courts presume to intervene in those seemingly rare cases that are both within their jurisdiction and susceptible of judicial resolution?

When the courts find the capacity to engage such questions, congressional acquiescence clearly matters. The problem has always been how to interpret congressional inaction or "silence." In *Youngstown Sheet & Tube Co. v. Sawyer*<sup>341</sup> and *Dames & Moore v. Regan*,<sup>342</sup> some Justices interpreted congressional inaction after notice from the executive coupled with relevant (in their view) legislation as implicit congressional approval.<sup>343</sup> Others construed such congressional silence and related legislation as implicit disapproval.<sup>344</sup> Without clear and affirmative congressional

---

339. HAROLD HONGJU KOH, *THE NATIONAL SECURITY CONSTITUTION: SHARING POWER AFTER THE IRAN-CONTRA AFFAIR* 148 (1990).

340. *Cf.* Barron & Lederman I, *supra* note 15, at 714 ("[L]egislative inaction, whether or not motivated by a congressional desire to avoid taking responsibility in the midst of a conflict, may actually entrench a baseline of robust statutory regulation already in place, and thereby *increase* the likelihood that Category Three issues might arise.").

341. 343 U.S. 579 (1952).

342. 453 U.S. 654 (1981).

343. *See Dames*, 453 U.S. at 686 ("In light of . . . the inferences to be drawn from the character of the legislation Congress has enacted in the area . . . and from the history of acquiescence in executive claims settlement—we conclude that the President was authorized to suspend pending claims . . ."); *Youngstown*, 343 U.S. at 702 (Vinson, C.J., dissenting) (noting the lack of congressional response to the President's notice of seizure and that "Congress has in no wise indicated that its legislation is not to be executed by the taking of private property . . . if its legislation cannot otherwise be executed").

344. *See Youngstown*, 343 U.S. at 586 ("Moreover, the use of the seizure technique to solve labor disputes in order to prevent work stoppages was not only unauthorized by any congressional enactment; prior to this controversy, Congress had refused to adopt that method of settling labor disputes."); *id.* at 601 (Frankfurter, J., concurring) ("In adopting the provisions which it did, by the Labor Management Relations Act of 1947, . . . Congress was very familiar with Governmental seizure as a protective measure. On a balance of considerations, Congress chose not to lodge this power in the President."); *id.* at 639 (Jackson, J.,



action, therefore, what may be implied from the available evidence, as well as the evidence deemed relevant to the analysis, appears to be rather subjective.

The purpose of this discussion is not to suggest the ultimate subordination of law to politics in real or contrived emergencies. It is to recognize occasions where a true necessity does not admit of a specific, predefined legal standard. Congress cannot possibly “anticipate and legislate” for “every possible” exception to a statute,<sup>345</sup> just as tort law does not attempt to prescribe or predefine every instance of allowable public or private necessity. Given the freedom of discretion such necessity claims provide, there is an obvious temptation to assert their existence whenever it is politically convenient. The challenge is whether we can recognize the existence of such a concept without inevitably reducing all law to merely a factor that executive branch officials consider in their political calculus.<sup>346</sup>

### B. *Notions of “Governmental Necessity”*

The idea that a threat to the nation’s existence might justify violating the law has deep historical roots. In 1810, Thomas Jefferson wrote to a friend that “[a] strict observance of the written laws is doubtless *one* of the high virtues of a good citizen, but it is not *the highest*.”<sup>347</sup> He expressed the belief that “[t]he laws of necessity, of self-preservation, of saving our country when in danger, are of higher obligation.”<sup>348</sup> Jefferson further added that “[t]o lose our country by a scrupulous adherence to written law, would be to lose the law itself, with life, liberty, property and all those who are enjoying them with us; thus absurdly sacrificing the end to the means.”<sup>349</sup> Jefferson’s caution on the exercise of such power is that the “officer is bound to draw [the line for such actions] at his own peril, and throw himself on the justice of his country and the rectitude of his motives.”<sup>350</sup>

---

concurring) (“Congress has not left seizure of private property an open field but has covered it by three statutory policies inconsistent with this seizure.”).

345. *Dames & Moore*, 453 U.S. at 678 (“Congress cannot anticipate and legislate with regard to every possible action the President may find it necessary to take or every possible situation in which he might act.”).

