Presidential Powers Revisited: An Analysis of the Constitutional Powers of the Executive and Legislative Branches Over the Reorganization and Conduct of the Executive Branch

Alexandra R. Harrington
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PART I – INTRODUCTION

Two hundred eighteen years after George Washington was elected to serve as the first President of the United States, the Constitutional Framers would likely be heartened to know that over a dozen people are vying for the right to run as their party’s presidential candidate in the upcoming 2008 presidential election. However, these same Framers would likely be severely disheartened to learn that the powers and responsibilities assigned to the executive branch and the President of the United States – an office which these dedicated men created and shepherded through a vehement anti-constitution protest – have been eroded. Indeed, many of the key points which the Framers cited as evidence of and reasoning for the tripartite system they devised have been whittled away by constant intrusion into the powers and responsibilities of the President and the executive branch. This intrusion has become increasingly commonplace and accepted by a broad spectrum of governmental and political actors. It has wide-ranging legal, security, and societal implications which, unfortunately, are not always easily summed up in a television sound bite. Although perhaps not as glamorous or headline grabbing as the day’s congressional bickering with itself and the president, the problems created by Congressional overreach into the executive branch are myriad. To demonstrate the scope and depth of these problems, there is perhaps no better question than the history and future of executive branch reorganizations with particular attention

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paid to the role of national security, military affairs, and foreign affairs in structuring and reorganization attempts.

Part II of this article starts with an examination of the early history of the powers assigned to the Continental Congress under the Articles of Confederation. From there, this part examines relevant provisions of the constitution and the Federalist papers to further understand the executive and legislative entities which the Framers intended to and did create through the ratification of the constitution. Part III of this article then examines the history of executive power to engage in security-based operations under the commander-in-chief powers, as well as military restrictions placed on the President by the Congress and selected points of Congressional involvement in issues and policy areas which have been vested in the executive branch. The author has selected an examination of security issues in particular because they demonstrate how a key function of the presidency was regarded and because security-based issues are at the heart of executive branch reorganization attempts which have occurred in the wake of September 11, 2001 and which are likely to occur in the future.

Part IV of this article discusses various statutes which affect the relationship between the executive and legislative branches and their functions. It goes on to discuss several other tools of national security policy and their relation to the executive and legislative branches.

After the extensive history provided by Parts II, III and IV, Part V analyzes the information gleaned from history and legal precedent in order to make observations regarding the appropriate border between executive and legislative branch power over the executive branch. Part V concludes that, since the advent of the CIA as an
institutionalized entity after World War II, congresses of all political affiliation have sought to usurp the powers of the president over his office and the executive branch – particularly in terms of national security – regardless of his own political affiliation or the domestic and international situations faced by the United States. Part V also concludes that this precedent is dangerous and violative of the constitution, and suggests that the way to stop further erosion is for both future presidents and members of congress to understand their proper role in the constitutional system which they are and will be elected to protect and serve. Ultimately, the business of governing the United States is not about creating a flattering sound bite or about generating campaign images of consensus or assault on an executive which might be unpopular; it is about governing the country to the best of one’s constitutional abilities within the framework created by the constitution itself.

PART II – FRAMING THE CONSTITUTION

A. Articles of Confederation

While the nation was in its infancy, and fighting for its life, the constitution had yet to be born. Rather, the nation was governed by two forms of government; a weak federal confederation and a strong state governmental apparatus which made each state independent from the other and fostered a sense of disunity among the people of the United States of America as a whole. During the Revolutionary War, the state militias fought for the same cause and fought the same enemy, but they were primarily governed

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by their own states and only loosely by the Continental Congress. Certainly, this arrangement made sense given that each state had been administered as a separate colony under British rule and the decision as to whether to join the war was made on a state by state basis.

The conclusion of the Revolutionary War, and its conclusory terms, was negotiated by a delegation of Americans who had been appointed and given negotiating powers by the Continental Congress itself. These men worked tirelessly to complete the negotiation and to end hostilities with the British, reporting to the Continental Congress as they did so. These men were called upon to act on behalf of the United States because there was no other governmental apparatus available to use in the conclusion of hostilities.

In many ways, the Articles of Confederation were, on paper at least, a rough sketch of the constitution. The Articles set out the powers of the Continental Congress and addressed the relationship between the Continental Congress and the states – a relationship in which the states had power not only over the federal apparatus but also each other. The Articles made provisions for the declaration and pursuit of war.

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2 See id.
4 See PROCLAMATION OF THE CONTINENTAL CONGRESS (Nov. 30, 1782), available at http://memory.loc.gov/cgi-bin/query/r?ammem/bdsdcc:@field(DOCID+@lit(bdsdcc08401)) (last visited July 16, 2007) (setting forth the terms of the American treaty with the British government, as negotiated by a select group of delegates to the Continental Congress).
6 See id.
Articles addressed certain aspects of interstate commerce.\(^9\) What the articles did not do, however, was create an executive branch or a strong federal government.\(^10\) Instead, the Office of the President referred to the person elected by the members of the Continental Congress to serve as President of the Congress.\(^11\) Alternatively, the term “executive” was used to denote the governor of a state, an office which was endowed with executive powers under the constitutions of the states which formed the confederacy called the United States of America.\(^12\) And, by creating an agreement to promote “friendship” between the newly declared independent states, the Articles established a weak method of federal control in favor of strong state independence and the maintenance of states’ rights.\(^13\)

The Articles of Confederation survived for several years. When the immediate needs of the states and the federal institution during wartime subsided, however, the Articles became in essence subservient to the will of the independent states.\(^14\) The problem with this development was that it allowed states to discriminate against other states,\(^15\) to negotiate with other nations in a manner which advanced their own interests at the expense of the federal whole,\(^16\) to coin their own money and declare its value,\(^17\) and to commit a host of other acts which were detrimental to the states themselves and the

\(^9\) See id.
\(^10\) See id.
\(^11\) See id.
\(^12\) See id.
\(^14\) See ALEXANDER HAMILTON, FEDERALIST NO. 15: THE INSUFFICIENCY OF THE PRESENT CONFEDERATION TO PRESERVE THE UNION FOR THE INDEPENDENT JOURNAL.
\(^15\) Id.
\(^16\) See JOHN JAY, FEDERALIST NO. 3: CONCERNING THE DANGERS FROM FOREIGN FORCE AND INFLUENCE FOR THE INDEPENDENT JOURNAL.
\(^17\) See ALEXANDER HAMILTON, FEDERALIST NO. 15: THE INSUFFICIENCY OF THE PRESENT CONFEDERATION TO PRESERVE THE UNION FOR THE INDEPENDENT JOURNAL.
federal construct. Eventually, the need for a reconstituted federal system became apparent to the members of the Continental Congress and others in society, and the Constitutional Convention began.

B. Constitutional Provisions

The new constitution which the Framers devised relied heavily on the precedents established by and provisions of the state constitutions. The state constitutions, in turn, essentially featured slight modifications on the tripartite system of government advocated by Montesquieu: independent executive, judicial, and legislative branches which worked together – and occasionally overlapped – to govern the political entity which they served. There is extensive evidence which shows that the Framers’ conceptions of the powers to be vested in each branch were drawn from the structure and content of the state constitutions; this is evident when one examines the structures of both old and new state constitutions relative to the provisions of the federal constitution.

The Framers apparently learned many lessons from the way in which the Articles of Confederation were structured and used. While preserving many of the same powers vested in the federal government under the Articles – and expanding a good number of them – the Framers created the executive branch and imbued it with the war, security, 

18 Id.; JOHN JAY, FEDERALIST NO. 3: CONCERNING THE DANGERS FROM FOREIGN FORCE AND INFLUENCE FOR THE INDEPENDENT JOURNAL.
19 See ALEXANDER HAMILTON, FEDERALIST NO. 1: GENERAL INTRODUCTION FOR THE INDEPENDENT JOURNAL.
20 JAMES MADISON, FEDERALIST NO. 39: THE CONFORMITY OF THE PLAN TO REPUBLICAN PRINCIPLES For the Independent Journal (explaining that the powers, responsibilities, and limits placed on the Executive branch in the constitution were derived from various state constitutional provisions governing state executives).
23 See Harrington, supra note 21.
and foreign relations powers which had previously been vested in the Continental Congress.²⁴ In so doing, the Framers expressly removed these areas from their previous jurisdictional home within the legislative branch.²⁵

The Constitution made the American President the nation’s chief executive²⁶ and gave him the power to “ensure that the laws are faithfully executed.”²⁷ It vested him with supreme control over the military in his role as Commander-in-Chief,²⁸ and allowed him primacy in negotiating treaties, which was tacitly extended to power over foreign policy.²⁹ It allowed him to nominate his choices for various governmental posts which required confirmation and gave him wide-ranging appointment powers for “inferior” governmental posts.³⁰

The Legislative branch was tasked with enacting legislation³¹ and acting as the appropriations body for the federal government.³² It was vested with the power to “raise” armies,³³ “support and maintain” them,³⁴ and to “provide” for a Navy.³⁵ The constitution vested the Senate with the ability to give advice and consent on treaties and nominations for certain officers.³⁶ The Framers made a distinction between funding military action

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²⁴ See U.S. Const. art. II.
²⁶ U.S. Const. art. II § 1.
²⁷ Id. § 3.
²⁸ Id. § 2.
²⁹ Id.
³⁰ Id.
³¹ U.S. Const. art. I § 1.
³² Id. § 8.
³³ Id.
³⁴ Id.
³⁵ Id.
³⁶ U.S. Const. art. II § 2.
and overseeing the conduct of military action by vesting these functions in different branches.37

C. Pre-Ratification Debate

The extensive public debates surrounding the propriety of the proposed constitution are historically quite useful in teasing out the legal intent of the Framers in creating the three branches of federal government and vesting them with specific powers. Through the fiery Federalist and Anti-Federalist Papers debate, an understanding of the words in the constitutional provisions began to emerge38; this understanding is vital to an examination of the appropriate powers of the executive and legislative branches, especially as they relate to control over the structure of the executive branch.

