American liberals and conservatives agree on little when it comes to the Constitution and foreign policy, war and emergency powers. One exception is their mutual distrust of the ambiguous struggle for power established by America’s unitary constitution – a single constitution meant to structure the allocation and exercise of power in foreign and domestic policy arenas alike. For conservatives, the challenge was and continues to be to find a way of building strong, efficient and central power in war and foreign policy and yet maintain their commitment to weak and decentralized authority when it comes to domestic policy. Their answer has been a series of efforts to radically reinterpret and bifurcate the unitary Constitution, building the case for a nearly unlimited Executive in war and emergency, while maintaining strict limits and constraints on national power in domestic affairs. For liberals – who have long been advocates of strong, central government in domestic and foreign policy alike – the problem was quite different. Frustration with their own inability to end the war in Vietnam, combined with their dismay over the abuse of Executive power revealed in Watergate and the Iran-Contra affair led many liberals to conclude that what was needed was a series of statutes that would explicitly define and then cabin and check the power they continued to believe had to be delegated to the

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Executive. What each side shares then is a belief that the ambiguities of America’s unitary constitution – the opaque lines that divide our “separate institutions sharing power” (Neustadt 1990:29) – are the problem rather than the solution.

Ambiguity is not without its vice. But stripping out the lubricant in this 18th Century system (whether through radical reinterpretation or jerry-rigged statutory band-aides) is a prescription for failure. If the Constitution itself has exceeded its useful life, then it ought to be replaced or fundamentally and formally revised (Levinson 2008). But this paper asks whether we might reconsider the virtues of constitutional ambiguity: Is a restoration of some degree of that ambiguity still the best (if often frustrating) way to continue to maximize the chances that we might – to paraphrase James Madison – find a way to secure the advantages of an efficient and stable government without unduly sacrificing liberty or representative democracy.¹

* * *

This essay begins in Part I with a brief outline of the role of ambiguity in the U.S. Constitution, and how the Supreme Court’s own approach to foreign policy and emergency powers cases has shaped and been shaped by this ambiguity – and has, in turn, shaped the role and place of ambiguity in the American system. Part II then explores two waves of conservative efforts to eliminate constitutional ambiguity about the allocation of power through radical constitutional reinterpretation. The first wave, coming in the wake of the First World War, was driven by a concern for protecting federalism and limiting the domestic role of government while simultaneously enabling strong central power in foreign affairs and war powers. The second wave coming in the wake of the Vietnam war and Watergate, as

¹ “Among the difficulties encountered by the [constitutional convention], a very important one must have lain in combining the requisite stability and energy in government, with the inviolable attention due to liberty and to the republican form” (James Madison, Federalist 37).
conservatives sought to shift power to the Executive branch, where their electoral prospects were far more promising, and, at the same time, sought to regain intellectual and then political influence within the federal judiciary. **Part III** examines liberal efforts to come to grips with the unintended consequences of their steady embrace of strong, centralized government focused in an active and independent White House, exposed in the inability to end the Vietnam war.

Constitutional ambiguity was seen by liberals as having created the means, motives and opportunity for the abuses of an Imperial Presidency (Schlesinger 1973; Rudalevige 2005): If constitutional ambiguity was the problem, the answer for liberals was to devise complex statutes that would delegate power with one hand, and yet attempt to check it with legislative devices with the other hand. While conservatives relied on constitutional reinterpretation, liberals sought to strip out constitutional ambiguity by writing statutes, formal delegations and what they believed were clearer procedural formalities designed to contain and tame the Executive. Both failed to achieve their objectives. The essay concludes in **Part IV** with a reconsideration of an 18th Century Constitution’s capacity to govern in the 21st. If constitutional reinterpretation and layers of statutory repairs do not work, are other reforms – constitutional, political or institutional – needed? And if so, where, when, and how?

### I: Ambiguity and the American Constitution

The American Constitution reflects an 18th Century polity’s deep ambivalence about power. A reaction to the dangers posed by an overly weak central government in domestic affairs and foreign policy alike (*Federalist Papers 2-13*), the Constitution also was the product of a generation that rose in revolt against the “Royal Brute of Britain” and his abuse of central and
unfettered power (Paine 1995:34). America’s original governing document, the Articles of Confederation were distinctly (and intentionally) inefficient. Taxation and the use of military force in particular required extraordinary unanimity among the States. The Constitution which replaced the Articles was meant to make sure that efficient action would be possible – but still difficult and particularly difficult to sustain. This was accomplished by an institutional design that established “separate institutions sharing power” (Neustadt 1990:29), and relied upon human nature and an assumption that proper designed; these institutions would be populated by ambitious, self-interested rational actors who would struggle for power. And – whether by design or natural process – would make those choices mindful that their decisions could and likely would be “challenged in the courts of law” (Frankfurter, Youngstown Sheet & Tube v. Sawyer, 1952:613), not to mention the Court of public opinion.  

Far from being an unintended consequence of American constitutional development, ambiguity was (and is) critical for the operation of James Madison’s separation of powers machinery.  

Ambiguity would help make it possible for the government to act, possible for the branches to cooperate – but not easy. Providing gray, ambiguous limits and boundaries was one of the most important ways to make sure that the American system would be able to respond to unexpected developments, and yet make equally sure that power would not consolidate in a single branch for too long. Ambiguity was the lubricant that allowed the machinery to function – and to last. “Great constitutional provisions must be administered with caution.” Oliver Wendell Holmes wrote in 1904. “Some play must be allowed for the joints of the machine” (Missouri, 1870).  

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2 John Stuart Mill emphasized the tremendous power of social approval and disapproval as an incentive for human behavior in democratic societies in On Liberty.  

3 As President Woodrow Wilson once remarked, if you pick up a copy of Madison’s Federalist Papers “some parts of it read like a treatise on astronomy instead of a treatise on government. They speak of the centrifugal and the centripetal forces …. The whole thing is a calculation of power and an adjustment of parts.” (Woodrow Wilson, Address to the Woman Suffrage Convention, Atlantic City, September 8, 1916).
Kansas & Texas Ry. Co. v. May 194 U.S. 267, 270 (1904). Taking the lubricant out of that machine would, one imagines, be a very risky enterprise – as it has proven to be in foreign policy, war and emergency powers.

The Constitution clearly assigns the power to raise and support an army to Congress, as well as the power to regulate interstate and international commerce; Taxes can only be imposed by legislation and Congress alone has the power to declare war. The President is Commander-in-Chief of the armed forces supplied and authorized by Congress; is charged with appointing and receiving ambassadors and with negotiating treaties which then require the consent of two-thirds of the U.S. Senate. There are, in short, some clear and specific allocations of power in the constitutional text. But there is also a great deal of ambiguity: Does the power to receive ambassadors imply the power to extend formal recognition to new governments abroad? While the President negotiates and the Senate confirms treaties, who has the power to terminate or interpret or reinterpret a treaty? (Goldwater v. Carter) The President is charged to “take care that the laws be faithfully executed” – but what is the President to do with laws that implicitly contradict or undercut one another? Can the President achieve by treaty what might otherwise be constitutionally invalid if authorized simply by ordinary statute?4 There are innumerable lacunae in the Constitution: Some have been filled by unchallenged Executive action; some through clear statutes and some through Supreme Court interpretation. And some have remained opaque and ambiguous despite the best and worst efforts of all three.

The Supreme Court, Constitutional Ambiguity and American Foreign Policy

The Supreme Court has long played a significant and – at least through the start of the Second World War – a fairly consistent role in foreign policy cases. Though the degree of

4 Missouri v. Holland, 525 U.S. 416 (1920)
deference, delegation and even abdication by Congress (Fisher 1999:932) has varied through American history, the Court consistently has maintained that: 1) The national government (Congress and President, together) has broad, but not unlimited power in foreign affairs; 2) specific limits or restrictions in the Constitution apply to foreign and domestic policy alike – including provisions assigning powers to the judicial branch itself – and these will be enforced by the Supreme Court even in war and emergencies; and 3) that Congress holds a great deal of constitutional authority (should it choose to exercise that authority) in foreign and domestic affairs alike. These tenets have not changed. What has changed are the thresholds that must be met (or exceeded) before the Court will intervene and block or reverse government actions (Silverstein 2009b) – in short, the changes have come in defining the opaque borders and boundaries of an ambiguous allocation of power.