346. Goldsmith states that former Vice President Cheney’s Chief of Staff, David Addington, once expressed the attitude that the Administration would “push and push and push until some larger force makes us stop,” which caused Goldsmith to surmise that Addington “viewed power as the absence of constraint.” GOLDSMITH, *supra* note 22, at 126. One wonders whether the Constitution or its Take Care Clause ever entered Addington’s “larger force” equation. It is possible President Truman’s Secretary of State, Dean Acheson, was correct when he remarked during the Cuban Missile Crisis that “the law simply does not deal with . . . questions of ultimate power—power that comes close to the sources of sovereignty.” Hon. Dean Acheson, Panel: Cuban Quarantine: Implications for the Future, Remark Before the Am. Soc’y of Int’l Law (Apr. 25, 1963), in PROCEEDINGS OF THE AMERICAN SOCIETY OF INTERNATIONAL LAW AT ITS FIFTY-SEVENTH ANNUAL MEETING 13, 14 (1963). If so, then it is our continuing attempts to apply law in theory where it does not apply in fact that creates a cognitive dissonance incurable by any coherent legal theory.

347. GOLDSMITH, *supra* note 22, at 80 (quoting Letter from Thomas Jefferson to John B. Colvin (Sept. 20, 1810), in 12 THE WRITINGS OF THOMAS JEFFERSON 418 (Andrew A. Lipscomb ed., 1903)) (internal quotation marks omitted).

348. *Id.* (internal quotation marks omitted).

349. *Id.* (internal quotation mark omitted).

350. *Id.* at 81 (citing 12 THE WRITINGS OF THOMAS JEFFERSON, *supra* note 347, at 422) (internal quotation mark omitted).

The Supreme Court has only once indirectly addressed this idea. In the *Prize Cases*,<sup>351</sup> the Court gave an alternate rationale for its decision upholding the capture and condemnation of “enemy” property as prize of war. It posited that: “If it were necessary to the technical existence of a war, that it should have a legislative sanction, we find it in almost every act passed at the extraordinary session of the Legislature of 1861 . . . .”<sup>352</sup> It further noted that Congress, “in anticipation of such astute objections, pass[ed] an act ‘approving, legalizing, and making valid all the acts, proclamations, and orders of the President, &c., as if they had been issued and done under the previous express authority and direction of the Congress of the United States.’”<sup>353</sup> “Without admitting that such an act was necessary under the circumstances,” the Court continued, “it is plain that if the President had in any manner assumed powers which it was necessary should have the authority or sanction of Congress, that, on the well known principle of law, ‘*omnis rati habitio retrotrahitur et mandato equiparatur*,’ this ratification has operated to perfectly cure the defect.”<sup>354</sup> Citing a similar statement in Justice Story’s dissenting opinion in *Brown v. United States*, the Court asserted “the doctrine stated by him on this point is correct and fully substantiated by authority.”<sup>355</sup>

Armed conflict obviously provides a ready venue for claims of exceptional necessity. It was in the context of the Civil War that Lincoln questioned

[a]re all the laws, *but one*, to go unexecuted, and the government itself go to pieces, lest that one be violated? Even in such a case, would not the official oath be broken, if the government should be overthrown, when it was believed that disregarding the single law, would tend to preserve it?<sup>356</sup>

Lincoln’s statement begs the question of who in our government may constitutionally determine *which* law(s) must be violated in order to save the nation, and at what point we can be sure that their violation is necessary. In the post-9/11 conflict, “saving American lives” was repeatedly asserted as the ultimate justification for a host of actions, some in reasonably apparent violation of applicable domestic and international law. It is a powerful political message, especially when any one of its recipients might believe that the life being saved could be theirs or a loved one’s. More recently, it has been suggested that the President’s alleged “paramount duty to ward off serious threats to the constitutional and economic system” would support unilateral presidential action to raise the national debt and avoid government default.<sup>357</sup> Neither

351. 67 U.S. (2 Black) 635 (1863).

352. *Prize Cases*, 67 U.S. (2 Black) at 670.

353. *Id.* (emphasis omitted).

354. *Id.* at 671.

355. *Id.* (citing *Brown v. United States*, 12 U.S. (8 Cranch) 110 (1814)).

356. Message from Abraham Lincoln to Congress in Special Session (July 4, 1861), in ABRAHAM LINCOLN: SPEECHES AND WRITINGS 1859–1865, at 246, 253 (Library of America ed., 1989).

357. Eric A. Posner & Adrian Vermeule, *Obama Should Raise the Debt Ceiling on His Own*, N.Y. TIMES (July 22, 2011), <http://www.nytimes.com/2011/07/22/opinion/22posner.html>. It is not clear whether Professors Posner and Vermeule believe this to be a legal power or the most politically savvy approach to the crisis. They write:

Constitutionally, [the President] would be on solid ground. Politically, he can’t lose. The public wants a deal, The threat to act unilaterally will only strengthen his bargaining power if Republicans don’t want to be frozen out; if they defy him, the public will throw their support to the president. Either way, republicans look like obstructionists and will pay a price.

threats to American lives nor projected economic turmoil necessarily threaten to bring an end to the government or the nation. A “spectacular” attack on a major city might destabilize the country and precipitate a series of events leading to its demise. Whether any specific attack or event might threaten the country’s very existence depends upon a multitude of factors making it difficult to predict.