The underlying premise of the new constitution, as explained through the various authors of the Federalist papers, was the protection and security of the American people.39 Although it is not explicitly stated, this protection extended to the economic, political, and physical safety of Americans in general, as these topics are the primary sources of debate and discussion in both the Federalist and Anti-Federalist papers.40 Through the Federalist papers, it became clear that the constitution gave the executive the ability to receive foreign ambassadors, ministers, negotiate treaties and otherwise conduct foreign policy.41 The Federalist papers explain that the treaty-making and negotiation provisions of the constitution were intended to allow the executive the leeway necessary

37 Compare U.S. CONST. ART. I § 8 with U.S. CONST. ART. II § 2.
38 The Federalist and Anti-Federalist papers were published in the years between the promulgation of the draft constitution and its adoption. In these papers, constitutional proponents and opponents debated the impact of the constitution on the nation and the states. The primary Federalist authors were Alexander Hamilton, John Jay, and James Madison. The primary Anti-Federalist author was Patrick Henry.
39 See generally, FEDERALIST PAPERS; Anti-Federalist Papers.
40 See generally id.
41 JOHN JAY, FEDERALIST NO. 64: THE POWERS OF THE SENATE FROM THE NEW YORK PACKET (1788).
to negotiate treaties in secret because secrecy in such negotiations was deemed to be critical to their culmination and success\textsuperscript{42} and because the intelligence operations which frequently surrounded treaty negotiations could only occur under the veil of executive secrecy.\textsuperscript{43} The Federalist papers make clear that the conduct of war, foreign policy, military affairs, and diplomacy were areas which the Framers intended to be controlled by and within the sole purview of the executive, as evidenced in Federalist #74:

> Of all the cares or concerns of government, the direction of war most peculiarly demands those qualities which distinguish the exercise of power by a single hand. The direction of war implies the direction of the common strength; and the power of directing and employing the common strength, forms a usual and essential part in the definition of executive authority.\textsuperscript{44}

This quote is a particularly sharp indication of the way in which the Framers envisioned serious questions of national security to be handled, namely, in the hands of the elected president, who could speak for the entire American people with one voice.\textsuperscript{45}

Although the Senate is vested with the ability to deny its consent to treaties and nominees, the Federalist papers make it very clear that the Senate’s role is only to give or withhold consent and that any attempt by the Senate to control who is nominated by a president for any position is violative of the strictures of the constitution.\textsuperscript{46} Specifically, Federalist # 66 explains that: “There will, of course, be no exertion of choice on the part of the senate. They may defeat one choice of the executive and oblige him to make

\textsuperscript{42} Id.
\textsuperscript{43} Id.
\textsuperscript{44} ALEXANDER HAMILTON, FEDERALIST NO. 74: THE COMMAND OF THE MILITARY AND NAVAL FORCES, AND THE PARDONING POWER OF THE EXECUTIVE FROM THE NEW YORK PACKET (1788).
\textsuperscript{45} See id.
\textsuperscript{46} See ALEXANDER HAMILTON, FEDERALIST NO. 66: OBJECTIONS TO THE POWER OF THE SENATE TO SET AS A COURT FOR IMPEACHMENTS FURTHER CONSIDERED FROM THE NEW YORK PACKET (1788).
another; but they cannot themselves choose, they can only ratify or reject the choice of the President.”

A persistent theme throughout the Federalist papers – and the Anti-Federalist papers as well – is the need for the three branches of government created by the constitution to be independent of each other to the fullest extent possible. While conceding that complete branch independence is not possible in the tripartite system, the Federalist papers make it abundantly clear that there can be no democratic state when one branch is at the mercy of another or when one branch exercises the functions vested in another branch. Interbranch dependency involving the legislature as the predominant branch was particularly decried in Federalist # 51, which stated that: “Were the executive magistrate, or the judges, not independent of the legislature in this particular, their independence in every other would be merely nominal.”

In terms of the powers vested in the Legislative branch, the Federalist papers make clear that this branch is charged with the practical decision of declaring war, and with raising, providing for, supporting, and maintaining troops of various types. Interestingly, the legal definition of a “declaration of war” which has emerged is: “A

47 Id.
48 See generally FEDERALIST PAPERS; ANTI-FEDERALIST PAPERS.
49 ALEXANDER HAMILTON, FEDERALIST NO. 71: THE DURATION IN OFFICE OF THE EXECUTIVE FROM THE NEW YORK PACKET (1788) (“The same rule which teaches the propriety of a partition between the various branches of power teaches us likewise that this partition ought to be so contrived as to render the one independent of the other. To what purpose separate the executive or the judiciary from the legislative, if both the executive and the judiciary are so constituted as to be at the absolute devotion of the legislative? Such a separation must be nominal and incapable of producing the ends for which it was established.”).
51 Id.
53 See id.
country’s announcement that it is officially engaged in war against another country.”\textsuperscript{54}

Parenthetically, as will be discussed in Part V below, this definition and the use of the power “to declare war” is problematic to Congressional attempts to control modern wars involving fights that stem from ideology and not national identity.\textsuperscript{55} Additionally, the Federalist papers shed instructive light on the intended ramifications and use of the Necessary and Proper clause in Article I of the constitution.\textsuperscript{56} As stated in Federalist #33, the Necessary and Proper clause was inserted into the Legislative powers article as a method of ensuring that Congress had adequate abilities to carry out its appropriations functions and not for the purpose of expanding the functions of the legislature beyond the powers to legislate and appropriate funds.\textsuperscript{57}

Thus, it is clear that the Framers meant what they said when they created three individual branches of government and vested them with distinct powers. While there is arguably an overlap of some of these powers, the overlap was in no way intended to allow one branch to subsume the other or to usurp control of that particular area. This is perhaps best demonstrated in the field of war, where Congress has initial declaratory power and has overall funding power but does not have legally and was not intended to have the ability to act in any way to control warfare. Because the constitution is the backbone of federal law – especially as it relates to the executive and legislative branches – the terms of the constitution and the intent of the Framers is extremely important in understanding the boundaries of power between these branches.

\textsuperscript{54} \textit{DECLARATION OF WAR}, BLACK’S LAW DICTIONARY 415 (7th ed.).
\textsuperscript{55} \textit{See infra} Part V(B).
\textsuperscript{56} U.S. CONST. ART. I § 8.
\textsuperscript{57} ALEXANDER HAMILTON, FEDERALIST NO. 33: CONCERNING THE GENERAL POWER OF TAXATION \textit{FROM THE DAILY ADVERTISER} (1788).
PART III – PRESIDENTS, WARS, SECURITY, AND HISTORY

The relative domestic calm of the Cold War and current war against terrorism in the United States belies the fact that the nation has been involved in many wars and threats to national security since its revolutionary inception. With these wars came tests and challenges to the President’s functions and powers as Commander-in-Chief which ultimately expanded the notion of the presidential activities necessary to serve this function as the types of wars and security threats evolved over time. The subsections below are intended to briefly chronicle the history of presidential involvement in warfare, national security, foreign affairs, and occurrences which have changed the shape of the balance of power between the executive and legislative branches.

A. Post-Constitutional Years

Victory in the Revolutionary War and the ratification of the constitution did not bring peace to America. With Native American issues on the forefront of many settler’s minds and sandwiched in between European powers on the North American continent, it was vital that the nation secure itself against threats to its existence and stability. In order to do this, President Washington retained a cadre of spies and other intelligence operatives to keep him abreast of threats and handle them in the manner he saw fit.  

58 The author’s point is that, although one hears about troop casualties and national security measures routinely in news stories, these aspects of war are not ever present in the daily lives of the average American whereas, for example, during World War II a massive number of American troops left their homes to serve and those left behind were involved in war-related work. Thus, the author’s intent is to make the point that war is less palpable to Americans today than at any other time in modern memory other than the Cold War, when war was more clandestine. In this regard, it is the author’s position that the American public has become weaned into a relative sense of tranquility, which impacts on past memory and understanding of domestic and international conflicts.