Here there was a long and important set of cases that stretches back to the 1804 case of *Little v. Barreme*. In his opinion for the Supreme Court (there were no dissents or concurrences), Chief Justice John Marshall made clear that even where the legislature speaks in a confused or contradictory manner – whether the topic is foreign policy, war or domestic affairs – when Congress has enacted a law, that law was to be enforced as written. The *Little* case involved a poorly worded statute in which Congress, attempting to keep the United States out of a conflict between Britain and France, had authorized naval officers to seize on the high seas any ships owned or hired by an American which was traveling to a French port. As Marshall himself notes, this language seems to invite evasion: If the object was to damage French commerce, cutting off trade in only one direction would not work very well. President Adams took a broader

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5 Many insist that the 1936 case of *U.S. v. Curtiss-Wright Export Corporation*, undercuts this assertion. This badly misunderstood and often misquoted case does no such thing. (For a full discussion, see Silverstein 1997, 37-41; Fisher 2007, 2008.)

6 *Little v. Barreme* 6 U.S. 170 (1804)
view of the law, issuing orders to his naval commanders that they were to “do all that in you lies
to prevent all intercourse, whether direct or circuitous, between the ports of the United States and
those of France or her dependencies ... bound to or from French ports ....” (*Little v. Barreme*
170,178).

That this may well have been “a construction [of the law] much better calculated to give
the law] effect,” Marshall conceded. But the language of the law was the language of the law,
and like every other law, it applies to all, Naval Captains and Presidents of the United States
alike, Marshall wrote. President Adams had no constitutional authority to change the law, and
Captain Little had no excuse for not obeying the law as written. The President’s “instructions
cannot change the nature of the transaction or legalize an act which without those instructions
would have been a plain trespass.” (*Little v. Barreme*, 179). In short, no man is above the law,
and Congress has the constitutional authority to pass laws (and have them enforced by the
Executive) even if they are poorly written and unlikely to achieve their logical ends.

A second major landmark for the Court came in 1936 in *United States v. Curtiss-
Wright Export Corp.* Here the Court was asked whether Congress could delegate to the
President the authority to impose an arms embargo in the Chaco Region of Latin America if, in
the President’s view, such a measure would help to resolve the conflict. Such delegation is
certainly not explicitly provided for by the Constitution – but neither is it forbidden. The Curtiss-
Wright company, which was quite profitably selling machine guns and military aircraft to both
sides in the conflict objected, arguing that their own contract and property rights prohibited the
national government from imposing this sort of limit. They also insisted that assigning this
discretionary power to the President was a violation of the separation of powers, and an undue

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delegation of power. Writing for the Court, Justice George Sutherland – otherwise a stalwart opponent of undue delegation of power and a champion of strictly limited national power – would insist that in foreign policy the only real constraints on the national government (President together with Congress) were the explicitly prohibitory words of the Constitution itself. While he briefly noted that the President carried some independent powers in war and foreign policy, this case turned on the delegation issue, and this delegation, he argued was permitted because it was not banned. 8

Though the Court had been developing its traditional interpretation with a general bias toward congressional prerogative for some decades, it was the 1952 Steel Seizure Case (Youngstown Sheet & Tube v Sawyer) that would produce the most coherent typology that would frame the Court’s rulings for at least 30 years.

The Steel Seizure case arose in midst of the Korean War. President Harry Truman was determined to maintain a peacetime economy at home if at all possible, but to do so without allowing government procurement for the war to generate inflation pressure. To do this, the government imposed wage and price controls for basic industries. Steelworkers – who had not had a wage hike for many years, stretching back through the Second World War – were demanding a raise, but the steel manufacturers were unwilling to provide that raise unless the government approved a hike in the price of steel to offset the wage hike. But of course, since steel was a key component in almost every major U.S. industrial product (appliances, construction, automobiles, ship-building, etc), any hike in the price of steel would ripple through

8 In this same opinion, Sutherland (a very conservative, former Republican Senator from Utah) would struggle mightily to build a wall dividing what he insisted was unconstitutional overreach and unconstitutional delegation in domestic affairs from the permissive view he articulated in foreign policy. This would constitute the first wave of the conservative struggle with constitutional ambiguity, and is addressed in Section II below.
the economy, driving up inflation. The Board authorized the wage increase, but rejected the price
hike, arguing that the steel makers’ profits were sufficient to absorb the higher wages. Steel
makers disagreed and refused to raise wages. The steel workers threatened to strike. But a strike
might imperil the American war effort (bullets, jeeps, tanks, ships all were dependent on steel
supplies). This left Truman with four rather unpalatable options. He could go to Congress for
authorization to seize the steel mills, but that would not be forthcoming since he was dealing
with a rather strongly anti-labor, Republican controlled Congress; He could support a the price
hike, but of course that would be a problem for him economically; He could use an existing, anti-
labor statute (the Taft-Hartley Act) to order workers off the picket lines – which, politically, was
unacceptable since organized labor was one of Truman’s only reliable sources of political
support; Or he could assert his authority as Commander-in-Chief to support the Army and Navy
by seizing the mills, making the steel workers into temporary government employees, give them
the wages they sought, and return the remaining profits (at the current prices) to the mill owners.
Truman chose to seize the mills.

In his opinion for the Court in the Steel Case, Justice Hugo Black largely followed the
logic in *Little v. Barreme* (Turner 2008:669): There was a law available for the President (the
Taft-Hartley Act) which would suspend any strike for 90 days and force the workers back to the
mills. That the President did not like this option was not a good enough excuse. And what of the
war? There was no war going on in Youngstown, Ohio, Black noted, so any claims for
extraordinary commander-in-chief / national security arguments were misplaced. Furthermore, as
Justice Douglas emphasized in his concurrence, while the *national government* has the power to
seize private property for public use, the President alone cannot do so, since a taking of private
property must be compensated, and only Congress has the power to authorize the appropriations that would be required to pay that compensation.

This certainly settled the case at hand – but it would be Justice Robert Jackson’s concurrence that would frame the contour of the Court’s doctrine in foreign policy for at least the next 30 years. Jackson argued that there were three distinct categories to consider: At one extreme, where Congress and the President act in concert, the President is on the strongest constitutional ground, and can do just about anything in foreign policy that is not explicitly prohibited by the Constitution. At the other extreme, the President is on the thinnest of ice where he or she acts against the will of Congress: Here the President can only do that which the Constitution explicitly and clearly assigns to the Executive. In between was a third category – what Jackson labeled the ‘twilight zone’ – in which a genuinely silent Congress might leave the President in a position to act, but with the caveat that a sign of congressional opposition would quickly cast the issue over into the third and least Executive-friendly zone. Here Presidents would have to tread exceedingly cautiously, for power was ambiguous and a President might actually have to take responsibility for actions that might later be ruled illegal. This is precisely the sort of ambiguity that is so crucial to Madison’s complex and interdependent separation of powers mechanism. This sort of ambiguity requires politicians to employ the arts of persuasion and negotiation. But it is precisely this sort of ambiguity that America’s politicians, lawyers and legal and political academics – liberal and conservative alike – find increasingly untenable in our modern, legalized and juridified world (Friedman 1994, Kagan 2003, Silverstein 2009b).

Jackson’s concurrence also suggested quite clearly that the benefit of the doubt would tip to Congress: Congressional silence would not be construed as implied consent. It was this default assumption that would shift rather profoundly at the hands of an increasingly conservative U.S.
Supreme Court in the 1980s where Justices appointed by Richard Nixon and Ronald Reagan would shift the burden, increasingly insisting that Congress would have to affirmatively assert its prerogatives and no longer could count on the Court to protect legislative power. Two cases powerfully signaled this shift – one a constitutional case in foreign policy, and the other, a statutory interpretation case concerning domestic environmental regulation.

The constitutional case – *Dames & Moore v. Regan* (1981) tested the President’s authority to suspend and transfer judicial claims in the wake of the Iran hostage crisis. The domestic, statutory case was 1984’s *Chevron v. Natural Resources Defense Council*. Together they signaled a rather profound shift in the Court’s understanding of the horizontal separation of powers. In both, the Rehnquist Court shifted the default assumption concerning congressional silence, turning silence from implied rejection into implied consent, and raising the bar considerably on the affirmative acts required before the Court would constrain and limit Executive discretion in statutory and constitutional interpretation (Sunstein 1990; Eskridge and Frickey 1992, Bradley 2000; Silverstein 2009b).

After *Dames & Moore* and *Chevron* the President was far more free to broadly and creatively interpret both statutes and the Constitution itself: Should Congress not approve, Congress would have to explicitly act to stop the President: Rather than demand evidence of congressional intent to expand executive discretion, now the Court signalled it would be more likely to tolerate Executive discretion unless there was clear evidence of a congressional intent to constrain the President or foreclose the chosen option. While this seems like no more than a matter of semantics, it is not. Should Congress disapprove of a President’s actions, opponents would need a supermajority: Since it is safe to assume the President would veto any explicit effort to restrain or limit executive power, Congress would actually need 66 percent to stop the
President. This is a huge strategic advantage. Ambiguity would matter a great deal, though a great deal differently than it had in the Steel case era.