It is difficult to discard the notion that the President must act when circumstances require action to preserve the nation. However, it is equally apparent that “[t]he plain terms of the Oath Clause indicate that the duty [to defend the Constitution] at most requires the President to take such measures indispensable to the preservation of the constitution, through the preservation of the nation.”<sup>358</sup> While this is true enough, it suggests that a power implied from the Oath Clause and grossly uncertain in its application has the potential to disrupt the entire constitutional framework—to completely undermine the rule of law.<sup>359</sup> Perhaps this observation should be buttressed by rephrasing Justice Black’s opinion in *Youngstown*: “The President’s power to see that the laws are faithfully executed refutes the idea that he is to be a law *breaker*.”<sup>360</sup>

### C. *The Unclear Line Between Governmental, Public, and Military Necessity*

To any extent that the law may be disregarded to preserve the nation, it is not the common situation faced by soldiers or commanders, not even in war. That one terrorist *might* know of a yet-unexecuted plan for a “spectacular” attack or other grave threat against the United States does not necessitate the brutal or even harsh interrogation, in violation of domestic and international law, of every *suspected* terrorist or terrorist sympathizer thought to potentially know about it.<sup>361</sup> It is also not clear whether there are any absolute thresholds that are so ineffective and/or morally repugnant that they might not be crossed under any circumstances, where an attempt at congressional ratification would be ineffective.<sup>362</sup>

*Id.*

358. Barron & Lederman I, *supra* note 15, at 746 (internal quotation marks and citation omitted).

359. Without regard for any conflicting constitutional assignment of powers in this area, Posner and Vermeule posit:

A deadlocked Congress has become incapable of acting consistently; it commits to entitlements it will not reduce, appropriates funds it does not have, borrows money it cannot repay and then imposes a debt ceiling it will not raise. One of these things must give; in reality, that means that the conflicting laws will have to be reconciled by the only actor who combines the power to act with a willingness to should responsibility – the president.

Posner & Vermeule, *supra* note 357.

360. See *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 587 (1952) (“[T]he President’s power to see that the laws are faithfully executed refutes the idea that he is to be a lawmaker.”).

361. Whatever ambiguity might have existed, whether real or contrived, regarding the appropriate treatment of al Qaeda or Taliban detainees under the War Crimes Act of 1996, 18 U.S.C. § 2441 (2006), or under the Uniform Code of Military Justice, should have been resolved with the passage of the Detainee Treatment Act of 2005, Pub. L. No. 109-148, §§ 1001–1006, 119 Stat. 2680, 2739–44.

362. The United States indicated that this might be the case when it joined the International Covenant on Civil and Political Rights, Dec. 16, 1966, 999 U.N.T.S. 171 [hereinafter ICCPR]. Article 4 of the ICCPR provides for derogation from its provisions “[i]n time of public emergency which threatens the life of the nation . . . to the extent strictly required by the exigencies of the situation.” *Id.* art. 4(1). It then prohibits

The necessities of war make it tempting to view every urgent situation or potential threat to many lives as one of the highest importance, justifying departure from the law. As noted in the World War II cases discussed above, such temptations become more acute when the threat is against the homeland by an enemy capable of inflicting great harm. Even then, there have been limits to what the Supreme Court will tolerate for potential enemy sympathizers.<sup>363</sup> Clearly defining and consistently applying these limits is the most difficult task.

The *Prize Cases* made clear that the President already possesses substantial but implied emergency powers in domestic matters.<sup>364</sup> These powers necessarily entail a measure of discretion in their implementation. Even today, section 332 of Title 10 provides that

[w]henver the President *considers* that unlawful obstructions, combinations, or assemblages, or rebellion against the authority of the United States, make it impracticable to enforce the laws of the United States in any State by the ordinary course of judicial proceedings, he may call into Federal service such of the militia of any State, and use such of the armed forces, as *he considers necessary* to enforce those laws or to suppress the rebellion.<sup>365</sup>

This statute recognizes that enforcing the law is a political and judicial responsibility, not a military matter—at least not in the first instance. When does this condition change? Under this statute and the *Milligan* majority opinion, the merger of public with military necessities in domestic emergencies occurs only in response to an actual invasion<sup>366</sup> or a condition of internal conflict that effectively “closes the courts,” or

---

derogations from provisions regarding, inter alia: the prohibitions of torture; cruel, inhuman, or degrading treatment; and ex post facto laws. *Id.* art. 4(2) (referencing arts. 6 and 15).