59 See RICHARD A. POSNER, UNCERTAIN SHIELD: THE U.S. INTELLIGENCE SYSTEM IN THE THROES OF REFORM 186 (2006). For background on then-General Washington’s use of covert and intelligence operations during the Revolutionary War, see CENTRAL INTELLIGENCE AGENCY, A LOOK BACK . . . GEORGE
Washington oversaw these operatives himself; the only Congressional involvement in their use and function was Washington’s secretive submission of bills for their services to Congress for payment. Even then, it is reported that Congress made payments to members of Washington’s family in order to avoid divulging the identities of his operatives and risk losing the information which they provided him and the nation.61

B. 1800s

During his term as president, Andrew Jackson used the presidential signing statement to indicate his displeasure with a bill presented to him by Congress.62 Rather than vetoing the entire bill, Jackson communicated the issues which he had with the legislation through the use of a signing statement, which, while having no binding legal effect, accompanied the bill into law and became part of its legislative history. More important than the contents of and reasons for the use of the signing statement was the public controversy it sparked.64

C. Civil War

The American Civil War posed a unique question for the executive – whether the war should be handled as an insurrection or a war.65 Regardless of its legal classification,

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60 See Posner, supra note 59 at 186.
61 See Posner, supra note 59 at 186.
63 Id.
64 Id.
65 See, e.g., Cushing v. Laird, 107 U.S. 69 (1883).
when Confederate troops attacked Fort Sumter, President Lincoln viewed this as an
attack on the Union and promptly took measures to impose a sea blockade and even raise
his own network of intelligence operatives.\textsuperscript{66} Further utilizing the powers vested in him
as Commander-in Chief, Lincoln suspended habeas corpus during much of the Civil
War.\textsuperscript{67} Congress would later grant Lincoln wide-ranging powers during the Civil War
and ratify Lincoln’s actions in defense of the nation after the attack on Fort Sumter.\textsuperscript{68}
Contemporaneous to the Civil War and years later, the Supreme Court held that Lincoln
had the ability to take such measures because of his standing as Commander-in-Chief.\textsuperscript{69}
These holdings were bolstered by the well-established military and governmental maxim
that taking defensive action after an attack was not a declaration of war but rather a
means of protection.\textsuperscript{70}

\textbf{D. World War II}

During World War II, President Franklin D. Roosevelt (“FDR”) established the
Office of Strategic Services (“OSS”) within the Executive Office of the President.\textsuperscript{71} This
sometimes shadowy office engaged in espionage and became a key component in
wartime strategy and victory.\textsuperscript{72} Congressional interest in, and oversight of, the OSS and
its activities was virtually non-existent and there were no major challenges to FDR’s
ability to create an espionage service within the executive branch as part of its wartime

\textsuperscript{66} See John Yoo, War by Other Means 113-4 (2006); Totten v. U.S., 92 U.S. 105 (1876); DeArnaud v. U.S., 151 U.S. 483 (1894).
\textsuperscript{67} See Yoo, supra note 66 at 265 n. 50.
\textsuperscript{68} Yoo, supra note 66 at 113-4.
\textsuperscript{69} Cushing v. Laird, 107 U.S. 69 (1883).
\textsuperscript{70} See Yoo, supra note 66 at 11; Holtzman v. Schlesinger, 414 U.S. 1316, 1318 (1973).
\textsuperscript{71} See generally Joseph E. Persico, Roosevelt’s Secret War: FDR and World War II Espionage (2001) (providing a detailed history of FDR’s involvement in the OSS and other spying operations during the course of World War II).
\textsuperscript{72} See id.
function.\textsuperscript{73} It is worth noting that, in the wartime security context, FDR became the first president to authorize wiretapping.\textsuperscript{74}

World War II occasioned the landmark case of \textit{Clark v. Allen}, in which the Supreme Court held that the president is solely responsible for American international and foreign affairs policy.\textsuperscript{75} The \textit{Clark} Court further admonished that, when acting in these areas of policy, the president’s decisions were not to be second guessed.\textsuperscript{76}

\textbf{E. Cold War}

After World War II ended and the Cold War quickly began, President Truman realized that the OSS operation needed to be continued for the security of the nation; however, he rapidly came to realize that it needed its own funding mechanism.\textsuperscript{77} Thus, Truman acquiesced to the National Security Act of 1947, which established the CIA as its own, freestanding entity and endowed it with funding.\textsuperscript{78} Although it is a freestanding agency, the CIA director’s role in the overall national security apparatus placed him – and continues to place him – squarely within the dominion of the executive branch’s policy plans and oversight.\textsuperscript{79}

President Truman also started the modern trend of using presidential signing statements as a method of communicating executive displeasure at Congressional

\textsuperscript{74} \textit{You}, supra note 66 at 72.
\textsuperscript{75} \textit{See You}, supra note 66 at 26 (citing \textit{Clark v. Allen}, 331 U.S. 503 (1947)).
\textsuperscript{76} \textit{Id}.
\textsuperscript{78} \textit{Id}.
\textsuperscript{79} \textit{See Central Intelligence Agency, About CIA: Leadership, available at https://www.cia.gov/about-cia/leadership/index.html} (last visited July 16, 2007) (describing the job of the Director of the CIA);
legislation without actually using a veto.\textsuperscript{80} Signing statements existed for some time before this; however they had largely gone unused since President Jackson’s historic use of a presidential signing statement to voice his displeasure with the actions of Congress.\textsuperscript{81} Since Truman’s embracing of signing statements as a rhetorical and political tool, presidents of all parties have used signing statements to object to the constitutionality of a variety of bills – including those which sought to circumscribe the powers of the president as granted in the constitution.\textsuperscript{82}

During the Korean Conflict, a steel plant ceased its operations and production of steel due to a labor strike.\textsuperscript{83} President Truman became concerned that this cessation in the production of steel – a commodity vital to wartime military production – would harm U.S. interests and its ability to adequately fight the war.\textsuperscript{84} Prior to the strike, Congress enacted laws governing labor-related disputes such as those which plagued Youngstown Steel, and debated the possibility of placing such disputes under the jurisdiction of the executive branch; ultimately, Congress devised a different system for handling labor disputes and did not delegate control to the executive.\textsuperscript{85} Concerned over the implications of the Youngstown Steel strike, Truman interceded and ordered that the steel plant resume its operations, effectively seeking to break the strike so that the plant would produce steel for the war effort.\textsuperscript{86} When sued over this decision, the executive asserted that it was acting within the scope of the powers delegated to the president as


\textsuperscript{81} See \textit{id}.

\textsuperscript{82} See generally \textit{id}.

\textsuperscript{83} \textit{Youngstown Sheet and Tube Co. v. Sawyer}, 343 U.S. 579 (1952).

\textsuperscript{84} \textit{Id.}; see also YOO, \textit{supra} note 66 at 183.


\textsuperscript{86} \textit{Id.}; see also YOO, \textit{supra} note 66 at 183.
Commander-in-Chief.\textsuperscript{87} The Supreme Court, however, found against Truman, holding that this was not an area over which he had inherent constitutional authority and that, because Congress debated vesting the executive with labor-relations powers but ultimately decided not to, there was no statutory basis for Truman’s efforts to reopen Youngstown even in the face of a war-related need.\textsuperscript{88}

A trend which emerged in the aftermath of World War II and continues on through the present day is that of the President using Executive Orders\textsuperscript{89} to shape and guide the policies and actions of his administration and those who serve in it. Be they addressed to war-related activities, national security, espionage, foreign policy, domestic policy, or executive branch governance, Executive Orders emerged in the Cold War years as a key method by which the president himself defined his administration and the Executive Office of the President.\textsuperscript{90} This is very interesting because Executive Orders are entirely without the realm of Congress; however, Congress has taken to attempting to supplant the content of Executive Orders in recent years.\textsuperscript{91}

In the wake of the Kennedy assassination, the Twenty-Fifth amendment was ratified and enacted in 1965.\textsuperscript{92} This amendment provides for clear lines of succession in the event of the death or disability of the sitting president or vice-president.\textsuperscript{93} More important for the issue of Congressional attempts to reorganize the Executive branch, this

\textsuperscript{87} Id.
\textsuperscript{88} Id.
\textsuperscript{89} Executive Orders are tools used by the president to promulgate rules, regulations, and policies of his administration for members of the executive branch. \textit{EXECUTIVE ORDER, BLACK'S LAW DICTIONARY} 591 (7th ed.) (defining an Executive Order as “an order issued by or on behalf of the president, usually intended to direct or instruct the actions of the executive agencies or government officials, or set policies for the executive branch to follow”).
\textsuperscript{90} \textit{See generally Executive Orders, FEDERATION OF AMERICAN SCIENTISTS, INTELLIGENCE RESOURCE PROGRAM, available at} \url{http://www.fas.org/irp/offdocs/eo/index.html} (last visited July 16, 2007) (providing a comprehensive list and description of Executive Orders issued from 1940 to present).
\textsuperscript{91} \textit{See infra} Part V(2).
\textsuperscript{92} \textit{See U.S. CONST. AMEND. XXV} (1965).
\textsuperscript{93} Id.
amendment provides that the president’s cabinet has the power to vote and declare the president disabled or incapacitated and, likewise, to vote to reinstate the president when the period of disability or incapacity is deemed to have concluded.\textsuperscript{94} The implications of this amendment will be discussed in Part V below.

At this time, the Congress as a whole – whether controlled by Democrats or Republicans – became an activist branch. Under the guise of the regulatory powers vested in Congress by the Commerce Clause, Congressional actions were taken to stop racial discrimination and segregation\textsuperscript{95}; when challenged, these laws were upheld by the Supreme Court, even in instances where the Court deemed the constitutional basis to be rather shaky.\textsuperscript{96} However, by the late Cold War and Post-Cold War period, Congress was held to have gone too far in its attempts to be an activist body and influence public opinion. Issues such as regulation of guns on school campus\textsuperscript{97} and liability for sexual assault under the Congressionally created Violence Against Women Act\textsuperscript{98} were found by the Supreme Court to have stretched the concept of regulating commerce and its instrumentalities too far and were overturned, irrespective of the dangers posed by the societal harms which these laws were intended to combat.\textsuperscript{99}

During this time, and particularly from the Vietnam era onwards, Congress attempted to assert greater control and guidance over the conduct of national security

\textsuperscript{94} \textit{Id.}
\textsuperscript{96} See \textit{id.}
policy and covert operations. The attempts used by Congress were several, including the advent of more and more committees and subcommittees tasked with overseeing the intelligence community (without much guidance as to the constitutionality of such a committee structure); the War Powers Resolution; legislation attempting to assert Congressional control over intelligence community operations through spending; legislation attempting to assert Congressional control over covert operations; and the forced creation of an anti-assassination Executive Order by President Ford in the face of a mounting Congressional threat to enact stricter legislation.