_Dames & Moore_ was an extraordinarily fraught case. When Americans were seized in Tehran, President Jimmy Carter was able to quickly freeze Iranian assets in the U.S. and abroad, providing leverage for negotiations. The ultimate resolution of the crisis had the United States agreeing to send all claims against Iran out of U.S. Courts, and assigning them to an international tribunal in Algeria. The Dames & Moore Corporation, owed significant sums by the government of Iran, objected, arguing that the President lacked the constitutional authority to shift their claims. The Supreme Court disagreed. Justice Rehnquist argued that a congressional statute (the International Economic Emergency Powers Act – IEEPA), could be construed as a broad delegation of power to the President, despite the fact that the IEEPA had been explicitly designed to limit, constrain, and reduce Executive discretion. While Rehnquist acknowledged the law’s purpose, the fact that the law failed to explicitly _prohibit_ the actions taken by the Carter administration meant that the President was free to act as he did. This reversed the burden, flipped the Steel Case default, by reducing, even eliminating the zone of twilight – reducing, eliminating ambiguity. Where before there would be times and circumstances when a President would think twice, doubt their choices, restrain their exercise of power – now the grey was becoming more black and white. Where before the default was to assume that congressional silence leaves the President on think ice. Now, congressional silence would imply consent. Where before the burden was on the president to justify his actions in the twilight zone, now the burden was on Congress to stop the President.

This shifting default assumption concerning congressional specificity was spelled out even more profoundly in the 1984 statutory interpretation case of _Chevron v. Natural Resources_
Defense Council (467 U.S. 837). Involving a challenge to an Environmental Protection Agency’s interpretation of rules under the Clean Air Act of 1977 and its later amendments, Chevron stood for the proposition that the Court would no longer entertain a discussion of legislative intent. In this case, the Reagan administration chose to interpret an environmental provision in a manner that seemed on its face to contradict the purpose of the law that was being applied. But the Court ruled that ambiguity would be left to Executive discretion. The clear message to Congress was to avoid ambiguity.

Where once the burden had been on the administration to demonstrate just exactly how and why their interpretation was consistent with the legislation, in Chevron the Court held that absent clear language that precluded their interpretation, the administration had great latitude and discretion in interpreting statutes. For Congress to prevail now would require much more than silence or even ambiguous signals of resistance. Congress would now have to anticipate the future, and preemptively close loopholes: Failure to do so would leave the administration great latitude.9

This dealt a huge – and explicit – blow to ambiguity. Where Congress “has directly spoken to the precise question” in dispute, the Court held, where “the intent of Congress is clear,” that would be “the end of the matter; for the Court, as well as the agency, must give effect to the unambiguously expressed intent of Congress.”10 And if not? Where Congress is less than “unambiguously” explicit or fails to anticipate a new problem or a new variation on an old problem? Well, the answer is simple, Justice Antonin Scalia would write more than a decade after Chevron (a case decided before he joined the Court). Congress was put on notice, Scalia wrote, that “the ambiguities it creates, whether intentionally or unintentionally, will be resolved,

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9 While Chevron formally dealt with domestic statutory interpretation, it had wide and deep impact in foreign policy as well (Posner and Sunstein 2007).
10 Chevron v. NRDC, 467 U.S. at 842–843 (emphasis added).
within the bounds of permissible interpretation, not by the courts but by a particular agency, whose policy biases will ordinarily be known” (Scalia 1989:517). If that interpretation does violence to what a majority in Congress would like to see done, well, the answer is simple enough: They can pass a new statute.11

But of course, that is easier said than done: The congressional coalition in Congress that passed the original statute has long since disbanded; new Members replace old, and the legislative agenda has since filled with an entirely different set of priorities, not to mention the many veto points that make moving legislation so hard, and that actually requires ambiguity to gain passage. Changing this default assumption, then, could rather profoundly reset the balance of power between the branches: The double-barrel of Dames & Moore and Chevron certainly seemed to suggest that there was a new normal, that the Court had moved to a new plateau, a new default position when it came to constitutional ambiguity in foreign and domestic affairs alike (Posner and Sunstein 2007; Sunstein 2005; Bradley 1998, 2000). Congress could still prevail as it always could under the traditional interpretation – but the threshold was steeply higher.

The Court seemed to have moved the line so dramatically that one might forgive a new administration for imagining that effectively there was little to worry about in terms of acting in what Justice Jackson had referred to as the twilight zone: That seemed mostly gone now, with a far cleaner distinction simply between what required congressional action and what the President might do independently of – and even in opposition to – Congress. And that seems to have been precisely the expectations of the “war council” of lawyers drawn from the White House, the Pentagon and the Justice Department (Bruff 2009:123-125; Goldsmith 2007:22-23) that

11 This is, of course, not quite what Scalia has said in one of the Court’s most recent cases dealing with the reach of federal law—see Rapanos v. United States, 547 U.S. 715 (2006).
assembled not only to advance the George W. Bush administration’s policy preferences, but assembled more particularly to embed a radical reinterpretation of the Constitution that would eradicate ambiguity in the allocation of power, and secure Executive prerogative in foreign policy, war and emergency powers permanently. This was not, however, the first effort by American conservatives to eradicate constitutional ambiguity through radical reinterpretation.

II: Conservatives and Constitutional Ambiguity – Radical Reinterpretation

Ambiguity in the foreign policy arena was apparent almost from the start. In 1793 President George Washington sought to remove the United States from an entangling alliance with France and stay out of a developing European war and issued a Proclamation of Neutrality. But where in the Constitution could one find this authority? Alexander Hamilton, then Washington’s Secretary of the Treasury, took up the constitutional challenge writing a series of papers under the pseudonym Pacificus. Hamilton took an expansive view of Executive power, arguing that the Constitution should be read as a document that allocated to the Executive broad powers limited by specific prohibitions and exclusions. Appalled by the scope of this interpretation, Thomas Jefferson (then serving as Secretary of State) wrote to James Madison noting that “Nobody answers [Hamilton] and his doctrine will therefore be taken for confessed.” Unable to formally contest his own administration’s policy, Jefferson implores Madison to respond: “For God’s sake, my dear Sir, take up your pen, select the most striking heresies and cut him to pieces in the face of the public.” 12 Madison rose to the occasion, issuing five essays under the name of Helvidius in which he articulated a strikingly different view of the meaning of a

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12 Thomas Jefferson, letter to James Madison, July 7, 1793.
limited constitution: The Executive (just as the national government as a whole) was to be understood to possess only those limited powers specifically and textually assigned to the office. Both visions of a limited government are coherent and easily supported by the text of the Constitution. Each can muster letters, essays and speeches from contemporaneous authors and commentators. But while there was great debate about how to understand the limits of a limited government there seemed almost no debate about the application of that definition: The American constitution was a unitary document, to be understood to be limited in the same ways at home and in foreign policy alike: America’s unitary Constitution can quite plausibly sustain each of these competing visions – a strong national government limited by specific prohibitions or a weak national government, empowered to perform limited and specific tasks. But it cannot sustain both. The same allocations and limits apply in foreign and domestic policy alike. This reality would create a distinct dilemma for American conservatives as they confronted the pragmatic needs of a growing international power in military and commercial activities alike: While conservatives on the Supreme Court valiantly insisted on maintaining their vision of a severely limited national government, even in the face of alarming national problems that really could not be resolved by individual states, even they were forced to rethink the international consequences of maintaining a weak, decentralized structure in the wake of America’s belated and ill-prepared entry into the First World War.

With no standing army to speak of and no national administrative state capable of transitioning the nation to a war economy, the United States was slow to enter the War and inefficient in its prosecution. With the United States emerging as a world power after the war, it seemed intolerable to risk this sort of inefficiency in the future. And yet, for conservatives, it was equally intolerable to concede the idea that domestic power should be decentralized and weak.
U.S. Senator George Sutherland, a Utah conservative, took up the challenge, writing and lecturing extensively on the subject before being tapped to serve on the U.S. Supreme Court by President Warren Harding. Shortly after joining the Court, Sutherland would have the chance to turn his theories and arguments into constitutional doctrine in a case called *United States v. Curtiss-Wright Export Corporation* (1936).

This case, often misquoted and rarely understood, had very little to do with the question of Executive power, though it is Executive power advocates who most often cite the case. In fact, *Curtiss-Wright* actually concerns the question of the limits on the power of the national government. Here the question was: Could Congress delegate to the President the power to impose an embargo on the sale of American war supplies to either or both sides of a conflict raging in the Chaco region of South America? Sutherland had explored this question in depth in a series of lectures at Columbia University which were published as a book before he joined the Court (Sutherland 1909 and 1919). In his lectures, his book, and in his Supreme Court ruling, Sutherland found a way to have his cake and eat it by radically reinterpreting the Constitution. This would be the first, but far from the last effort by conservatives to draw bright lines and cabin international and war powers (which they would embrace) from power over the domestic economy and domestic policy powers.