363. Compare *Korematsu v. United States*, 323 U.S. 214, 225 (1944) (upholding exclusion of people of Japanese ancestry from certain “military areas” on West Coast due to executive fear of an invasion or subversion), with *Ex parte Endo*, 323 U.S. 283, 305–07 (1944) (reversing denial of habeas corpus relief to Japanese American whose detention was based solely on her ancestry with no showing of being a threat to security). See *supra* Part IV.C.3 for a discussion of these cases.

364. See *supra* notes 196–203 and accompanying text for a discussion of the scope of presidential emergency powers according to the *Prize Cases*.

365. 10 U.S.C. § 332 (emphases added).

366. The other statute at issue in the *Prize Cases* is currently codified at 10 U.S.C. § 12406. It provides:

Whenever—

- (1) the United States, or any of the Commonwealths or possessions, is invaded or is in danger of invasion by a foreign nation;
  - (2) there is a rebellion or danger of a rebellion against the authority of the Government of the United States; or
  - (3) the President is unable with the regular forces to execute the laws of the United States;
- the President may call into Federal service members and units of the National Guard of any State in such numbers as he considers necessary to repel the invasion, suppress the rebellion, or execute those laws. Orders for these purposes shall be issued through the governors of the States or, in the case of the District of Columbia, through the commanding general of the National Guard of the District of Columbia.

10 U.S.C. § 12406.

otherwise makes it “impracticable to enforce the laws of the United States in any State by the ordinary course of judicial proceedings.”<sup>367</sup>

Lincoln had occasion to suggest a line between emergency powers and military necessity in armed conflict. In a letter explaining his decision to modify an order by one of his commanders, General Fremont, purporting to emancipate slaves in Kentucky, he explained that:

Genl. Fremont’s proclamation, as to confiscation of property, and the liberation of slaves, is *purely political*, and not within the range of *military law*, or *necessity*. If a commanding General finds a necessity to seize the farm of a private owner, for a pasture, an encampment, or a fortification, he has the right to do so, and to so hold it, as long as the necessity lasts; and this is within military law, because within military necessity. But to say that the farm shall no longer belong to the owner, or his heirs forever; and this as well when the farm is not needed for military purposes as when it is, is purely political, without the savor of military law about it. And the same is true of slaves. If the General needs them, he can seize them, and use them; but when the need is past, it is not for him to fix their permanent future condition. That must be settled according to laws made by law-makers, and not by military proclamations. . . .

I do not say that Congress might not with propriety pass a law, on the point, just such as General Fremont proclaimed. . . . What I object to, is, that I as President, shall expressly or impliedly seize and exercise the permanent legislative functions of the government.<sup>368</sup>

It would seem Lincoln used the phrase “permanent legislative functions” to distinguish between sovereign acts that fix rights permanently and those imperative military measures which are situational and indefinite. His formulation certainly allowed broad military discretion to temporarily invade private rights. Unfortunately, Lincoln’s letter does not fully clarify the scope of rights subject to temporary derogation. Nor does it clarify whether or under what circumstances some rights, such as the right to life, may be permanently sacrificed to the public good.

#### D. *The Necessary Limits of Military Necessity*

It is usually possible, if difficult, to broadly distinguish between laws that might be abrogated or displaced in armed conflict and those that may not. The suggestion that in war certain generally applicable domestic laws may be displaced or superseded, or that certain private, statutory, and even some constitutional rights may be abrogated, does not support the notion that no law applies or that all law is generally subordinate

---

367. 10 U.S.C. § 332. One wonders whether this standard creates an implied obligation to preserve the operation of the domestic courts, either in purely domestic disturbances or wars, in order to avoid the imposition of martial law or the use of military tribunals for civilians in all but the most compelling of circumstances. See *Duncan v. Kahanamoku*, 327 U.S. 304, 319–22 (1946) (briefly recounting influence of British and U.S. historical events from seventeenth, eighteenth, and nineteenth centuries in shaping legal limitations on military powers in favor of civilian control).

368. Burrus M. Carnahan, *Lincoln, Lieber and the Laws of War: The Origins and Limits of the Principle of Military Necessity*, 92 AM. J. INT’L L. 213, 220–21 (1998) (third emphasis added) (quoting Letter from Abraham Lincoln to Orville H. Browning (Sept. 22, 1861), in *SPEECHES AND WRITINGS 1859–1865*, *supra* note 356, at 268–69))

to the necessities of war. As noted by Lieber, Lincoln, and the Supreme Court cases analyzed above, even the necessities of war are limited to specific imperative measures or subject to the limits of laws specifically applicable to the exigency. In such cases, the law governing the exigency, whether domestic or international, has already balanced the interests and made the required legal or policy determination.<sup>369</sup>

The Court has limited the permissible invasion of generally applicable constitutional or private rights to only those that must yield in the face of a clear, extant necessity. In *Milligan*, for example, neither the majority nor concurring opinions suggested that Milligan could be summarily executed without trial, tortured, or punished by cruel or unusual means had he actually been subject to military jurisdiction. Both opinions presumably accepted the potential legality of using military tribunals under different, but reasonably narrow, circumstances because such tribunals have standards and procedures that adequately reduce the risk of a wholly arbitrary deprivation of rights.