In 1973, Congress overrode a presidential veto and enacted the War Powers Resolution, a measure which severely constricted presidential authority as Commander-in-Chief by requiring that numerous steps be taken before a president is allowed to deploy troops of any nature into situations which are not necessarily hostile at the time of

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101 See id. at 2-4.
102 Despite extensive research, the author has yet to find any constitutional provision or precedent for the creation of standing or special committees which have within their jurisdiction issues and entities not related to the appropriation or legislative areas vested in Congress. It is the author’s position that the committees used to oversee the intelligence committee are not legislative in capacity because they seek to invade a space squarely placed in the executive for no apparent purpose other than embarrassment. The information sought by these committees regarding the general functioning of the intelligence community is available in a general form in the administration’s annual appropriations requests. For more on the appropriateness of secrecy in the communications of intelligence-based spending from the Executive branch to the Legislative branch, see U.S. v. Richardson, 418 U.S. 166 (1974).
106 Executive Order 12333. See also YOO, supra note 66 at 60.
deployment. The War Powers Resolution requires that the president meet certain benchmark reporting guidelines for Congress and that he withdraw the troops at issue from the particular theatre or zone of hostilities after sixty days unless Congress authorizes an extended stay in the theatre or zone. At the time of its enactment, President Nixon vehemently objected to the constitutionality of the War Powers Resolution in his veto message; every president since Nixon has held the same view and enunciated it whenever the War Powers Resolution became an issue. Through the War Powers Resolution, Congress fulfilled its vow of attempting to reign in the powers of the executive branch relative to the conduct of war in the wake of Vietnam despite these flaws. Interestingly, no president has sought to challenge the validity of the War Powers Resolution in court. Given that the War Powers Resolution was enacted solely under the Necessary and Proper clause of the constitution – a clause which the Supreme Court has repeatedly held is insufficient to justify the enactment of a statute – a challenge would hardly seem to be improper. On several occasions, Congress either agreed to look the other way and not demand the implementation of the War Powers

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108 Id.
109 Id.
110 Id. It should be noted that even when the War Powers Resolution was used by various presidents to inform Congress of troop deployment or involvement in real or potential hostilities, it has been with the express statement that the War Powers Resolution was not constitutional. Id.
111 Id.
112 Id.
113 See McCulloch v. Maryland, 17 U.S. 316 (1819) (establishing the principle that Congress may enact laws under the Necessary and Proper Clause provided that they are in furtherance of another area or power vested in Congress by the Constitution).
Resolution provisions to a conflict. There have also been unsuccessful Congressional attempts to repeal the War Powers Resolution.

Until 1983, Congress acted on the assumption that it had the power to use what was termed a “legislative veto,” in which Congress would unilaterally declare certain points of policy to be law. This practice came to a halt in 1983 with the Supreme Court’s decision in *INS v. Chadha*. This case, brought by the executive through the INS, challenged a legislative veto which overruled the INS’ and Attorney General’s finding that Respondent Chadha should be deported. Citing the constitutional requirement of presentment, the Supreme Court held that legislative vetoes were unconstitutional and required that binding legislation of all types meet both the bicameralism and presentment requirements set forth in the constitution in order to be constitutionally and legally legitimate.

F. Post-Cold War

The immediate post-Cold War period was a time of relative relaxation, punctuated by the first Gulf War and several terrorist attacks within and without the United States. Support for the first Gulf War was broad-based and Congress was amenable to declaring war and allowing the executive to conduct the war largely unfettered by Congressional

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115 Id.


117 Id.

118 Id.

119 Id.
attempts at involvement. The Clinton years saw the “peace dividend” idea applied by the executive and legislature to facilitate the downsizing of the United States military. Although controversial within largely conservative circles and among members of Congress from districts which were threatened by economic loses as a result, there was not a great deal of tension between the executive and the legislative branches regarding the decision to downsize. Al-Qaeda’s early attempts to damage United States-related targets, such as the U.S.S. Kohl, the U.S. embassy in Nairobi, Kenya, and even the 1993 World Trade Center bombing, attracted media attention but were largely handled within the U.S. intelligence community – and, in the case of the World Trade Center bombing, by the Justice Department and the court system – and there were few Congressional attempts to encroach on the powers vested in the executive in order to reign in this new threat to American stability.

The sense of increased security which pervaded the United States during the initial post-Cold War period was shattered by the Al-Qaeda attacks of September 11, 2001. The September 11th attacks were followed very quickly by a broad-based declaration of war against terrorists in general, and Afghanistan in particular. Congress’ declaration of war was open-ended and allowed the administration great latitude in the pursuit of what all involved agreed would be an atypical war. The September 11th attacks also resulted in the enactment of the USA PATRIOT Act, which gave the executive branch updated powers for the new war which it was about to wage on

122 Id.
123 Id., supra note 66 at 10.
124 Id.
transnational terrorism.\textsuperscript{125} Despite widespread agreement that the PATRIOT Act was used responsibly in order to further its goals, and that the PATRIOT Act’s provisions were directly related to the interception of several major plans of domestic attack by various terrorists, 2006 saw the reenactment of a less vigorous PATRIOT Act as the result of attempts to exact retribution on an administration which was labeled as being anti-civil liberties because it used the express provisions of the PATRIOT Act to fight terrorism.\textsuperscript{126}

In the wake of September 11\textsuperscript{th} and the perceived governmental failures which became part of the public understanding of the attacks of that day, Congress has repeatedly attempted to find a way to reform its executive oversight structure.\textsuperscript{127} However, no concrete revision system has been proposed or debated, and there are widely differing opinions over any method of reorganizing the Congressional oversight committee structure as it relates to the executive in general and the intelligence community in particular.\textsuperscript{128}

Much has been made of the September 11\textsuperscript{th} Commission report and the legislation which was prompted by it.\textsuperscript{129} Missing from the headlines, however, was the determination of the executive branch – after a thorough study – that the most effective way to implement the inter-agency reforms necessary to counteract terrorist threats to the

\begin{footnotes}
\item[125] P.L. 107-56 (2002).
\item[128] Id.
\end{footnotes}
United States was through an executive order and not through statute. Acting on these findings, President G.W. Bush issued Executive Order 13228, which created the Office for Homeland Security within the Executive Office of the President. Later, Congress duplicated this office through its creation of the Department of Homeland Security, an entity which essentially recreates of the Office of Homeland Security except in a few key areas. There is currently uncertainty over the grey areas created by the enactment of the DHS statute after the Executive Order was promulgated; these grey areas are likely to become problems and not assets in the future.

Periodically, the executive branch has issued a formal National Security Strategy. The goal of these documents has historically been to present to the administration, Congress, American people and, increasingly, the world, with the nation’s plan for domestic and international security in light of the current state of national and world affairs. The G.W. Bush administration issued its first National Security Strategy in 2002. This document – written before Congressional involvement in the creation of DHS – plots the administration’s internal reorganization plan, which is explained to be needed in order to better handle the requirements of fighting global terrorism. An essential element of the administration’s reorganization plan was the creation of the Office of Homeland Security through Executive Order 13228. This National Security Strategy, like its predecessors, is the embodiment of the nation’s security strategy as

135 Id.
136 Id.
enunciated by the executive branch; the branch which the Framers intended to speak for
the American people with one voice.\textsuperscript{137}

The IRTPA of 2004 was passed by Congress in November, 2004 and
subsequently signed by the President.\textsuperscript{138} Several of its provisions, such as the creation of
the Director of National Intelligence ("DNI"), are discussed in greater detail below. In
regards to the DNI, which was created as the ultimate buffer between much of the
intelligence community and the President but placed outside of the Executive Office of
the President,\textsuperscript{139} Senator Joseph Lieberman – who was himself instrumental in the bill’s
creation and passage – admitted that the DNI is essentially an executive function.\textsuperscript{140}
Despite this admission, the IRTPA of 2004 placed the DNI outside of the Executive
Office of the President, while at the same time requiring the DNI to act as a buffer
between security and intelligence information and the president.\textsuperscript{141} Another important
component of the IRTPA was the statutory creation of the National Counterterrorism
Center ("NCTC").\textsuperscript{142} This was a statutory creation because President G.W. Bush had
already created such an office in Executive Order 13354, and provided it with essentially
the same powers and responsibilities as the IRTPA.\textsuperscript{143}

Following Hurricane Katrina and the mountain of blame which fell on the Federal
Emergency Management Agency ("FEMA") as a result of its disaster response
performance, Congress passed and President G.W. Bush signed into law the Post-Katrina

\textsuperscript{137} Id.  
\textsuperscript{138} Id.  
\textsuperscript{139} Id.  
\textsuperscript{140} \textit{See} T\textsc{odd} M. M\textsc{asse}, T\textsc{he} N\textsc{ational} C\textsc{ounterterrorism} C\textsc{enter}: I\textsc{mplementati}o\textsc{n} C\textsc{hallenges} a\textsc{n}d I\textsc{ssues f}or \textsc{congress}, C\textsc{ongressional} R\textsc{e}search S\textsc{ervice} 8 (Mar. 24, 2005), available at \url{http://www.fas.org/sgp/crs/intel/RL32816.pdf} (last visited July 16, 2007).  
\textsuperscript{142} Id.  
\textsuperscript{143} Executive Order 13354.
Emergency Reform Act of 2006, a bill which sought to reform the perceived problems with FEMA. \(^\text{144}\) Several provisions of this attempted reorganization are particularly challenging to understand from an operational standpoint, such as those provisions which divest much of DHS’ direct authority to control and reshape FEMA while still leaving FEMA as part of DHS and under the direction of the DHS Secretary. \(^\text{145}\) Further, the Post-Katrina Emergency Reform Act imposed specific experience-based qualifications on presidential nominees and appointees to various FEMA positions, including the FEMA Director himself. \(^\text{146}\) Despite his concerns that these qualification requirements were unconstitutional, G.W. Bush signed the Post-Katrina Relief Act into law and bound presidents to these qualification requirements. \(^\text{147}\)

In 2003, Congress sought to encourage the Lebanese people in their attempts to free themselves from Syrian involvement in their governmental, political, and security structures. \(^\text{148}\) In order to achieve its goal of providing support to the Lebanese, Congress passed the Syrian Accountability and Lebanese Sovereignty Restoration Act, a largely symbolic act which sought to provide the Lebanese with a declaration of American support. \(^\text{149}\) Through its content, this act veered into the foreign policy domain assigned to the executive – which, indeed, had already made its own statements on and policies to put political pressure on the Syrian government to cease its quasi-control over Lebanon and

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\(^{144}\) P.L. 109-295 (2006)


\(^{149}\) Id.

