

October 2019

## A Statutory National Security President

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### Recommended Citation

Amy L. Stein, *A Statutory National Security President*, 70 Fla. L. Rev. 1183 (2019).

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## A STATUTORY NATIONAL SECURITY PRESIDENT

*Amy L. Stein*\*

### Abstract

Not all presidential power to address national security threats stems from the Constitution. Some presidential national security powers stem from statute, creating complicated questions about the limits of these powers delegated to the President by Congress. Scholars who have explored ways to achieve the proper balance between responsiveness and accountability have generally focused on the proper degree of deference that courts should provide to the President interpreting statutory provisions, with little confidence in the utility and efficacy of statutory constraints.

This Article counters this narrative by arguing that a key to achieving this balance may lie in such constraints. Instead of defaulting to the broad deference often provided when the President is exercising constitutional national security powers, this Article urges both courts and Congress to be more attentive to the differences between constitutional and statutory national security powers and realize that statutory national security authorities are more amenable to constraints.

Specifically, this Article focuses on procedural constraints as viable, yet underappreciated, mechanisms to enhance transparency and consistency. It is also the first to argue for a distinction between acute and chronic national security threats and to propose a sliding scale of procedural constraints that is tailored to each threat classification. It argues that such constraints pose minimal separation of powers concerns where the President is already acting under delegated statutory power, encouraging more thoughtful analyses without hindering the ability of the President to respond nimbly to national security threats.

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INTRODUCTION

The linchpin of our Republic, the separation of powers, is being tested like never before, particularly with respect to national security matters. Although courts and scholars have long debated the proper balance of national security powers among the branches, much of this analysis focuses on a president’s constitutional war powers to perform acts related to national security. But not all of a president’s national security powers come from the Constitution. Some of a president’s national security authority stems from statutes, delegated by Congress. Professor Kevin Stack has spent the last decade expertly exploring the nuances of a “statutory President,” focusing on complicated and necessary questions of deference, reviewability, and contingent delegations.<sup>1</sup> This Article

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1. Kevin M. Stack, *The Constitutional Foundations of Cheney*, 116 YALE L.J. 952, 1013–14 (2007) [hereinafter Stack, *Constitutional Foundations*]; Kevin M. Stack, *The President’s Statutory Powers to Administer the Laws*, 106 COLUM. L. REV. 263, 304–10 (2006) [hereinafter Stack, *Statutory Powers*]; Kevin M. Stack, *The Reviewability of the President’s Statutory Powers*, 62 VAND. L. REV. 1171, 1172–73 (2009) [hereinafter Stack, *Reviewability*]; Kevin M. Stack, *The Statutory President*, 90 IOWA L. REV. 539, 553 (2005) [hereinafter, Stack, *Statutory President*]

builds on his comprehensive work, focusing explicitly on the additional wrinkles in the analysis when the statutory President is exercising statutory *national security* powers, a president that I have termed the “Statutory National Security President.”

Despite over 2,100 references in the United States Code to national security,<sup>2</sup> the term is rarely defined, creating complicated questions at the intersection of constitutional and administrative law. Can a president unilaterally declare that national security is threatened without any demonstration of the threat? How is a court to review a president’s interpretation of these statutory terms? What is the proper analysis for courts in reviewing these exertions of statutory power? These challenges are exacerbated by the changing nature of national security threats. Whereas Congress may have envisioned wars when such national security provisions were enacted, national security threats now include terrorist attacks,<sup>3</sup> electric grid emergencies,<sup>4</sup> climate change,<sup>5</sup> and even global competition.<sup>6</sup> The statutory powers provided to the President to address such national security threats are varied, extensive, and underexplored in the legal literature.

This Article has three main objectives. First, it provides evidence of the extensiveness of presidential national security authority that stems from statute. These delegations are broad and largely without limitations, rendering presidents capable of expansive interpretations cloaked in statutory authority. Second, this Article demonstrates the shortcomings of judicial review as applied to presidential assertions of statutory national security. Faced with such broad grants of authority, many look to the Judicial Branch to provide a necessary check on this unbridled power. Unfortunately, the U.S. Supreme Court has yet to provide clear instruction on the proper level of deference to provide a president, as opposed to an agency, interpreting statutory provisions. Third, to address the limitations of the current muddled deference doctrine, this Article sets

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(“The only potential constitutional source of procedural constraint on presidential orders is the Fifth Amendment’s Due Process Clause.”).