Other cases also supported the very limited nature of emergency powers in war. The *Mitchell v. Harmony*<sup>370</sup> and *United States v. Russell*<sup>371</sup> cases discussed earlier recognized the power to invade private property rights of loyal nationals subject to the constitutional requirement for just compensation.<sup>372</sup> In *Ex parte Endo*,<sup>373</sup> the Court would not countenance the forced detention of an individual presenting no threat to national security. *Korematsu v. United States*<sup>374</sup> and *Hirabayashi v. United States*<sup>375</sup> probably surpass a blurry outer boundary, but their modern critics do not speak to what the Constitution might or should permit if the measures adopted were more narrowly tailored to specific security threats then facing the nation.<sup>376</sup>

Whatever the precise limits, there is no indication that the Court would leave everything to complete executive discretion or allow Congress to arbitrarily sanction extreme measures, such as torture or inhuman treatment.<sup>377</sup> It would seem that governmental necessity and judicial strict scrutiny are related in this context. All permit the derogation of rights only so far as justified by a clear, identifiable, and compelling

---

369. See, e.g., HUMANITARIAN HANDBOOK, *supra* note 181, at 37–38 (“International humanitarian law in armed conflicts is a compromise between military and humanitarian requirements . . . . [M]ilitary necessity cannot, therefore, justify departing from the rules of humanitarian law in armed conflicts . . . .”); John C. Dehn, *Permissible Perfidy? Analysing the Colombian Hostage Rescue, the Capture of Rebel Leaders and the World’s Reaction*, 6 J. INT’L CRIM. JUST. 627, 648 (2008) (positing that international humanitarian law “has already taken into account the competing interests of life and death attendant to war” and “must be generally understood to have balanced those interests . . . thereby ‘exclud[ing] the possibility of invoking’ exceptional circumstances excusing its violation”).

370. 54 U.S. (13 How.) 115 (1851).

371. 80 U.S. (13 Wall.) 623 (1871).

372. See *supra* notes 244–54 and accompanying text for a discussion regarding the facts and holdings of *Mitchell* and *Russell*.

373. 323 U.S. 283, 302 (1944).

374. 323 U.S. 214 (1944).

375. 320 U.S. 81 (1943).

376. See *supra* notes 265–71 and accompanying text for a discussion of *Korematsu* and *Hirabayashi*.

377. See *Milligan v. Hovey*, 17 F. Cas. 380, 381 (C.C.D. Ind. 1871) (No. 9,605) (“If an act is prohibited by the constitution, and it is beyond the power of congress to authorize it, then it may be said the wrong done by the act is not subject to complete indemnity by congress . . . .”).

public interest.<sup>378</sup> Then again, as Koh's observations suggest, without a viable legal or political forum to vindicate those rights, their existence or preservation may depend entirely upon executive self-restraint.<sup>379</sup> Ironically, this condition was precisely what the Colonists sought to remedy by declaring independence, and what the Framers sought to avoid by separating national powers over war and the military.

It is with this background that we can better understand the "elegant simplicity"<sup>380</sup> of Justice Black's opinion in *Youngstown*. Justice Black begins his analysis with a truism, that the "President's power, if any, to issue the order must stem either from an act of Congress or from the Constitution itself."<sup>381</sup> He then dismisses, on separation of powers grounds, any notion that the President had general executive authority to seize the nation's steel mills without congressional authorization.<sup>382</sup> As regards the Commander-in-Chief power, Black concluded that

---

378. Professor Monaghan "accept[s] the proposition that the government will act in an emergency when the dominant interests so require." Monaghan, *supra* note 17, at 33 n.157. For him, "the question is whether in legal analysis the national government's emergency power is extra-constitutional." *Id.* The question may not be so simple. *Ex parte Milligan* and the *Prize Cases* suggest that it is possibly both constitutional and extra-constitutional, at least in some circumstances.

According to the majority in *Milligan*, the President, empowered by the Commander-in-Chief Clause, may subject civilians in U.S. territories to military tribunals as a matter of military necessity—in violation of their Fifth and Sixth Amendment rights as well as Article III's vesting of jurisdiction—at least when the courts are closed. This analysis would seem to place the power to do so entirely within the Constitution; precisely where, however, is not clear. Perhaps it is implicit within Congress's power "[t]o provide for calling forth the Militia to execute the Laws of the Union, suppress Insurrections and repel Invasions." U.S. CONST. art. I, § 8, cl. 15. *Hirabayashi*, *Korematsu*, and *Quirin* make clear the importance of at least implied legislative sanction to the deprivation of private rights, which should, of course, originate in an enumerated power.