In 2006, the nation became galvanized by Congressional outrage at the federal wiretapping “scandal.” Although Congress could ultimately find little legal basis for this outrage, it decided to take action and introduced the National Security Surveillance Act of 2006.\footnote{S. 2453 (109\textsuperscript{th} Cong. 2006).} Although this legislation was not enacted, this act moved Congress further into the realm of the executive by attempting to more heavily regulate wiretapping, a practice which was recognized as within the prerogative of the executive branch since FDR began the practice during World War II.\footnote{See Yoo, \textit{supra} note 66 at 72.}

2006 also saw the issuance of a new National Security Strategy by the executive branch.\footnote{\textsc{The National Security Strategy of the United States of America} (2006).} The new National Security Strategy was deemed necessary by the administration after the wars in Afghanistan and Iraq had progressed beyond the initiatory phases and had moved into the secondary phases of democratization.\footnote{\textit{Id.}} This document continued to speak as the one voice for American security, military, and diplomatic policy around the world.\footnote{\textit{Id.}} Of particular importance to this article are the many proposals to reorient the Department of State and to reinvigorate the activities of USAID made in the 2006 National Security Strategy.\footnote{\textit{Id.}} In addition to the new National Security Strategy, in 2006 the G.W. Bush administration released a report entitled “9/11
Five Years Later. The document discussed the many steps taken by the administration to counteract the conditions which gave rise to the September 11th attacks and demonstrated that agencies within and without the Executive Office of the President worked together to implement the President’s National Security Strategy and policies; these are not areas in which Congress plays an extended role constitutionally or practically.

The Fiscal Year 2007 Homeland Security Appropriations Act saw the culmination of five years of executive branch effort to provide the DHS Secretary with the ability to regulate security procedures at certain designated chemical plants and facilities in the United States. Public concern over the regulation and safety of such facilities, especially in light of reports that terrorists were targeting “soft targets” within the United States, prompted these requests. However, the authorizing legislation is only valid until 2009 and there appears to be a sense among some in Congress that the powers granted to DHS under the FY2007 Appropriations Act need to be circumscribed.

The enactment of the U.S. Troop Readiness, Veterans’ Care, Katrina Recovery, and Iraq Accountability Appropriations Act of 2007 saw Congress reaching into executive control over the planning and implementation of the Iraq War to require that

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158 Id.
161 Id.
162 P.L. 110-28 (110th Cong. 2007).
the administration provide Congress with “benchmark” reports and information on the progress in Iraq in order for Congress to evaluate the continuation of the war.\footnote{Id.; see also **INITIAL BENCHMARK REPORT, THE WHITE HOUSE, available at** \url{http://www.whitehouse.gov/news/releases/2007/07/20070712.html} (last visited July 17, 2007).}

Currently, the Defense Department, in conjunction with the Executive branch – specifically, the Department of State and various associated security and aid operations – is proposing to reorient the way in which U.S. military, intelligence, and diplomatic/civilian actions in Africa are administered and organized.\footnote{See **LAUREN PLOCH, AFRICA COMMAND: U.S. STRATEGIC INTERESTS AND THE ROLE OF THE U.S. MILITARY IN AFRICA, CONGRESSIONAL RESEARCH SERVICE** (May 16, 2007), available at \url{http://www.fas.org/sgp/crs/natsec/RL34003.pdf} (last visited July 16, 2007) (describing the AFRICOM proposal).} The Defense Department explains that this reorganization is necessary given the nature of issues on the African continent and their impact on U.S. domestic and foreign policy.\footnote{Id.} The “AFRICOM” plan intends to merge the military, intelligence, diplomatic and civilian aid functions – namely USAID – into multiple units dispersed throughout the African continent and administered under a centralized African command.\footnote{Id.} The goal of this system is to replace the United States’ German-based command structure, which is currently used by the military, with a command structure which focuses solely on African issues and to create a mobile and swift-moving U.S. based response team on the ground in Africa, which would allow U.S. officials and offices to work in a coordinated fashion during times of emergence or other necessity.\footnote{Id.} The AFRICOM plan is a prime example of the G.W. Bush administration’s intent to reorient various aspects of the State Department – especially USAID – as part of the National Security Strategy.\footnote{See **THE NATIONAL SECURITY STRATEGY OF THE UNITED STATES OF AMERICA** (2006).} However, due to the multitude of Congressional committees having jurisdiction over elements of
AFRICOM and the increasing incursion of Congressional committees into areas which were once delegated to the Executive branch, AFRICOM remains very much a plan as of the time of writing.

PART IV – NATIONAL SECURITY PROTOCOLS, STATUTORY PROVISIONS, AND CONSIDERATIONS

In addition to the provisions of the constitution, the powers of the President and the legislative branch in relation to national security issues and military powers are codified at various points throughout the United States Code – the codification body for the laws of the United States. Statutes which are particularly important to the executive branch reorganization topic of this article are briefly discussed below. Also discussed in this Part are Executive Orders, Directives, and other documents, is the issue of the classification of national security other information possessed by the government, and the national security structure.

A. Statutory Provisions

1. The President

Of particular interest to the question of the appropriate roles of the legislative branch and the executive branch in reorganization of the executive branch is 3 U.S.C. § 301, which expressly allows the president to delegate to agency and department heads within the executive branch “any function which is vested in the president by law,” or “any function which such officer is required or authorized by law to perform only with or subject to the approval, ratification, or other action of the president.”

2. The Legislature

The ability of each house of Congress to have a functioning committee structure is codified in statute.\textsuperscript{170} Further, each house has its own rules which relate to, in relevant part, the organizational structure of committees and the creation of new committees.\textsuperscript{171} However, neither these statutes nor these rules specify the portions of the constitution which justify the creation of the plethora of committees and subcommittees used by the House and Senate today.\textsuperscript{172} Nothing in statute or rule creates or discusses any familiarity or experience requirement for the areas over which a committee or subcommittee has jurisdiction.\textsuperscript{173} Further, there is no requirement that members of a committee or subcommittee employ staffers who are versant in the particular areas of expertise necessary to evaluate the issues attendant in the committee or subcommittee’s jurisdiction, be it agriculture or intelligence.\textsuperscript{174}

Additionally, although there are statutes giving some weight to the power of a Congressional subpoena, there is no enforcement mechanism for committees or subcommittees other than appropriations-based retaliation or attempts at introducing legislation aimed at the topic of a committee hearing.\textsuperscript{175} For example, other than public embarrassment, the recent attempts to investigate allegedly improper firings of several United States Attorneys by the Justice Department were toothless, as the worst possible thing which could have happened to the Justice Department or the administration was a vote of no confidence in the Attorney General. Even this supposed punishment had no real sting because it was without implication other than embarrassment.

\textsuperscript{171} See H. Res. 6 (110th Cong. 2007) (codifying the House rules); SEN. RULE XXV (2007).
\textsuperscript{172} See id.
\textsuperscript{173} See id.; see also 2 U.S.C. ch. 6 (2006).
\textsuperscript{174} See id.
\textsuperscript{175} 2 U.S.C. ch. 6 (2006).
3. Homeland Security

As described above, the Office of Homeland Security came into existence in 2002 pursuant to Executive Order 13228. However, Congress created the Department of Homeland Security – essentially a duplicate of the Office of Homeland Security – in statute in late 2002 as part of the Homeland Security Act. Under the Homeland Security Act, DHS was placed within the Executive Office of the President and its Secretary has broad powers over the designation of its staff members. The Secretary of DHS promulgates the rules for information sharing within the many agencies which are part of the DHS. In certain instances, such as trade regulations which will impact international trade, the Secretary of DHS is required to notify several Congressional committees prior to taking any action or implementing a regulation. As referenced above, the Post-Katrina Emergency Reform Act allowed Congress to prescribe qualification requirements for the presidential nominee to head FEMA, along with several key FEMA posts which are presidential appointments.