Foreign affairs, Sutherland argued, were governed by sovereign power, and sovereign power, he said, passes unbroken and in whole from one Sovereign (in this case the King in Parliament in England) to another (the Continental Congress and then the U.S. national government – the President *together with Congress*). All other power – domestic policy and police powers for example – passed from the Sovereign to the people and the states in the wake of the Revolution. From there, the people and states chose which powers to specifically delegate
and which to retain. In short, Sutherland crafted a theory to explain how and why the American Constitution could be split, with a Hamiltonian vision of limited government applying in foreign policy (the national government can do just about anything expect what is explicitly forbidden by the Constitution) and a Jeffersonian vision of the limits of the Constitution in domestic policy (where the national government has only limited, specific and specifically delegated powers). The problem was, and is, that the Constitution itself makes no clear distinctions between foreign and domestic policy powers. While there are some unique provisions that involve foreign and war powers, they are incorporated into the same unitary instrument as all the rest – there is no separate foreign policy or emergency powers section, no explicit or even implicit language to support a bifurcated reading.

While Sutherland’s bifurcation was an appealing and creative effort to work around the text of the Constitution, it could not hold. With the growing demands on the State in domestic affairs, combined with the economic crisis of the Great Depression, the attempt to limit the national government in domestic affairs collapsed in 1939 when Justice Owen Roberts made clear that he would cross ideological lines and endorse a far more expansive role for the national government in the domestic economy. Without his crucial fifth vote, the conservative wing could no longer hold back the tide of the national administrative state. Three of the remaining four retired, and one died.13 Ultimately, Franklin Roosevelt would name eight Associate Justices to the U.S. Supreme Court (and elevate a ninth from Associate to Chief). The FDR Court – and the Warren Court which followed it – had no interest in narrowing or blocking the exercise of national power in foreign or domestic policy, and a unitary, Hamiltonian view of national power

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13 Willis Van Deventer retired in 1937, Sutherland retired in 1938, Pierce Butler died in office in 1939 and James McReynolds retired in January, 1941. For a full discussion of this period, see Shesol 2010.
and the administrative state took hold across the board (Reich 1964; Shapiro 1968; Wiecek 2006; Powe 2009).

**Bifurcating Along New Lines**

Sutherland’s effort at radical reinterpretation failed, and the wall between centralized power in foreign policy and weak and decentralized government in domestic policy collapsed in the face of the rising administrative state. But his was not the first, nor would it be the last effort at radical reinterpretation by conservatives determined to impose clean and hard lines between the exercise and allocation of power they favored, and that which they feared.

Even if one accepts or tolerates the idea that there is to be great power (constrained by explicit limits) in the national government, that does not necessarily decide the question of where within the national government, that power would reside. Here too there was real ambiguity built into the Constitution. While one might imagine that conservatives, committed to small, decentralized government, might be expected to think this power should be controlled by the branch closest and most responsive to the people – the Congress in general, and the House in particular – the dominance of the House by urban Democrats and progressives undercut that natural affinity. And while it was liberal, Democratic administrations that had laid the foundations for the Imperial Presidency (Schlesinger 1973; Rudalevige 2005), by the early 1980s, Republicans were increasingly committed to using constitutional reinterpretation to argue that national power, particularly in foreign affairs, should be concentrated in the Executive branch. These arguments took hold in the Reagan administration, and reached a modern zenith in the administration of George W. Bush (Savage 2008, Pfiffner 2008).
While control of the White House shifted with some regularity between the Parties for two decades after FDR’s death in 1945, a Republican dominance of the Executive would then set in for next 25 years, with the GOP controlling the Presidency for all but four years between 1968 and 1992. Congress was quite another story. Democrats controlled the House of Representatives without interruption for 40 years – from the election of 1954 until 1994. In the Senate the story was not much different, with Democrats holding power – with just one exception in 1952 – from 1948 until 1980. And, having appointed every Member of the Supreme Court, FDR’s influence on the Court was long-lived, extended by two Truman appointees, and then surprisingly given a further extension by Eisenhower’s selection of Earl Warren as Chief Justice, and nomination of William Brennan as an Associate Justice.

This might help explain why conservatives, who had relied on the Supreme Court to protect federalism and block progressive legislation from the late 19th Century through to the mid-1930s, turned away from the courts well into and through the 1970s. This would change dramatically in the Reagan administration. By the early 1980s, key conservatives would come to realize that abandoning the Courts was a severe error. A new intellectual and political movement started to develop at the nation’s elite law schools (Teles 2008, Hollis-Brusky 2009) and within the Reagan administration itself that would focus intently on constitutional theories to support an increasingly autonomous Executive branch combined with a judiciary and a broader legal complex (Halliday, Karpic and Feeley 2007) of judges, legal academics and legal practitioners that would articulate, defend and embed this constitutional reinterpretation. Young, idealistic and ideological lawyers working for Edwin Meese in the Justice Department (including future


15 Indeed, from FDR’s first election in 1930 until 1994, the Republicans controlled the House just twice, winning control for one term in the 1946 election, and again, for another single term in the election in 1952.
Supreme Court Justice Samuel Alito and Chief Justice John Roberts) would be among those who would articulate and defend creative theories designed to return power to the states without sacrificing the central power and efficiency they acknowledged were needed for national security in the midst of the Cold War – but, in a twist on Sutherland, that power, they asserted, constitutionally belonged exclusively to the President.

Through legal briefs, academic writing, and government filings, these lawyers, students and academics would develop a theory built on what they argued were originalist readings of the Constitution that would eliminate constitutional ambiguity in the horizontal separation of powers (Meese 1985; Bork 1997). But while they shared with Sutherland a formal commitment to Jeffersonian limits in domestic policy, the fault line for this new bifurcation was a bit different: Here the concern was not only with the vertical separation of powers between the States and the national government, but also the horizontal separation of powers between Congress (which, in the 1970s, appeared to be a nearly wholly-owned subsidiary of the Democratic Party) and the Executive (which, thanks to the Southern Strategy articulated by Richard Nixon, and the blue-collar realignment under Reagan, put the White House solidly in Republican hands).

This new interpretation of the Constitution rejected the ambiguity suggested by a struggle for power, or Neustadt’s classic “separate institutions sharing power” formulation. Ambiguity would be traded for clear, bright lines dividing the powers of Congress (which, in their view were few, and specific and limited) and the powers of the Executive (which, they argued, were broad and largely undefined, constrained only by explicit and specific limits).

In part they rested this assertion on the differences in language in Article I, which assigns to Congress specific and defined powers (“Congress shall have the power to …”) and Article II, which states that “The Executive Power shall be vested in a President of the United
States....” This “vesting clause” would constitute the foundation for an originalist-driven claim
that the “unitary Executive” should be thought to have exclusive control of all Executive-type
power, not to mention the specific powers (such as the power to serve as Command in Chief)
assigned to the President by Article II. (Calabresi and Prakash 1994; Prakash and Ramsey 2001;
Calabresi and Yoo 2008; Fisher 2010).

Beyond domestic political reality, this view was driven by international realities as well.
Reagan took office with the Cold War in full bloom: Among the foreign policy powers his legal
team sought to assert was the authority to independently interpret – and effectively abrogate –
administration ultimately reached a negotiated compromise on this issue with the Senate, and the
underlying constitutional assertion never was tested (Silverstein 1997:159-163), but it was
asserted, briefed and defended. But this was a transitional time, and by the end of the Reagan
administration negotiations with Congress were no longer thought to be required. When
Congress imposed explicit statutory restrictions on the administration’s policy of providing aid to
the Contras, an insurgent group that was fighting to overthrow the leftist government in
Nicaragua (Draper 1991), the Reagan administration decided to simply work around and even
directly violate those restrictions. When their secret strategy was revealed, the Iran-Contra affair
would help to revive academic and popular attention to the role of law and the Constitution in
foreign affairs (Glennon 1990; Hinckley 1994; Koh 1990; Fisher 1995b; Franck 1992; Ely;

When the Cold War effectively ended with the fall of the Berlin Wall on November 9,
1989, “the end of history” (Fukyama 1989) seemed to offer the United States at least two broad
options: Here would be a chance for the United States to assert itself as the world’s sole-
superpower or, conversely, here would be an opportunity for the United States to take a more modest position, embracing a global diffusion of power (and responsibility), perhaps even moving toward genuine globalization including the development of international institutions and some measure of genuine transnational governance.