In the *Prize Cases*, the President's commander-in-chief powers, activated by delegated congressional authority, permitted use of the international laws of war to deprive citizens of Confederate States of their property (whether loyal to the Union or disloyal we are unsure because the court's analysis made the question irrelevant) by declaring them to be the equivalent of an enemy. This action then appears to be both constitutional and extra-constitutional—unless one accepts that the international laws of war are somehow impliedly adopted in domestic law during war, as is at least suggested by some commentary. *See, e.g.*, 1 MILITARY LAW AND PRECEDENTS, *supra* note 68, at 1 (noting that "the law of war in this country . . . is quite independent of the ordinary law," with "its original authority in the war powers of Congress and the Executive, and thus constitutional in its source" (emphasis added)). At bottom, any emergency power is of constitutional origin by virtue of its reflecting the sovereign will. Its form and limits, however, have been determined to be extra-constitutional in some circumstances. The separated nature of our sovereign power leads to an occasional schizophrenia that courts of appropriate jurisdiction must resolve when cases arise.

379. *See supra* note 339 and accompanying text. One commentator has noted that many legal issues addressed in opinions by the Office of Legal Counsel (OLC), which provides legal advice to the President and other executive components, "are unlikely ever to come before a court in justiciable form" and "often represent the final word in those areas." Trevor W. Morrison, *Stare Decisis in the Office of Legal Counsel*, 110 COLUM. L. REV. 1448, 1451 (2010). Morrison also notes that the OLC "is not immune to various external pressures" although it may employ "procedural devices to deflect . . . those pressures." *Id.* at 1470. Such devices, however, "cannot guarantee OLC's own commitment to integrity, independence, and excellence in its work." *Id.*

380. GLENNON, *supra* note 43, at 10. After this description, Glennon claims that Black's opinion "has not withstood the test of time." *Id.* It was, however, cited approvingly in *Medellin v. Texas*, 552 U.S. 491, 524 (2008) (citing *Youngstown* for the proposition that "[t]he President's authority to act, as with the exercise of any governmental power, 'must stem either from an act of Congress or from the Constitution itself'").

381. *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 585 (1952).

382. *Id.* at 587–89.

[t]he order cannot properly be sustained as an exercise of the President's military power as Commander in Chief of the Armed Forces. The Government attempts to do so by citing a number of cases upholding broad powers in military commanders engaged in day-to-day fighting in a theater of war. Such cases need not concern us here. Even though "theater of war" be an expanding concept, we cannot with faithfulness to our constitutional system hold that the Commander in Chief of the Armed Forces has the ultimate power as such to take possession of private property in order to keep labor disputes from stopping production. This is a job for the Nation's lawmakers, not for its military authorities.<sup>383</sup>

Black recognized the broad discretion attending military necessity in a theater of war. While he dismissed the notion that the President may burden private rights domestically during a purely foreign war, he did not foreclose the notion that a commander in a theater of war, including an actual domestic battlefield should one ever again exist, possesses the power to do so. In *Youngstown*, there was simply no viable claim to a domestic military threat or overriding public necessity.<sup>384</sup>

The complicating factor is that Congress is not necessarily limited to extraordinary circumstances in determining which executive acts it will ratify or indemnify. Congress might have ratified Truman's decision to seize the steel mills. While this would have created potential Compensation Clause or other constitutional issues, Congress's determination of the necessity of such action might have been sanctioned given its enumerated powers to regulate commerce and to raise and provide for the army and navy. As earlier mentioned, Chase's *Milligan* formulation did not limit cases of "controlling necessity" to those which pose a threat to the existence of the nation. Indeed, the *Mitchell* Court suggested that Congress might have indemnified the military commander who unjustifiably destroyed the merchant's property in Mexico.<sup>385</sup> Also mentioned earlier, Congress appears to have effectively excused, for purposes of domestic trial at least, the actions of at least some interrogators in the post-9/11 conflict.<sup>386</sup> Presumably, the courts may review the constitutionality of any ratification or indemnification that permits the abrogation of private or constitutional rights<sup>387</sup> provided there is an opportunity for them to do so.<sup>388</sup>

---

383. *Id.* at 587.

384. As Professor Monaghan notes, "despite the government's argument and President Truman's statement, no emergency existed. Ample time existed for congressional action, both before and after the seizure, yet Congress did nothing. To transform political deadlock into an emergency would drain the concept of emergency of all content." Monaghan, *supra* note 17, at 37–38 (citations omitted).

385. *Mitchell v. Harmony*, 54 U.S. (13 How.) 115, 135 (1851).