2. See *infra* note 37.

3. Press Release, Office of the Coordinator for Counterterrorism, U.S. Dep’t of State, Executive Order 13224 (Sept. 23, 2001), <https://www.state.gov/j/ct/rls/other/des/122570.htm> [<https://perma.cc/5KCB-X3Q7>].

4. *DOE’s Use of Federal Power Act Emergency Authority*, OFFICE ELEC.: U.S. DEP’T ENERGY, <https://energy.gov/oe/services/electricity-policy-coordination-and-implementation/other-regulatory-efforts/does-use> [<https://perma.cc/KWT3-A7X6>].

5. Associated Press, *Congress Declares Climate Change a National Security Threat*, N.Y. POST (July 14, 2017, 1:38 PM), <https://nypost.com/2017/07/14/congress-declares-climate-change-a-national-security-threat/> [<https://perma.cc/R3P4-6UKW>].

6. *Mattis: US National Security Focus No Longer Terrorism*, BBC (Jan. 19, 2018), <http://www.bbc.com/news/world-us-canada-42752298> [<https://perma.cc/G2YV-DKVK>].

forth an alternative mechanism to provide a more effective check on a Statutory National Security President. Specifically, it urges Congress to provide explicit procedural constraints that a president must pursue prior to unlocking these statutory national security powers.

This Article identifies the perpetual problem that results from failing to clearly distinguish presidential actions that are grounded in statutory powers from those grounded in constitutional powers. Regardless of the source of the President's national security authority, the discussions generally revolve around the amount of deference given to the President on national security issues.<sup>7</sup> Where constitutional powers are used, however, the courts often revert to grand statements and entrenched doctrine about the deference to the political branches on national security.<sup>8</sup> Where statutory powers are used, the courts apply an ad hoc process to determine how much deference to afford the President.<sup>9</sup> Where presidents rely on both constitutional and statutory powers, the situation is even more muddled.<sup>10</sup>

The scope of these analyses therefore ends up somewhat distorted. Whereas constitutional national security powers are exceptionally broad, (enough so that scholars have even coined a term, “national security exceptionalism”<sup>11</sup>) statutory national security powers are more constrained. These powers are delegated by Congress, and are therefore subject to more discrete and explicit limits than the President's constitutional powers. National security powers that are delegated by Congress are also powers that originate from a political branch.<sup>12</sup> This negates some of the traditional arguments that constrain the Judiciary when reviewing the Executive, many of which argue that a political

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7. See *infra* Section II.B. As Robert Schapiro has defined it, “deference involves a decisionmaker following a determination made by some other individual or institution that it might not otherwise have reached had it decided the same question independently.” Paul Horwitz, *Three Faces of Deference*, 83 NOTRE DAME L. REV. 1061, 1072 (2008) (citing Robert A. Schapiro, *Judicial Deference and Interpretive Coordinacy in State and Federal Constitutional Law*, 85 CORNELL L. REV. 656, 665 (2000)).

8. See *infra* note 105 and accompanying text.

9. Deborah N. Pearlstein, *After Deference: Formalizing the Judicial Power for Foreign Relations Law*, 159 U. PA. L. REV. 783, 786 (2011) (“If there is no predictable or sensible way of determining how much attention the Court will pay executive views in construing foreign relations law, rule-of-law interests require, at a minimum, the development of a new understanding of the judicial relationship to the executive on questions of law interpretation.”); see *infra* notes 184–217 and accompanying text.

10. See *infra* notes 311–33 and accompanying text.

11. See, e.g., Aziz Z. Huq, *Against National Security Exceptionalism*, 2009 SUP. CT. REV. 225, 226.

12. The concept of delegated authority from Congress may be difficult for some formalists, see *Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457, 472–73 (2001), but delegations to a president may be less controversial than delegations to an agency.

branch needs to make national security decisions.<sup>13</sup> In cases where Congress has delegated national security power to a president, the court may very well be pitted between two political branches: one that delegated the authority and established parameters and one that is interpreting and executing that authority. This important distinction may change the dynamics between the branches, the willingness to tread into areas traditionally thought to be sacrosanct, and the court's ability to engage in a more searching review of the President's actions. As Justice Andrew Jackson remarked, "[p]residential powers are not fixed but fluctuate, depending upon their disjunction or conjunction with those of Congress."<sup>14</sup>

Part I of this Article highlights the unique challenges of a Statutory National Security President—one whose powers stem not from the Constitution, but from a specific statutory provision. It then provides some examples of the broad range of statutory national security powers without discernible limits, demonstrating the difficulties associated with judicial review. This Part provides a sampling of the types of broad authority that Congress has delegated to the President on national security matters and notes the ambiguity and definitional uncertainty surrounding national security terms.