The opportunity to play a more modest role as one among many cooperating nations was embraced by some – but it was equally feared by many others. Global cooperation could also mean a United States that might readily bind itself to international obligations, a nation no longer willing to defend, never mind embed and extend, its sovereign power. This fear would lie at the root of the Reagan-Meese effort to strip out constitutional ambiguity. Where the Reagan-era lawyers were primarily concerned with federalism on the one hand, and the separation of powers on the other, what Peter Spiro refers to as the “New Sovereigntists” (Spiro 2000) were concerned about the risk (suddenly real by 1992) that a liberal, Democratic President like Bill Clinton might actually use the Executive power – for which they had argued so assiduously – to bind the nation, to diminish its authority and oblige it to abide by standards, rules, laws and procedures for which no American had voted, and for which no American legislator might be held responsible.

John Yoo was one of the leading voices among the New Sovereigntists – a group that also included the prolific Curtis Bradley and Jack Goldsmith (Bradley 1998, 1999, 2003 and 2007b; Bradley and Goldsmith 1996, 1997, 1998; Goldsmith 1997a, 1997b; Yoo 1999, 2000a, 2000b). Yoo would later write of that period that “just as nationalization created a demand for regulation of the economy at the national level,” globalization increased “the need for regulation at the international level” (Yoo 2005:301). The problems of globalization, Yoo adds, “have prompted the formation of international institutions designed to coordinate a multilateral policy
solution. As these international institutions increase in number and authority, they place increasing pressure on the Constitution's structures for democratic decisionmaking and accountability” (Yoo 2005:299).

If one is committed to a nearly unfettered Executive (as the New Sovereigntists assuredly were) how then to guarantee that a President constitutionally empowered in this way cannot easily exercise these vast powers to enter into agreements that might open America and Americans to the risks of global regulation that might bind the nation, and force Americans to sacrifice their sovereignty in everything from trade and environmental regulation to international criminal proceedings (Silverstein 2005)?

Properly understood, Yoo argues, the Constitution gives the President virtually unfettered war powers – powers with which even the Court was constitutionally powerless to interfere – along with the power to interpret or even terminate treaties as he or she sees fit. But when it comes to obligations with binding domestic effect, Yoo argues, treaties alone are not good enough – domestic legislation, passed through both Houses of Congress are required. Here, Yoo wants to again bifurcate the Constitution – and again, it really does break on domestic (effect) versus international sovereign power lines: George Sutherland for the age of globalization. While the worry about global governance was of critical importance for the New Sovereigntists, the attacks of September 11 forced the Bush legal team to focus on the first part of the equation: The assertion of exclusive Executive power in war and emergency powers.

*George W. Bush: Legal Combat*
Members of George W. Bush’s administration entered office with a clear goal. Vice President Richard Cheney – who has served as Defense Secretary for Richard Nixon and Chief of Staff to Gerald Ford, also had served on the congressional special committee investigating the Iran-Contra affair. These experiences convinced him that the Executive branch had been dangerously diminished in the wake of the Watergate scandals. The period after Watergate and the Vietnam War, Cheney told reporters on Air Force Two in 2005, was “the nadir of the modern presidency in terms of authority and legitimacy” a period in which the Chief Executive’s ability to lead “in a complicated, dangerous era” was severely diminished (Baker and VandeHei 2005). Cheney arrived at the White House in 2001 determined to restore Executive branch power and autonomy. To do so, Cheney pressed others in the administration to aggressively assert and pursue legal arguments and constitutional theories that would eradicate ambiguity in favor of unfettered executive power.

In the wake of September 11, the Bush administration assembled a “war council” of lawyers drawn from the White House, the Pentagon and the Justice Department (Bruff 2009:123-125; Goldsmith 2007:22-23). This group would be charged with conducting counter lawfare – laying down legal arguments, memos, briefs and formal rulings from the Office of Legal Council that would preemptively disable the legal filings they anticipated from non-governmental organizations, international organizations and courts “both domestic and foreign” (Bruff 2009:134). They were tasked as well to provide the legal and constitutional interpretations that would immunize administration officials from any legal jeopardy their actions might trigger under statutes such as the federal War Crimes Act, which “imposes penalties for violations of the Geneva Conventions and the laws of war” (Bruff 2009:133).
Though it would take a few years before the administration’s legal strategy would face significant challenges in the Supreme Court, the Bush/Cheney effort at the eradication of ambiguity and the assertion of Executive prerogative through radical constitutional reinterpretation ultimately failed. The administration’s overreach not only failed to achieve their constitutional goals, but generated the unintended consequence of undercutting their more immediate policy goals which they sacrificed for what they saw as the greater good of embedding the administration’s radical reinterpretation. This failure, Jack Goldsmith (an Office of Legal Counsel official in the Bush administration) writes, came about in large measure because the administration “was excessively legalistic, because it often substituted legal analysis for political judgment, and because it was too committed to expanding the President’s constitutional powers” (Goldsmith 2005:102).

Had their goal been limited to efficiently executing their chosen strategies, the Bush administration could easily have secured congressional approval for most of their major (and most controversial) measures quite easily. In the shadow of 9/11, Congress would most likely have authorized by formal statute just about anything Bush might have requested. (The 340-page Patriot Act sped through Congress in record time, with many members unaware of many of its major components.) The Bush legal team primarily focused on making broader and deeper constitutional claims: Asserting that neither Congress nor the judiciary itself constitutionally could interfere with the administration’s unlimited authority to use force where and how it saw fit; insisting that the administration was free to interpret treaties or ignore them, particularly those concerning the treatment of prisoners in general, as well as the use of “harsh interrogation techniques” (Yoo and Delahunty 2002 and 2001) – techniques that had been the subject of war crimes charges of torture brought against the Japanese after World War II. All of these and more,
they said, belonged exclusively to the Executive (Yoo 2005). Their goal was not simply to support policy choices the administration had made in the midst of an emergency, but rather to assert that these Executive actions were a matter of constitutional right, removing ambiguity about the allocation and distribution of power at the national level.

Their tools were the tools of law – legal briefs, formal memos and findings from the Justice Department’s Office of Legal Counsel; signing statements attached to legislation, court briefs and public statements by the President, the Vice President, the Attorney General and other high administration officials (Bruff 2009; Goldsmith 2007; Savage 2008; Pfiffner 2008; Bradley and Posner 2006). In all of these, the administration consistently asserted independent and unfettered constitutional powers that could not, they argued, constitutionally be interfered with by Congress or even by the Federal Courts.16

These claims were destined to be tested before the U.S. Supreme Court which – by the close of the Bush years – would include four Justices with extensive experience in the Executive branch: Two veterans of the Reagan Justice Department (Alito and Roberts17), one from the Nixon Justice Department (Scalia), and one who had served in George H.W. Bush’s Justice Department (Thomas). With these Justices in place, and with the doctrinal trend (Dames and Chevron) appearing to point in an increasingly Executive-friendly direction, the Bush legal team had every reason to imagine that their radical constitutional theories would be vindicated and embedded in the Court’s doctrine.

16 In signing a defense appropriations bill in 2005 that contained a provision banning torture, for example, President Bush wrote “The executive branch shall construe Title X in Division A of the Act, relating to detainees, in a manner consistent with the constitutional authority of the President to supervise the unitary Executive branch and as Commander in Chief and consistent with the constitutional limitations on the judicial power” (White House document, December 30, 2005).
17 Who replaced William Rehnquist – a veteran of the Nixon Justice Department.
The first significant test came in *Hamdi v. Rumsfeld* in 2004. Here the Court was asked if the Administration had the constitutional authority to seize, hold and even try those captured as enemy combatants. The Court said the national government certainly could do these things, but was unwilling to agree that the Executive could do them independently. The Court was able to dodge a direct ruling on Executive power since it was able to point to an existing statute – the 2001 Authorization for the Use of Military Force (AUMF) – as a source of implied congressional authorization. While this posed no barrier to the substantive policy, it was an early signal that *Youngstown* and Jackson’s original, harder-edged definition of the limits on Executive power might not have been permanently reworked by *Dames & Moore* and *Chevron*.

In 2005, the 4th Circuit Court of Appeals ruled that the administration could do precisely what it wanted to do – hold Jose Padilla, an American citizen accused of attempting to blow up an airliner that was inbound to Chicago’s O’Hare airport, indefinitely detain him and deny him access to civilian courts. But – Fourth Circuit Court of Appeals Judge Michael Luttig ruled – the administration could do this only because the Authorization for the Use of Military Force (a Joint Resolution of Congress) provided implied legislative support, explicitly rejecting the Executive’s claim that the Administration could do this independently, as an exercise of its inherent Article II power (*Padilla v. Hanft*, 423 F.3d 386, 2005): The policy goal stood – the aggressive constitutional reinterpretation did not.