386. See *supra* note 28 and accompanying text for a discussion of the Detainee Treatment Act of 2005.

387. See *Milligan v. Hovey*, 17 F. Cas. 381, 381 (C.C.D. Ind. 1871) (No. 9,605) (discussing whether congressional ratification could cure constitutional error of trial "illegal at the time for want of an act of Congress").

388. In general, the Federal Tort Claims and Westfall Acts, 28 U.S.C. §§ 2671–2680 (2006), appear to effectively indemnify a great deal of government conduct. They first convert a civil suit to one against the government when employees act within the scope of their employment and when there is no relevant statutory or constitutional right of action. 28 U.S.C. § 2679(b). The Acts then limit the rights of action that might be pursued by divesting the courts of jurisdiction, particularly in military matters, over claims involving "combatant activities" of the armed forces as well as claims arising in a foreign country. 28 U.S.C. § 2780(j), (k); see, e.g., *Sosa v. Alvarez-Machain*, 542 U.S. 692, 700–12 (2004) (dismissing plaintiff's FTCA-based



## VI. CONCLUSION

The Supreme Court has consistently observed both express and implied limitations on the authority of the President as Commander-in-Chief. It has done so in international and non-international, as well as general and limited, armed conflicts. Moreover, the Court's precedent fully supports the proposition that laws plainly calculated to cabin executive discretion in armed conflict are not subject to derogation by the Commander-in-Chief on claims of general military authority or necessity. Instead, precedent reveals that the Commander-in-Chief's military powers extend only to measures not prohibited by specifically applicable domestic and international law and reasonably calculated to defeat a national enemy.<sup>389</sup>

Precedent also indicates that the status of an individual as an enemy of the United States is relevant to the determination of the applicable law, and thus, the level or nature of the necessity required to support presidential action. While a simple, *McCulloch v. Maryland*<sup>390</sup> concept of military necessity might justify acts against public enemies regardless of nationality, precedent endorses an idea of imperative public necessity: the power to invade private, statutory, and constitutional rights of even loyal U.S. nationals when strictly necessary under the circumstances, but only to the extent justified by those circumstances.

Whatever authority exists to act in violation of a specifically applicable law in response to an existential national threat must be defined quite narrowly. As the result in *Hamdi v. Rumsfeld*<sup>391</sup> makes clear, implied powers of military necessity already supersede laws not clearly intended to apply to armed conflict, such as general criminal laws prohibiting executive detention without congressional authority, or the "assault" or "murder" of an enemy as part of lawful hostilities.<sup>392</sup> Thus, any claim of exclusive presidential power to violate laws intended to regulate armed conflict can apply only to

---

complaints under the foreign country exception). In the post-9/11 conflicts, the potential for this result was demonstrated in *In re Iraq and Afghanistan Detainees Litigation*, 479 F. Supp. 2d 85 (D.D.C. 2007). In that case, the court dismissed a suit by detainees seeking damages for torture and inhuman treatment under international law and the Alien Tort Statute. *Id.* at 88–91. Even assuming the allegations were true, the court found that the putative defendants were acting within the scope of their employment, as broadly defined by the court. *Id.* at 114. The court therefore dismissed the case for failure to meet the Federal Tort Claims Act (FTCA) requirement for an express statutory right of action. *Id.* at 115. *But see* Doe v. Rumsfeld, No. 1:08-CV-1902, 2011 WL 3319439, at \*1 (D.D.C. Aug. 2, 2011) (denying and granting in part motion to dismiss *Bivens* constitutional tort and other claims on basis of qualified immunity and other grounds); Padilla v. Yoo, 633 F.Supp.2d 1005 (N.D. Cal. 2009) (same).

389. One must recall, however, that the opinions in *Brown v. United States*, 12 U.S. (8 Cranch) 110 (1814), *Charming Betsy*, 6 U.S. (2 Cranch) 64 (1804), and *The Paquete Habana*, 175 U.S. 677 (1900) support the notion that through congressional authorization or a "controlling executive act," the United States possesses the sovereign "power (not the right) to violate its treaty obligations" and other international law. LOUIS HENKIN, FOREIGN AFFAIRS AND THE UNITED STATES CONSTITUTION 196, 244 (2d ed. 1996).

390. 17 U.S. (4 Wheat.) 316 (1819). See *supra* note 61 and accompanying text for a discussion of *McCulloch*.

391. 542 U.S. 507 (2004).