As previously discussed, President G.W. Bush created the Homeland Security Council – similar in many respects to the National Security Council – in 2001 with

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176 Executive Order 13228 (2002).
179 Id. § 115. See also 6 U.S.C. § 121 (2006) (establishing the Directorate for Information and Analysis – an area which was of specific concern to the President, Congress, and the September 11th Commission – within the DHS and allowing the President to appoint its leadership).
180 Id. § 141.
181 Id. § 217. This is one of many provisions requiring Congressional notification of certain actions and that certain segments of DHS frequently report their actions to designated Congressional committees.
182 Id. § 313.
183 Id. § 252; § 271.
Homeland Security Presidential Directive 1.\textsuperscript{184} Again, Congress duplicated the terms of this executive order by enacting legislation providing for the creation of the Homeland Security Council within the Executive Office of the President.\textsuperscript{185}


In his role as Commander-in-Chief, the president is granted extensive authority to use and deploy the military in civil disaster situations once certain statutory requirements have been met.\textsuperscript{186} Although this ability is somewhat circumscribed due to the inherent risk of implicating the anti-posse comitatus laws,\textsuperscript{187} it should be noted that the 2007 Defense Appropriations bill did contain a clause providing that the president can send in federal troops to certain state disaster and emergency situations to enforce laws and restore order even without a request from a state or local government.\textsuperscript{188}

5. War and National Defense

As part of his role as Commander-in-Chief, the President has been given the power to remove citizens of a nation with which the United States is at war under the appropriate circumstances.\textsuperscript{189} The President is given plenary power over the National Defense Stockpile; however, Congress has placed specific restrictions regarding the President’s decisions on the use of the National Defense Stockpile.\textsuperscript{190} In times of national emergency, the President may regulate the anchorage and movement of maritime

\textsuperscript{184} HSPD 1 (2001).
\textsuperscript{186} U.S. CONST. ART. II § 2.
\textsuperscript{187} Posse comitatus refers to the use of military forces to serve as civilian police. POSSE COMITATUS, BLACK’S LAW DICTIONARY 1183 (7th ed.). Its prohibition is aimed at preventing the military’s access to control over civilian law enforcement mechanisms.
\textsuperscript{189} 50 USC § 21 (2006).
\textsuperscript{190} 50 USC § 98 (2006).
vessels\textsuperscript{191}; in times of insurrection, the President may suspend commercial intercourse with the particular states in insurrection.\textsuperscript{192}

In terms of intelligence activities, the applicable statutes demonstrate the extent to which recent Congressional activities have attempted to undermine presidential control of the intelligence community and its functioning. Members of the intelligence community are required to operate within a tightened system of funding for overt and covert operations\textsuperscript{193}; a system in which it was made more difficult to transfer funds during the current war under the provisions of the IRTPA of 2004.\textsuperscript{194}

Several miscellaneous but very important provisions for the purposes of this article are scattered throughout title 50 of the U.S. Code. One places limits and Congressional oversight requirements on presidential declarations of national emergency and the continuation of such declarations.\textsuperscript{195} Another creates accountability and reporting requirements for the president in certain circumstances.\textsuperscript{196} Another provides the president with certain authority under the International Emergency Economic Powers subsection of this title.\textsuperscript{197} Yet another requires that specific Congressional reporting requirements be followed in regards to international embargoes against governments in armed conflict with the United States.\textsuperscript{198}

\textsuperscript{191}50 USC § 191(2006).
\textsuperscript{192}50 USC § 205 (2006). It should be noted that this statute essentially codified powers which Congress and the Supreme Court recognized as being essential to the functioning of the President as Commander-in-Chief during the Civil War. See \textit{Cushing v. Laird}, 107 U.S. 69 (1883).
\textsuperscript{193}50 USC § 413; 413a (providing for restrictions on and required Congressional involvement in covert operations and actions); 414 (providing limitations on intelligence funding and providing the level of information which Congressional committees must be provided in order to consider intelligence funding).
\textsuperscript{195}50 USC § 1552 (2006).
\textsuperscript{196}50 USC § 1541 (2006).
\textsuperscript{197}50 USC § 1702 (2006). For a discussion of the Supreme Court’s construction of the scope of the President’s powers under the IEEPA, see \textit{Dames & Moore v. Regan}, 453 U.S. 654 (1981).
\textsuperscript{198}50 USC § 1707 (2006).
B. Executive Orders, Directives, and Other Executive Documents

Starting with FDR, modern American presidents have used a system of issuing national security policies, sometimes called directives, to members of the intelligence community and the executive branch. These documents are often confidential and provide authorizations and guidance to the intelligence community and those other members of the executive branch whose functions are involved in the particular topic of the document. Many times, such documents address pressing or emerging international threats to the U.S., its allies and its interests.\footnote{See Presidential Directives and Executive Orders, Federation of American Scientists, Intelligence Resource Program, available at http://www.fas.org/irp/offdocs/direct.htm (last visited July 16, 2007).} There are several unifying themes throughout the history of these documents and the diverse administrations which have issued them. Unilaterally, these documents were used for the creation of committees and subgroups within the NSA to handle specific issues or vested with specific jurisdiction.\footnote{See id.} These entities were created entirely at the will of the sitting president and their composition was also at the sitting president’s will.\footnote{Id.} These entities helped presidents craft national security strategies on a small and large scale.\footnote{Id.} Additionally, these documents were typically the home of covert action directions and authorizations.\footnote{Id.}

Executive Orders are used by presidents to promulgate rules and regulations which are binding on members of the Executive branch. These orders have been used in many realms of policy formation and implementation\footnote{See Executive Orders, Federation of American Scientists, Intelligence Resource Program, available at http://www.fas.org/irp/offdocs/eo/index.html (last visited July 16, 2007).}, however, a few deserve attention for the purposes of this paper. In Executive Order 11051, President Kennedy
created the Director of Emergency Planning within the executive branch.\textsuperscript{205} This order is notable because, decades before September 11\textsuperscript{th}, President Kennedy created a less onerous version of the Director of the Office of Homeland Security which President G.W. Bush created in 2002.\textsuperscript{206} Unlike his successor, President Kennedy’s order was not met with a subsequent attempt at reorganization by Congress. Additionally, and without Congressional incident, President Clinton established the President’s Foreign Intelligence Advisory Board in Executive Order 12863.\textsuperscript{207}

National Security Presidential Directive 51/Homeland Security Presidential Directive 20, issued under President G.W. Bush’s joint system of classifying national security and homeland security presidential directives together, establishes the requirements for executive branch continuity of control.\textsuperscript{208} Since September 11, 2001, continuity of control planning – culminating in the G. W. Bush administration’s National Continuity Policy – has been a key area of concern and importance.\textsuperscript{209} These directives require that entities within the executive branch establish continuity protocols and establish a liaison between the executive and the legislative and judicial branches for the purpose of ensuring that continuity is provided at all levels of government.\textsuperscript{210} These directives make clear that the covered agencies are under the exclusive jurisdiction of the executive in terms of the formulation and implementation of continuity planning and that the executive is not interested in the continuity plans of the other branches.\textsuperscript{211}

\begin{footnotesize}
\begin{enumerate}
\item Executive Order 11051.
\item See Executive Order 13228.
\item Executive Order 12863.
\item NSPD51/HSPD20 (2007).
\item NSPD51/HSPD20 (2007).
\item Id.
\end{enumerate}
\end{footnotesize}
Another area over which the executive exercises primary control is the national threat level system.212 Adopted in the wake of September 11th, this system is likely familiar to readers, especially those who have flown since the attacks. This system uses a color-coding system to inform executive branch and DHS-related agencies of the level of known and/or expected threats to the nation.213 Initially intended solely for governmental use, this system has become a guide to individuals and corporations and changes to it have been known to affect everything from family holiday plans to stock exchange rates.214

C. The Classification System

Prior to FDR’s executive order relating to the regulation of state secrets, made during World War II, control over state secrets – especially secrets relating to national security – was vested in the military.215 A nascent non-military attempt to regulate the flow of this type of information was made during World War I; however this attempt did not come to fruition as hoped.216 At the end of World War II, President Truman asserted that classification control was vested squarely in the executive branch; this argument was accepted and the executive began to set classification policy and enact requirements.217

214 Id.
216 Id.
217 Id.
Since Truman’s assertion, every successor presidential administration has accepted that the executive branch has ultimate classification control by virtue of the constitution and has shaped classification policy accordingly. Various departments and agencies have their own protocols for handling classification but, ultimately, control over classification and its implementation is an executive function. There have repeatedly been attempts by Congress to usurp presidential control over the classification system – most notably during the course of the legislative history prior to the National Intelligence Reform Act of 2004 – however these attempts have systematically failed. Within the legislative branches, it should be noted that each house has its own protocol for securing classified information received by the plethora of committees which require or request it. The House has stringent guidelines for handling such information, while the Senate has very few protocols and its rules permit members and staffers to disclose information which the administration has chosen to classify.

D. National Security Structure

The latest attempt to reshape the Unites States’ national security structure was the IRTRA of 2004, which replicated many of the provisions contained in various executive orders and created the position of DNI as a separate entity, reporting to the President and

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218 Id. The Supreme Court has validated the idea of executive primacy in the field of classifying information. See Dep’t of the Navy v. Egan, 484 U.S. 518 (1988). Even the September 11th Commission report admits and recommends that security clearance procedures and protocols be an administrative/executive function.