This pattern was repeated and amplified by the U.S. Supreme Court in 2006 when it ruled that Salim Ahmed Hamdan – a driver for Osama bin Laden who had been captured in Afghanistan – could not be tried by a military commission authorized exclusively by the President. Not only would this policy violate the Geneva Accords, an international treaty to
which the United States was a party,¹⁸ but these military commissions violated the Uniform Code of Military Justice. The Uniform Code could be changed, of course – but not by the President alone since the power “to make rules for the Government and Regulation of the land and naval forces” of the United States is assigned explicitly to Congress in Article 1, Section 8 of the U.S. Constitution. Following the Court’s ruling, the administration reluctantly went to Congress for authorization which was provided almost immediately in the Military Commissions Act of 2006. This authorization would have been provided much earlier, of course, had the President asked. But while that would have delivered the President’s policy objective, it would have undercut the broader legal and constitutional objectives of fortifying the administration’s bold constitutional theories and claims for unambiguous prerogative power.

The administration did not limit its effort to assert exclusive executive control to disputes with Congress: They also argued that the judicial branch might be excluded as well. These claims, which were asserted in signing statements and Court briefs, were reinforced in the legislation finally sent through Congress in 2006 to authorize military commission in the face of the Court’s Hamdan ruling. Not only did the Military Commissions Act of 2006 codify the administration’s plan for hearings and trials, but it went further, explicitly stripping the federal courts of the authority to review habeas petitions from the Guantanamo detainees. This would set the stage for a dramatic shift by the Court: In Hamdi, Hamdan, and Padilla, the Court had refused to uphold challenges to the Administration’s substantive policies, focusing almost exclusively on the process and the separation of powers issues. Now the question would shift. Could the national government (Congress together with the President) do this? The answer was no.

¹⁸ Common Article 3 of the Third Geneva Convention precludes the use of evidence to convict a prisoner unless the prisoner has had a chance to see or hear that evidence and to present a defense.
In a 5-4 decision, Justice Anthony Kennedy ruled in Boumediene v. Bush that the right to habeas corpus can be suspended, but only if it is done as dictated by Article I, Section 9, Clause 2 of the Constitution. A simple provision in the Military Commissions Act would not do. Once more the administration had asserted unambiguous power; once again they had tried to turn gray into black and white. But far from removing ambiguity in favor of exclusive Executive-branch control, the Bush administration’s efforts were producing the opposite effect, as the Court moved away from the deference it had exhibited toward Executive control in Dames & Moore and back to the Court’s more traditional default assumptions about ambiguity as expressed in the Steel Seizure case. This return to equilibrium was not limited to the constitutional struggle: The Court already had partially rolled back the Chevron doctrine in a case handed down three months before the September 11, 2001 attacks in U.S. v. Mead (533 U.S. 218). In an 8-1 decision, the Justices ruled that courts should defer to agency interpretations only “when it appears that Congress delegated authority to the agency generally to make rules carrying the force of law.” This was a step away from Chevron, and had drawn a scornful dissent from Justice Scalia. "What was previously a general presumption of authority in agencies to resolve ambiguity in the statutes they have been authorized to enforce has been changed to a presumption of no such authority," Scalia insisted. His Brethren disagreed. In a joint opinion the other eight Justices held that there are a "great variety of ways in which the laws invest the Government's administrative arms with discretion, and with procedures for exercising it, in giving meaning to Acts of Congress." This wide range of "statutory variation has led the Court to recognize more than one variety of judicial deference, just as the Court has recognized a variety of indicators that Congress would expect Chevron deference." Mead in no way struck down or reversed Chevron, although it certainly took a step away from it.
Far from embedding a new normal, the Bush Administration’s lawfare strategy (Bruff 2009:285-294) was having the opposite effect (Goldsmith 2005, Cole 2008). John Yoo, a primary architect of the Bush legal and constitutional strategy, recognized as early as 2006 that far from being an ally in the realignment of constitutional power away from Congress and the courts and into the Executive branch, the Supreme Court would in fact be a major impediment. “What the Court is doing,” Yoo told the *New York Times* after the Court handed down the *Hamdan* decision in 2006, “is attempting to suppress creative thinking.” The Court, Yoo added, “has just declared that it is going to be very intrusive in the war on terror.” The *Hamdan* decision, Yoo said, could undercut the entire legal edifice that had been built by the Bush lawyers: “It could,” he insisted, “affect every aspect of the war on terror” (Liptak 2006). But, of course, *Hamdan* was a great defeat not for the administration’s policy preferences, but for the broader goal of the formal bifurcation of the constitution and eradication of any ambiguities that shared power imposed.

Saikrishna Prakash (2006) illuminates this important distinction between the constitutionality of the policy itself (where the Bush lawyers typically prevailed) and the question of who decides upon that policy (where they failed). Consider torture. There were, Prakash notes, two very different constitutional debates to be had: Could the United States torture? And just who has the authority to torture; who has the authority to interpret and abrogate treaties; who can detain, and who can establish and administer military commissions? Similarly, Mark Tushnet notes that the military commission decision in *Hamdan* dealt “solely with the procedural law of emergency powers” (Tushnet 2007:1452) and offered no opinion on the substantive or normative issue of the place of military commissions in American law, leaving that to prevailing political preferences.
The message in these cases was that the United States could engage in the practices in question (harsh interrogation; military commissions, truncated habeas proceedings), but that the Executive, alone, did not have the authority to make these choices. To do these things would require explicit authorization from Congress. To the degree the Court was eliminating ambiguity, it was doing so by issuing clear opinions favoring congressional and not Executive prerogatives which was arguably worse from the administration’s perspective than would have been the case had they never pressed for exclusive control. At least with ambiguity, the administration could act now, and seek post-hoc ratification (Gross 2008). By eradicating ambiguity and pressing the Court to go on record requiring an explicit congressional role, the Bush lawyers had succeeded in expanding Justice Jackson’s least permissive category (President versus Congress) and shrinking the “twilight zone” in the opposite direction – away from Executive power.

III  Liberals, Constitutional Ambiguity and the Turn to Statutory Solutions

At least since the Progressive Era, liberals have broadly accepted the notion of a unitary constitution in which the national government was allocated broad and open powers in foreign and domestic policy alike. They embraced the administrative state that emerged from Franklin Roosevelt’s New Deal as warmly as they embraced the increasing centralization of foreign policy power, first by Wilson during the First World War, again by FDR in the Second, and then by Truman, Kennedy and Johnson in the Cold War. Not only did they welcome the growth of national power in these arenas, but they embraced as well the growing imbalance of powers within the national government as the Executive Branch took ever greater control over foreign affairs, war and emergency powers (Silverstein 1997).
Though power had been shifting from Congress to the Executive in foreign policy at least since the Civil War, the National Security Act of July 26, 1947 (NSA) marked a major shift of power not only to the Executive branch, but even within the Executive branch to the West Wing of the White House itself. The NSA created the National Security Council and the office of the National Security Advisor, who would emerge as the key conduit for Executive action in war and foreign policy in the Kennedy and Johnson administrations, and ultimately, in the Nixon administration where the Secretaries of State and Defense as well as the Director of the CIA – all of whom were subject to Senate confirmation (and direct congressional oversight) – would be supplanted by the National Security Advisor, a Member of the President’s personal staff, not subject to confirmation or direct oversight.

Congress, which passed the National Security Act, was perfectly willing to delegate this broad national power to the Executive. Indeed, presidential advisor Clark Clifford noted that “Congress chose not to be involved and preferred to be uninformed" (Smist 1994:5) in a wide range of foreign policy issues (Silverstein 1997:65-100). This complacency would be shaken and broken first by congressional inability to end the war in Vietnam, and later by the revelations of the congressional investigations of the intelligence agencies, and the abuse of power that emerged in the wake of the Watergate scandal.

These disasters led many liberals to conclude that the problem stemmed from constitutional ambiguity. The separation of powers was too easily abused. While they still embraced the Hamiltonian conception of limited government, power in the national government – particularly power concerning war and emergencies – had to be formally assigned and formally checked.
This was, of course, the opposite conclusion from the one that James Madison had drawn. It was precisely the formal allocations and hard walls between the separate institutions which were the flaw James Madison identified in Montesquieu’s classic blueprint for the separation of powers. The “celebrated Montesquieu,” Madison wrote in *Federalist 49*, was quite right to state that “There can be no liberty where the legislative and executive powers are united in the same person, or body of magistrates,” but, Madison insisted, this did not mean that “these departments ought to have no partial agency in, or no control over, the acts of each other” (Madison, *Federalist 47*). In fact, it was this overlap, which would create a contest for power that would preserve liberty. In *Federalist 51* he made this explicit: The “security against a gradual concentration of the several powers in the same department consists in giving to those who administer each department the necessary constitutional means and personal motives to resist encroachments of the others. ... The interest of the man must be connected with the constitutional rights of the place.”