392. To remove any doubt, the UCMJ provides a "justification" defense at courts-martial for a "death, injury, or other act caused or done in the proper performance of a legal duty." Rules for Courts-Martial 916(c), in MANUAL FOR COURTS-MARTIAL, UNITED STATES (2008 ed.) at II-109. The commentary to this defense provides that "killing an enemy combatant in battle is justified." *Id.*

the most exceptional of circumstances, and must be limited in time and scope to a truly extraordinary necessity.<sup>393</sup> Although Congress cannot provide for every contingency, Congress has delegated broad presidential discretion to respond to an extensive range of crises. There is no reason to believe that the political branches cannot devise a system of laws responsive to the threats of the modern world, including international terrorism.

What we witnessed in the early phases of the post-9/11 armed conflict was an attempt by executive branch lawyers to make the scope of military necessity co-extensive with that which this Article terms governmental necessity.<sup>394</sup> Perhaps this is due to the fact that the Court has not been careful to distinguish, or entirely consistent in its application of, the implied powers of military and public necessity in war. Perhaps it also is due to the extraordinary nature of the threat posed by international terrorists, as well as the lack of reliable information regarding when, where, or how those threats might again manifest.<sup>395</sup> One hopes it is not because the motives of the Bush Administration were not as pure as Jefferson suggested they must be to justify the use of extraordinary emergency powers.<sup>396</sup>

---

393. See Barron & Lederman II, *supra* note 15, at 975–76 (discussing “particular claim of limited necessity” that Thomas Jefferson asserted in connection with exercise of presidential power not granted by statute or Constitution).

394. Here are two of several examples. In a memorandum opinion signed by Professor Yoo citing excerpts from Supreme Court opinions, prior OLC opinions, and statements of prior Presidents, the OLC concluded that it is

*beyond question* that the President has the *plenary* constitutional power to take such military actions as he deems necessary and appropriate to respond to the terrorist attacks upon the United States on September 11, 2001. Force can be used both to retaliate for those attacks, and to prevent and deter future assaults on the Nation. Military actions need not be limited to those individuals, groups, or states that participated in the attacks on the World Trade Center and the Pentagon: the Constitution vests the President with the power to strike terrorist groups or organizations that cannot be demonstrably linked to the September 11 incidents, but that, nonetheless, pose a similar threat to the security of the United States and the lives of its people, whether at home or overseas.

Yoo Memo, *supra* note 33, at 24 (emphases added). This opinion is notable for its dearth of analysis—or for that matter disclosure—of contrary authority.

Similarly, Judge Bybee, then an Assistant Attorney General in the OLC, signed a memorandum containing these now-infamous words regarding the President’s power to authorize what have been called “enhanced interrogation techniques”:

Congress can no more interfere with the President’s conduct of the interrogation of enemy combatants than it can dictate strategic or tactical decisions on the battlefield. Just as statutes that order the President to conduct warfare in a certain manner or for specific goals would be unconstitutional, so too are laws that seek to prevent the President from gaining the intelligence he believes necessary to prevent attacks upon the United States.

Bybee Memo, *supra* note 34, at 207.

395. See GOLDSMITH, *supra* note 22, at 71–76 (discussing President’s “threat matrix” and “anxiety” created in executive branch by knowledge of potential threat and lack of specific information regarding its possible manifestations).

396. Compare *supra* note 350 and accompanying text for a discussion of the President’s ability to extend his conduct beyond the bounds of legality, with Goldsmith’s explanation, *supra* note 316, of why extralegal conduct “wasn’t feasible.” The latter sounds more like a lack of true conviction or political courage, which then required contrived legal analysis as cover.

---

---

Whatever the reason or reasons, it is essential to thoroughly understand and carefully apply the “necessities of war” that define the Commander-in-Chief power. As Hamilton cautioned, “[i]t is of the nature of war to increase the executive, at the expense of the legislative authority.”<sup>397</sup> The Framers clearly understood this and provided against it by subordinating executive authority to the legislature in matters of war and general military government and regulation.

To prevent overly expansive (or even overly modest) claims of Commander-in-Chief power, we must heed Madison’s warning:

A weak constitution must necessarily terminate in dissolution, for want of proper powers, or from the usurpation of powers requisite for the public safety. Whether the usurpation, when once begun, will stop at the salutary point, or go forward to the dangerous extreme, must depend on the contingencies of the moment. Tyranny has perhaps oftener grown out of the assumptions of power, called for, on pressing exigencies, by a defective constitution, than out of the full exercise of the largest constitutional authorities.<sup>398</sup>

Our government can only prevent executive usurpation of our national war powers by observing and enforcing the implied and subordinate nature of the Commander-in-Chief power. Only then will the federal government’s powers to defend the nation be once again shared—permitting each branch of government to assume its role in protecting and preserving our Republic.

---

397. THE FEDERALIST NO. 8, *supra* note 41, at 92 (Alexander Hamilton).

398. THE FEDERALIST NO. 20, *supra* note 41, at 175 (Alexander Hamilton & James Madison).