219 Id.


222 Id.

223 Id.
receiving reports and information from other members of the intelligence community.\textsuperscript{224} The national security structure itself includes military information from the Department of Defense – which is separate from the overall National Security Agency apparatus – and a host of agencies, such as DHS, FBI, and CIA.\textsuperscript{225} DHS comprises myriad agencies, ranging from the Coast Guard to FEMA.\textsuperscript{226} Unlike the National Security Agency, the newly created position of the DNI is a presidential appointee but his office is not located within the Executive Office of the President.\textsuperscript{227}

**PART V – THE EXECUTIVE, CONGRESS, AND THE EXECUTIVE BRANCH**

Beyond its general historical and legal interest, the above information was presented in order to create a foundation and context for the principle arguments of this article. The crux of this article’s argument is that only the executive has the constitutional and operational power to reorganize the executive branch, especially in regards to issues of national security, military operations and foreign affairs, and that Congressional attempts to do so are legally void. This argument is based on two underlying principles: (1) the provisions of the constitution itself – bolstered by legislative intent from the Framers, jurisprudential findings, and historical constructs; and (2) the recently emerging pattern of Congressional usurpation of Executive powers and responsibilities on a massive scale across all policy areas. For these reasons, there is both a legal and practical need for control over the executive branch, especially in relation to any potential

\textsuperscript{226} Id.
reorganization generally – and any reorganization which would affect the intelligence community and national security policy in particular – to be vested solely and squarely in the executive.

A. The Constitution and Reorganization

Outside of the Bill of Rights provisions, arguably the most recognizable creation of the constitution and its Framers is the three branch system of government. It was with this system that the Framers intended to defeat the possibility of tyranny within America and ensure a stable democracy for generations of Americans. The Framers carefully and clearly vested substantive powers and responsibilities in each branch, mindful of the need to weight each branch separately to preserve governmental and societal liberty.\(^{228}\)

For the purposes of this paper, it is important to remember that the Framers vested the executive branch with the Commander-in-Chief function\(^ {229}\); the overall requirement to serve as the chief executive of the nation\(^ {230}\), the ability to negotiate treaties and thereby fashion American foreign policy and conduct foreign relations\(^ {231}\); the ability to nominate superior officers – subject to the advice and consent of the Senate – and to appoint inferior officers\(^ {232}\); to receive ambassadors\(^ {233}\); and to take care that the laws be faithfully executed.\(^ {234}\) Many of these powers and responsibilities were previously vested in the Continental Congress generally and it is important to note and understand that the Framers made a conscientious decision to take these powers away from the legislative


\(^{229}\) U.S. Const. Art. II § 2.

\(^{230}\) U.S. Const. Art. II § 1.

\(^{231}\) U.S. Const. Art. II § 2.

\(^{232}\) Id.

\(^{233}\) U.S. Const. Art. II § 3.

\(^{234}\) Id.
branch and vest them in the newly created executive branch. It is also important to note that the federal executive branch was explicitly modeled on and incorporated provisions of state constitutions, which had always provided for an executive branch which was imbued with many of these powers and which functioned apart from the various state legislatures.235

Likewise, the Framers vested the legislative branch with the power and responsibility to: enact legislation236; make monetary appropriations237; issue a declaration of war238; provide, raise, support and maintain the military and militias239; make laws necessary and proper to carrying out its functions240; and for the Senate give advice and consent on presidential nominees and treaties.241 These powers were retained from the powers possessed by the Continental Congress and were similar to those powers vested in the majority of state legislatures through state constitutional provisions.

Beyond the face of the constitution, the Framers provided illuminating statements regarding their intent in creating each branch of government throughout the Federalist papers. In these publications, the Framers demonstrated time and again that their main aim in creating the constitution – and the tripartite system of federal government which it installed in America – was the protection of the safety of the American people from

235 JAMES MADISON, FEDERALIST NO. 39: THE CONFORMITY OF THE PLAN TO REPUBLICAN PRINCIPLES For the Independent Journal (explaining that the powers, responsibilities, and limits placed on the Executive branch in the constitution were derived from various state constitutional provisions governing state executives); Alexandra R. Harrington, Executive Parity: How the Structure of Executive Branches at the City, State, and Federal Level Impacts Presidents and Presidential Candidates, Working Paper available at http://works.bepress.com/alexandra_harrington/7 (last visited July 17, 2007).
236 U.S. CONST. ART. I § 1.
238 U.S. CONST. ART. I § 8.
239 Id.
240 Id.
241 U.S. CONST. ART. II § 2.
international threats, rebellions, and the instability and duplicity which emerged under the loose federation memorialized in the Articles of Confederation. Overall, the Framers were adamant that the use of a tripartite system was intended to vest each branch with its own independence and that no one branch should attempt to perform the functions of another branch because this could lead to the tyranny of one branch at the expense of the other branches and the system of liberty created in the constitution.\textsuperscript{242}

In terms of the executive branch, the Federalist papers make it clear that the executive was given primacy in the area of negotiating treaties because of the secrecy and intelligence which is necessary in order for treaties to be properly negotiated.\textsuperscript{243} It was also expressly stated that the Senate’s power in the confirmation process was to issue the president its advice and consent – if deemed appropriate – and not to direct the president’s nominee.\textsuperscript{244} To the Framers, the executive branch was the appropriate branch for the conduct of war and the handling of military affairs, of diplomacy, and of foreign affairs because of its inherently and uniquely unitary quality, which devolved to one person who spoke for and represented the nation and its people.\textsuperscript{245} Thus, it is clear that both the constitution and its Framers had a particular role in mind for the executive and did not intend for any other branch to attend to these functions.

In terms of the legislative branch, the Federalist papers go to great lengths to explain that the system used to elect the members of the House and Senate is at once representative and insular to popular revolts\textsuperscript{246}; that the Congress is intended to have

\textsuperscript{242} See supra Part II(C).
\textsuperscript{243} See supra Part II (C).
\textsuperscript{244} See supra Part II (C).
\textsuperscript{245} See supra Part II (C).
\textsuperscript{246} See supra Part II (C).
control of the purse, including for military expenditures; and that the Necessary and Proper Clause was meant to be a corollary to the Congressional appropriations function and nothing more. It is, therefore, clear that the Framers vested the legislative branch with its own distinct set of powers and responsibilities, but that interfering in the internal structure and functioning of other branches – or the usurpation of any function vested in another branch – was not one of these powers or responsibilities.

Within the realm of national security, the executive has historically been afforded great latitude in the conduct of warfare, national security and intelligence operations until the relatively modern era, when Congressional understanding of its function began to shift. Presidents from Washington to Lincoln to FDR were actively involved in the use of intelligence operations with little more than a Congressional request for a bill or reaffirmation of support for the actions taken by the president in his role as Commander-in-Chief. Although the nomination process for various cabinet members has historically taken sometimes turbulent twists, once in place in the executive branch, Congressional interference in the functioning of that branch was typically minimal. Issues such as the classification of intelligence information and state secrets were initially issues for the military alone; when this changed, such issues were vested in the executive, where all manner of authorities agree that they should constitutionally reside.

Post-World War II presidents have uniformly and without challenge used Executive Orders and a variety of directives to shape the nation’s security and

247 See supra Part II (C).
248 See supra Part II (C).
249 See supra Part III.
250 For example, President Andrew Jackson fought legendary battles with Congress, including one over his nomination for the position of Ambassador to England. Ultimately, Jackson won the battle and his nominee was approved. See ANDREW JACKSON, PRESIDENTS OF THE UNITED STATES, WHITE HOUSE.GOV, available at http://www.whitehouse.gov/history/presidents/aj7.html (last visited July 16, 2007).
251 See supra Parts III (A), (B), (C), (D).
intelligence policy. Throughout history, the president’s ability to act as the sole organ of American foreign policy and diplomacy has been largely unchallenged although, as discussed below, this trend has slowly and dangerously become subject to slight erosion and has been threatened with further erosion during the nation’s current fight against terrorism.

Finally, the enactment of the Twenty-fifth amendment to the constitution elevated the role of executive branch cabinet members from their previous positions as overseers of their particular administrative domains and oracles to and of the president in their specific fields of agency and policy control. Under the provisions of the Twenty-Fifth amendment, these cabinet members are also arbiters of the president’s incapacity and/or disability for the purpose of certifying whether a president should be temporarily removed from office in favor of the Vice President or the next in the established line of succession.

Taken together, the constitution and its several forms of interpretation set the boundaries of legislative branch involvement in the organization or reorganization of the executive branch at providing the funds necessary for the administration and proper functioning of the executive branch and providing advice and consent for nominations and treaties as required in the constitution. This boundary reflects the provisions of the constitution, its Framers’ intent for the functions of each branch of government, and the actions of subsequent Congresses, Presidents, and Supreme Court terms in regards to the appropriate roles of the executive and legislative branches. It is reinforced by the

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252 See supra Parts III (E), (F).
253 See U.S. CONST. AMEND. XXV.
254 By appropriating, the author means both the provision of economic resources and, where necessary, the creation and funding of additional governmental agencies which the executive requests.
provisions of the Twenty-Fifth amendment to the constitution because excessive legislative involvement in and oversight of the structuring of the executive branch raises the risk that a Congressional body could shape the executive branch in a way that it would be more favorably disposed to declaring the president incapacitated or disabled and removing him from office. Lest this seem like a preview of the next season of the hit television show 24, the author would remind readers that, with confirmations becoming increasingly contentious, several administrations have decided to chose “consensus” candidates who are deemed in favor with and favorable to the Senate for cabinet positions. Given this trend, and the Congressional trend of attempting to ratchet up political rhetoric by threatening to call a host of executive officials before Congressional committees at the cost of their reputations (even for imagined infractions) and micromanaging the budgets of executive agencies, concern over the relationship between the Twenty-Fifth amendment and allowing the legislative branch more control over the structure and reorganization of the executive branch is indeed realistic.

B. Patterns of Congressional Usurpation and Reorganization

As discussed above, the years since the end of World War II have seen a dramatic rise in the incidents of Congressional involvement, and attempted involvement, in areas which were once recognized as the sole province of the executive. This represents more than a benign and vigorous attempt to do the duties vested in the legislative branch by the constitution; rather, it represents a bipartisan attempt to enlarge Congressional

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255 Two prominent examples are the confirmations of now-Justice Samuel Alito and now-Chief Justice John Roberts to the United States Supreme Court.