But this lesson was lost on liberals determined to find formal ways to control the delegated power they believed was essential in a modern world. They would put their faith in statutes and framework legislation. The first major effort along these lines would be the War Powers Resolution of 1972, which would provide the model for other similar efforts to define, narrow, specify and formalize foreign relations, intelligence oversight, and emergency powers as well.19

The pattern soon became familiar. Congress would formally give away power that had once been constitutionally ambiguous in exchange for a formal method of checking the allocation of that power after the fact. In each case, the initial proposal was a strong one that

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boldly asserted a fundamental and independent role for Congress. But to achieve a majority in each House – and actually the supermajorities needed to override a likely presidential veto of a bill that was perceived as a constraint on presidential power – compromises had to be made. And in these instances, the compromises tended to be similar – the strict assertions of power and tight constraints were moved into the law’s non-binding preamble, or into a general statement of purpose. But the formal delegation, the formal language that stripped out ambiguity and often for the first time explicitly assigned to the President power that had always previously been contested – this was left in the bill itself. The trade-off – mechanisms for legislative innovations meant to constrain, check and limit that delegated power – would soon come under a severe constitutional shadow when the Court ruled in an immigration case in 1983 (INS v Chadha, 462 U.S. 919) that legislative vetoes violated the Constitution’s requirement that every law passed by Congress had to go through both Houses and then be subject to Executive veto. If this were to be applied to the legislative vetoes in these bills, of course, that would totally undercut and defeat their purpose. This would leave liberals in Congress in the worst possible position – their legislation now formally delegated power that had until then been ambiguous and open to a struggle for power between the branches – without any formal check on that new formal delegation. This would be particularly troublesome should there ever be a court challenge: The formal delegation meant the President was acting together with Congress – Justice Jackson’s most permissive category.

One problem with this sort of anticipatory legislation is the unanticipated consequences. Consider the War Powers Resolution of 1973. No one would argue that it has achieved the objectives of those who initially pressed for this legislation: Senator Thomas Eagleton, an original sponsor, actually voted against the law when it finally reached the Senate floor, arguing
that the final, compromised version actually ended up giving the President more power, rather than less (Eagleton 1974). Before the War Powers resolution, any use of force by the President was constitutionally suspect without formal and explicit congressional authorization. This certainly did not stop Presidents from using force, but it just as certainly left them constitutionally (and politically) vulnerable. The War Powers resolution, however, was meant to remove ambiguity and relieve the high political cost of challenging a President when the nation’s security was at risk. Presidents were formally authorized to use force for a limited time at the end of which, their authority would lapse unless Congress took affirmative action to reauthorize their military exercise. This was meant to change the political equation, but in the event there ever might be a constitutional or legal challenge in Court, this sort of formal authorization clearly shifts the debate from one about a President acting, at best, in Jackson’s zone of twilight, into a debate about the limits (or lack thereof) facing a President who has explicit prior authorization from Congress.

When it became increasingly apparent that the War Powers Resolution of 1972 was failing in its objectives, the response from most liberals was not to repeal the law, or rethink the whole concept of regulating the separation of powers in foreign policy through framework statutes. The response was that we needed more law, better law. Even less ambiguity. (Ely 1993 and 1995; Koh 1990). This tendency to think that more law, or better law, is the solution for a perceived lack of law, or flawed or failed laws may be a particularly American trait (Silverstein 2009). As Karl Llewellyn has reminded generations of law students who have been assigned his book on the study of law, in America there is “no cure for law but more law” (Llewellyn 1960:102).
Some might argue that even if they failed, there was no harm in these statutes. But that ignores the degree to which such statutes can inform and influence decisions in Court. In *Dames & Moore*, for example, Justice Rehnquist turned a statute explicitly designed to reign in Executive discretion into an authorization for an unprecedented exercise of Executive power (shifting legal claims made by Americans to an international tribunal in Algeria). Rehnquist argued that though the statute had pruned back legislative delegations to the Executive – and was clearly meant to narrow and not expand Executive power – nevertheless it was still legislation that delegated power, and there was no explicit prohibition on the sort of thing that President Carter had done.

**Liberal Efforts to Eliminate Ambiguity in the Wake of 9/11**

Just as the crises of Vietnam and Watergate led liberals to embrace framework legislation as means of eradicating the ambiguity they believed President Nixon, in particular, had exploited, the Bush administration’s response to September 11 led liberals to once again worry about the risks inherent in ambiguity when it comes to war and emergency powers.

9/11, Iraq and Afghanistan brought forth a new round of liberal proposals for framework legislation that would trade formal delegation for specific, and what was hoped bounded and limited Executive discretion and prerogative in dealing with unimagined emergency. Here the argument was that in a new emergency, Presidents would seize power (and the public would thrust it upon them) so far better to get in front of this process and formalize and legislate this power shift. Bruce Ackerman (2004) offered one of the most articulate examples of a liberal argument for the eradication of ambiguity in emergency power. Ackerman argued that like it or not, another major attack on the United States would lead Americans to willingly surrender liberty across the board to preserve security. Before the next attack, then, Ackerman argued that
liberals would be wise to get ahead of the problem, and formally establish what the Constitution most clearly and distinctly does not – a separate set of rules and procedures for balancing liberty and security in the face of crisis or emergency. “To avoid a repeated cycle of repression, defenders of freedom must consider a more hard-headed doctrine,” Ackerman writes, “one that allows short-term emergency measures but draws the line against permanent restrictions” (Ackerman 2004:1030). Along a similar line, Nomi Lazar (2009) argues that liberal values can only be preserved if the state that sponsors and supports them survives. Other liberal constitutionalists argued that enforcing strict, explicit and formal interpretations of the text of the Constitution – again stripping out ambiguity – would be the best solution (Tribe and Gudridge 2004; Alexander and Prakash 2003). Still others saw no hope of restoring the traditional balance of powers and instead imagined the answer is to develop some sort of shadow-separation-of-powers system wholly within the Executive branch itself (Katyal 2006), creating in effect a substitute set of self-checking mechanisms. But of course, this wholly misses the essential Madisonian message that setting independent institutions against each other only works when the “interest of the man” is “connected with the constitutional rights of the place” (Madison, Federalist 51). That is very difficult to do when the individuals whose institutional interests must clash actually are part of the very same institution.

These solutions – both those that were attempted, such as the War Power Resolution, and those that have merely been proposed – suggest that while liberals (unlike conservatives) accept the unitary Constitution, they share with their opponents a conviction that ambiguity is the problem, and not the solution. But neither has worked and each has undermined the objectives of those who proposed them in the first place.
Ambiguity is the vital lubricant in Madison’s mechanical separation of powers. Madison was convinced that the there were two equal dangers for the new government of the United States – that it might be too weak to actually govern, and that it might be too strong, and threaten America’s hard-won liberties. The trick would be, as he put it in *Federalist 51*, to “enable the government to control the governed; and in the next place oblige it to control itself.” Ambiguity would help make it possible for the government to act, possible for the branches to cooperate – but not easy. These gray areas were one way in which the American system of “separate institutions sharing power” would allow the government to respond to unexpected developments, and yet make sure that power would not consolidate in a single branch for too long (Neustadt 1990:29). Ambiguity is essential in a constitutional system that is meant to endure: “Great constitutional provisions must be administered with caution.” Oliver Wendell Holmes wrote in 1904. “Some play must be allowed for the joints of the machine” (*Missouri, Kansas & Texas Ry. Co. v. May* 194 U.S. 267, 270 (1904). Precisely because its boundaries are unclear, in the struggle for power the Court has traditionally left a good deal of leeway in what Justice Jackson referred to as the “twilight zone” of the separation of powers, where the allocation and division of power has rough and poorly defined borders, inviting political struggle and guaranteeing a healthy dose of insecurity for those who exercise that power.

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20 As President Woodrow Wilson once remarked, if you pick up a copy of Madison’s Federalist Papers “some parts of it read like a treatise on astronomy instead of a treatise on government. They speak of the centrifugal and the centripetal forces …. The whole thing is a calculation of power and an adjustment of parts.” (Woodrow Wilson, Address to the Woman Suffrage Convention, Atlantic City, September 8, 1916).
For conservatives and liberals alike, however, ambiguity has increasingly become anathema. Ambiguity breeds abuse, as liberals learned during Watergate; and ambiguity is inefficient and can even be dangerous, as conservatives came to understand first in the aftermath of world war, and then again in an era dominated by liberal legislatures and liberal federal court judges.

Each crisis in American life leads some to conclude that the world has fundamentally changed, and that our 18th Century Constitution with its fly-wheels and counterweights can no longer govern. This question has come up with every crisis from the Civil War to World Wars I and II; from the Cold War to Vietnam, Watergate and now 9/11. Did these crises change everything? Maybe. But then again, perhaps not (Dudziak 2010; Silverstein and Hanley 2011).

Consider the Cold War – America’s first experience with an undefined and potentially permanent emergency. Unlike the wars and crises that preceded it, Kim Lane Schepple reminds us, the Cold War asked of its citizens that they sacrifice civil liberties not for the limited and defined period of a specific conflict, but rather through a promised “indefinite future of crisis and a perpetual alternation of both separation of powers and individual rights” (Schepple 2004:1015). But the Cold War, remarkably, ended on November 9, 1989. Is the wave of terror that kicked off the 21st Century different? To be sure. Does that mean our 18th Century Constitution cannot manage this new challenge? Maybe – but we have yet to see the empirical evidence that might warrant actually, formally and unambiguously handing the government in general and the Executive in particular emergency powers on a permanent basis.

“The indeterminacy of the U.S. Constitution has been a source of great controversy and consternation,” Clement Fatovic writes (2009:10), “but that indeterminacy was a deliberate feature of liberal constitutionalism in the seventeenth and eighteenth centuries.” Their goal, he
argues, “was to design a system of government that would be safe and effective both during periods of normalcy and in moments of crisis.” (Fatovic 2009:10) We bifurcate that unitary constitution at our peril.

Stripping from the Constitution the ambiguity which is essential to its safe operation makes no sense. This is not a matter of tinkering with the machinery – ambiguity was one of the essential elements in the Madisonian system that would “enable the government to control the governed” and yet, at the same time, “oblige [that government] to control itself” (Madison, Federalist 51). The trick to doing that, and a fundamental mechanism on which the Madisonian system relies, is precisely the ambiguous borders of the separation of powers.

It could be that this 18th Century constitution simply has outlived its natural life, cannot adequately guide a 21st Century superpower (Huntington 1984), and ought to be replaced or fundamentally and formally revised (Levinson 2008), as politically difficult as that might be. But far more dangerous than trying to work with an outmoded piece of machinery is to attempt to jerry-rig that same machine, whether by means of radical reinterpretation, or by means of statutory band-aides.

**Back to the Future: Restoration Not Replacement or Repair**

Are we condemned, then, to endure a system that neither works, nor can be replaced or repaired? Not necessarily. There is another way to look at this problem, which is to restore the institutional features to their original design specifications. In other words, the problem may not be the machinery as it was designed, but those who are using the machinery and the institutional and personal incentives that govern their use of that machinery.
Most of the focus – conservative and liberal alike – has been on the White House. But in a Newtonian system where, to paraphrase, an institutional actor seizing or exercising power will continue to do so until it is met by another institutional actor trying to do the same, and where each action should generate an equal and opposite reaction – the problem may not be the actor who is doing what the system was designed to encourage, but rather the problem may lie with the institutional actors who fail to press for their own constitutional rights and powers and influence. Instead of creating new constitutional interpretations, or elaborate framework legislation, we should start by looking at Congress – the equal and opposite force that is supposed to counterbalance the Executive.

Many in political science have long maintained that Congress actually has played its constitutional role, but in a quiet and informal way (Howell and Pevehouse 2007, Lindsay 1993a, 1994a; Burgin 1993).\textsuperscript{21} It is certainly the case that Congress does have a number of tools available with which to influence foreign policy -- procedural requirements, public pressure, and the influence of anticipated reactions, consultations, hearings, oversight, and floor statements to name a few. It is hard to argue that Congress has the capacity and, where it has sufficient constituent demand, the will to influence foreign policy.

But the distinction between formal and informal matters – and it matters most particularly when disputes wind up in Court. Here the distinction Richard Neustadt draws between influence and control is critical (Neustadt 1990:320-321). Yes, Congress has the tools to influence outcomes, and can and sometimes does exercise those. But it is increasingly rare that Congress insists upon its formal powers. And the failure to do so can make a significant difference when the Court is looking for clear congressional signals.

\textsuperscript{21} Though others have strenuously and compelling refuted these claims (Hinckley 1994; Fisher 1999; Schoenbrod 1993, for example).
So what explains the congressional reluctance to serve as an institutional check? Was Madison was wrong in his assumption that Members of Congress would naturally fight for the powers of their institution out of self-interest (Federalist 51)? This is an area that deserves a good deal more research attention. Part of the explanation has to do with who is serving in Congress and why they are there – and part of the explanation for that hinges not on constitutional design, but on structures and incentives Madison never imagined, particularly on the current party system, career patterns and incentives, electoral-districting, salaries and career advancement and the current system of campaign finance among others. Though the Court has constitutionalized the issue of campaign finance (Silverstein 2009:152-174), these are not issues of constitutional design, and they can be solved through repairs that lie beyond and outside the realm of constitutional interpretation and statutory frameworks.

The congressional reluctance to serve as an institutional check against the Executive no doubt has a great deal to do with changes in Congress itself. In the aftermath of Watergate, Congress was flooded with new, reform-minded legislators. They revised the seniority system of Congress and restructured its committee system, undercutting the power of seniority, but inadvertently also making the institution far more individual-focused and less institution-focused. These reforms were coupled with trends toward greater and greater partisanship – with increasing ideological cohesion – within the Legislature. The Founders’ vision of the separation of powers did not anticipate or assume the rise of parties, not to mention ideologically narrow parties (Levinson and Pildes 2006:2313). Separation of powers has not disappeared, but it now functions in a far different way than imagined by the framers. Where government is divided (the White House in the hands of one party, and one or both Houses of Congress in the hands of the
other) to all outward appearances, there is separation of powers. But where these branches are in unified hands the incentives for pressing the Executive in war and emergency powers are particularly weak. The focus on narrow individual interests driven by the structural reforms raises even more dramatically the incentives for Members to focus their attention in areas that will produce the greatest constituent support. War and emergencies offer very little appeal for a legislator: If the war is a success, the President will get (and take) all of the credit. If a war goes badly (and the past 50 years have not offered a lot in the way of victory-dividends) then why on Earth would a Member of Congress want to be there to share the blame?

Indeed, lacking personal or constituent incentives, there is reason to suspect that Congress is not particularly eager to embrace the opportunity to shape (and take responsibility for) war and emergency powers. As a general proposition, Members of Congress actually are quite pleased with the ability to delegate power (and responsibility) for hard choices in war and emergency powers to the Executive (Hinckley 1994; Schoenbrod 1993; Silverstein 1997:194-199). This was part of the appeal of the automated War Powers Resolution of 1972. And it is part of the continuing allure of automated, formalized, framework statutes that would force Congress to do what it has always had the power (but lacked the incentives) to do on its own.

Mark Tushnet (2007) points to one hopeful sign. If it is the case that the Bush legal team’s overreach has pressed the Court to move back toward a less deferential attitude about Executive power and to insist ever more on a real congressional role, it may be the goad Congress has long needed. In the Hamdan case, the Court insisted that Congress had to play a role in establishing military commissions. This ruling was, as Tushnet argues, a rather minimalist decision that simply dealt “with the procedural law of emergency powers, that is, with the mechanisms by which the executive obtains substantive authorities” (Tushnet 2007:1452). But
the Court did effectively require Congress to participate in a formal, public way, without offering clear boundaries or guidelines about the specific choices Congress would have to make. At first, Members were very reluctant to set the parameters for the law. Before *Hamdan* the presumption had been, Tushnet notes, that “constitutional law as articulated by the Supreme Court provides the only legal framework” for structuring emergency powers (Tushnet 2007:1457). But it slowly seemed to dawn on Members that *Hamdan* left them free to structure this policy themselves. “As the debate over creating military tribunals developed,” Tushnet writes, the presumption that the Supreme Court would articulate the legal framework “disappeared.” Members including John Warner, Lindsay Graham and John McCain “quickly stopped suggesting that the procedures they preferred had been, or would be, required by the Supreme Court, and shifted to asserting that those procedures were, in their view, the ones that ought to be used, without reference to adjudicated constitutional law” (Tushnet 2007:1457).

But of course this was a case with powerful (and unusual) incentives. The President had an urgent need for legislation, and was therefore not in a position to press too hard on details. And it was unusual in the fact that there were individual Members, particularly three critical Senators involved with deep personal interests in this issue: John Warner had served in World War II, John McCain in Vietnam, and Lindsay Graham who had served in the Air Force, and was recalled to duty in the First Gulf War. All three, furthermore, came from states with significant constituent interest in military affairs (There are extensive naval facilities in Virginia, a lot of retired veterans in Arizona and a number of military bases in South Carolina). The Court was opening the door, but would the military commissions experience become the new norm, or merely another exception?
If we cannot (or do not care to) replace the Constitution, we need to find a way to restore this old, but still quite functional machinery. The answer is to improve the incentives that drive the participants to play their appointed roles in the system – the answer then is to recognize that the virtues of ambiguity may outweigh its vice.

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