256 See supra Part III.
powers at the expense of the executive branch, particularly in the realm of national
security, the military, and foreign policy.

After World War II, Truman’s decision to retain an intelligence operation similar
to the OSS caused him to seek funding for the CIA, which in turn resulted in the National
Security Act of 1947 and the creation of the CIA as a separate agency. From this
point on, Congress became increasingly interested in the activities of the American
intelligence community; this interest frequently went beyond interest for appropriations
reasons. Requests for information on CIA and other intelligence community member
activities during the 1960s and 1970s were made by various Congressional
committees. When these requests were complied with, predictably, they revealed
information which was startling and possibly repugnant to some in the public, the
government, and the press, and resulted in the creation of an extensive notification
protocol imposed by the Congress on the president and members of the intelligence
community whenever covert action was to be used. These actions, though compelling
sound bites for television news show appearances and constituent news letters, directly
interfered in the powers of the executive to control national security, as vested in him by
the constitutional Commander-in-Chief provision and recognized implicitly and explicitly
for centuries.

Intelligence operations have come under increasingly intense scrutiny from
various members of Congress and there has been a chorus of requests for at least the
basic elements of the intelligence community’s budget to be declassified and released to

257 See supra Part III (E).
258 See BARRY M. BLECHMAN, THE POLITICS OF NATIONAL SECURITY: CONGRESS AND U.S. DEFENSE
259 Id. chs. 1-2.
260 Id.
the public despite explanations from those in the executive and intelligence community which highlight the danger of doing so and the necessity of maintaining the current classified system.\textsuperscript{261} At the same time, Congress imposed strict funding and budgetary restrictions on the intelligence community as a whole through such acts as the IRTPA, which requires that the DNI inform Congress prior to shifting money from one operation to another even after an internal, executive finding of necessity has already been made.\textsuperscript{262}

Congress has periodically attempted to reorganize the executive and its constituent parts.\textsuperscript{263} It achieved part of this goal in 2002, with the creation of DHS, and in 2004, with the creation of the DNI and attempt to streamline the intelligence community overall.\textsuperscript{264} This article has already shown that the majority of the provisions in both of these acts were already provided for by executive orders issued by the president and, further, that these acts were enacted despite evidence that the best way to handle the perceived problems with the American intelligence community prior to September 11\textsuperscript{th} was through purely executive action. It is important to note that, in addition to the legislative branch encroachment upon the executive branch – and its functions – which resulted from these acts, these acts further usurped executive powers and functions by attempting to legislate at least some aspects of the security classification process.

Similarly, Congress created the War Powers Resolution in an attempt to reign in the powers of the executive under the Commander-in-Chief clause and its associated


\textsuperscript{263} See supra Parts III, IV.

\textsuperscript{264} See supra Parts III (F), IV (A).
historical construction without regard to the strictures of the constitution or its Framers regarding the primacy of the executive in military affairs.\textsuperscript{265} Although it has never been challenged in court, current and past members of Congress agree that the War Powers Resolution is inherently unconstitutional, and the signing statements of every president since Nixon indicate that this belief is shared by the executive branch regardless of party affiliation.\textsuperscript{266}

Recent attempts by Congress to use its appropriations powers to force the executive to change its stance on and course in the Iraqi war\textsuperscript{267} are current illustrations of the fact that the same mindset which created the War Powers Resolution still exists in Congress today and that it has become so seethingly anti-executive that it threatens to undermine the role of the president as the arbiter of American national security policy, military policy, and foreign policy. Further, scant attention has been paid to the question of whether the current “war on terrorism” is in fact a “war” which the Congress can declare or seek to control through measures other than appropriations restrictions. Using the legal definition of a declaration of war requires that a nation declare war on another nation.\textsuperscript{268} While the war on terror has effectively targeted the former regimes in Afghanistan and Iraq, the current phase of the war is truly fighting terrorists of all nationalities, who have flocked to an ideology rather than a flag. This issue has not been properly addressed, as members of Congress from both political parties have been more eager to attempt to denigrate the presidency than to determine the bounds of their own constitutional abilities.

\textsuperscript{265} See supra Part III (E).  
\textsuperscript{266} See supra Parts III (E), (F).  
\textsuperscript{268} DECLARATION OF WAR, BLACK’S LAW DICTIONARY 415 (7th ed.).
At the same time, Speaker of the House Nancy Pelosi recently ventured to Syria on what was deemed a state visit and met with President Bashir Assad – the representative of a regime which has been targeted by the current president for its links to terrorism and which has not historically been a strong U.S. ally – despite requests from the administration that she not take this trip. When asked whether she would go to Iran – a nation with which the United States has even more fragile diplomatic relations, which is known to harbor terrorists who seek to kill American troops, and which is currently attempting to become a nuclear power to a chorus of international condemnation – to meet with its leadership, Speaker Pelosi refused to rule out such an excursion.

As referenced above, the Senate confirmation process has gone from a given to a huge hurdle for several presidents and nominees. Even for successful nominees, the process is arduous not only because of inquiry into credentials but also because of its often embarrassing focus on seemingly every personal detail of a nominee’s life. Senators are unafraid to tell the president who he should and should not nominate, as evidenced by the recent decision of the G.W. Bush administration not to re-nominate General Peter Pace to the position of Chairman of the Joint Chiefs of Staff because of concern that the Senate would not confirm him. In another incident, Senators publicly informed the G.W. Bush administration of the characteristics they expected to see in his

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272 For example, during the recent confirmation hearings for now-Supreme Court Justice Samuel Alito, the inferences which some senators attempted to draw from previous statements he made were such that they drove his wife from the hearing chamber in tears.
nominees to fill the seats on the Supreme Court vacated by Sandra Day O'Connor and the late William Rehnquist within hours of the time at which these seats became vacant. 274 There is perhaps no more striking way to demonstrate the overreach of the Congress into the executive branch than with this trend in confirmation history because it has resulted in the exact situation which the Framers denounced and stated should not occur in the Federalist papers.

During much of the same time period, Congress became more activist and attempted to extend the powers vested in it by the constitution to combat social ills. Initially, these attempts centered on using the Commerce Clause to create desegregation and anti-racism statutes. 275 These statutes were repeatedly challenged in federal court and sustained by the Supreme Court. 276 However, in the 1990s, Congress passed a series of laws attempting to regulate guns in school zones and liability for sexual assault incidents under the Commerce Clause; these statutes were found to have exceeded the powers vested in Congress by the Commerce Clause and were overturned. 277 Another startling example of Congressional attempts to extend its powers are the many instances in which presidents use signing statements to indicate their problems with bills and the extent to which the Supreme Court has afforded these signing statements credence through examining them as part of the overall legislative history of a contested statute. 278

276 See id.
Together, the above history paints the picture of a bipartisan effort to enlarge the powers and prerogatives of Congress at the expense of the powers vested in the executive. Should it seem to readers that this is an unduly harsh indictment of Congress, one should also remember that many of the actions taken by Congress were the result of statutes signed into law by the sitting president who was given custodianship of the office and its powers. For whatever reason, many presidents have ultimately acquiesced to laws which seek to undermine the executive branch and hope that the use of a signing statement will help them in the event of a legal challenge.

It is clear that the past century has seen erosion in respect for executive powers. This has damaged the constitution and threatens to severely damage the executive branch at a time when a strong executive is needed to guide the nation through the many threats it faces. Legally and practically, the boundaries of Congressional involvement in the structure and any potential reorganization of the executive branch – especially in relation to national security and intelligence issues – ends with appropriations and confirmations for the additional reason that, when even these roles have been expanded, it is unlikely that the further involvement of the legislative branch in the executive branch will be productive or beneficial to the nation or its security.

C. The Need for One Voice From and In the Executive Branch

From the Framers to the voters, it is expected and understood that the president speaks for his country. In times of crisis, it is the president who addresses the nation. In times of sorrow, it is the president who seeks to comfort the nation. The perception of the President of the United States as “the most powerful man in the world” is still a
common one wherever one might land on the globe. This is not because George Washington never told a lie, or was the general who helped secure our independence; it is not because FDR reassured the American public through his fireside chats; it is not because of the universally appealing idealism of the Kennedy years; or because of the image of President Reagan demanding that the Wall come down. These men and their enduring images are the result of the Framers of the constitution and the document which vested America presidents with strong executive powers and intended for them to speak as the voice of the nation.

The idea of legislative branch involvement in the structure or reorganization of the executive branch beyond the appropriations and confirmation functions is inappropriate under constitutional law. It is especially inappropriate given the sustained modern trend of Congressional self-enlargement at the expense of areas of executive prerogative which have historically been squarely within executive purview. And it is also inappropriate because it undermines the tenet that the president – and his office – function in a separate realm from the legislature and form the one voice which represents America at law and war, in peace and mercy, throughout the course of history.

PART VI – CONCLUSION

This article has explained the history of the executive and legislative branches relative to each branch’s individual functions and to each other with an eye on the handling of national security, intelligence, military, and general foreign affairs policy. The aim of this article is to demonstrate that the structure of the executive branch – and any attempts to reorganize it – are solely within the boundaries of the executive branch
except for the role of Congress in appropriating funds to it and confirming various presidential nominees. This argument is advanced not because of a desire to afford one branch supremacy over another, but rather because attempts by Congress to enter into the realm of executive branch function hurts the constitution, the executive branch, the legislative branch, and the nation as a whole.