Part II then tackles the deference dilemma. The historical jurisprudence on this issue has resulted in a muddled legal landscape that leaves open many questions regarding the review of a president's interpretation of a statutory national security provision. This Part first explores the jurisprudence at the intersection of constitutional, administrative, and national security law. It then provides some critical background on a few of the complications of a statutory President, particularly the compounded deference that a president receives when acting under express statutory authority *and* in the name of national security. Perhaps more importantly, the Supreme Court has found that the President is not considered an agency governed by the Administrative Procedure Act (APA).<sup>15</sup> The Court declined to apply the traditional *Chevron*<sup>16</sup> deference provided to an agency's interpretation of a statute to a president's interpretation of a statute and neglected to provide an

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13. See *infra* note 105.

14. *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 635 (1952) (Jackson, J., concurring).

15. Pub. L. No. 79-404, 60 Stat. 237 (1946) (codified as amended in scattered sections of 5 U.S.C.).

16. 467 U.S. 837 (1984). The Supreme Court in *Chevron* established a two-part test for review of an agency's interpretation of a statute. *Id.* at 842–43. At Step One, the court asks whether Congress has spoken directly to the precise question at issue. *Id.* If not, the analysis proceeds to Step Two, where the court merely asks whether the agency's answer is based on a permissible construction of the statute. *Id.* at 843.

alternative standard of review.<sup>17</sup> This leaves a critical void in the jurisprudence where encountering a Statutory National Security President, allowing inconsistencies to develop in the doctrine. For this reason and others, this Part examines the shortcomings of judicial review of this type of president.

Most scholars have sought clarification by engaging in a debate about the appropriate degree of deference that courts should provide to a president interpreting a statutory national security provision.<sup>18</sup> Although deference is an essential component of untangling these issues, resorting to deference arguments is not enough. These deference discussions fail to ask critical questions about how procedural constraints could be more effective and how Congress could remain within their constitutional powers in limiting a president's statutory powers. This Part will demonstrate why relying on deference alone is unsatisfying on a number of levels.

Given the limitations on deference, Part III of this Article proposes an alternative approach for achieving an improved balance between the Executive, Legislative, and Judicial Branches. It argues against Congress reflexively assuming that delegations of national security power should be committed to the President's discretion. Instead, with each statutory grant of national security power, it urges Congress to consider whether imposing substantive and procedural constraints may be appropriate and desirable in a broader set of circumstances than currently exists. It argues that Congress should consider systematically the question of constraints on delegations of statutory national security powers. To demonstrate the viability of such a proposal, this Article first identifies a number of existing procedural constraints that Congress has placed on a Statutory National Security President, sorting them into categories based on their degree of burden. It argues that it is time for a new approach that focuses not only on the appropriate degree of deference, but also on the right level of external constraint. It pays particular attention to procedural constraints—those that impose some sort of demonstration, hearing, reporting, or consultation—before a president acts on her statutory national security power. Although a number of scholars dismiss these procedural constraints as having questionable utility,<sup>19</sup> this Article

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17. *Franklin v. Massachusetts*, 505 U.S. 788, 800–01 (1992).

18. *See, e.g.*, Pearlstein, *supra* note 9.

19. Although some articles have made oblique mention of statutory or procedural constraints on presidential authority, few have actually explored the viability of such constraints. *See, e.g.*, David J. Barron & Martin S. Lederman, *The Commander in Chief at the Lowest Ebb—Framing the Problem, Doctrine, and Original Understanding*, 121 HARV. L. REV. 689, 693 (2008) (arguing that academic attention should shift to the question “of whether and when the President may exercise Article II war powers in contravention of congressional limitations”); Brian M.

counters that narrative with concrete examples of procedural constraints that Congress has imposed on the President prior to exercising statutory national security powers. Unlike constitutional powers, these statutory powers were granted by Congress and can be limited by Congress.<sup>20</sup> The novelty of this Article lies in both its categorization of different types of procedural constraints that Congress has already imposed on presidents, and its defense of their merits when narrowly tailored to the type of national security threat that triggers a president's statutory powers.<sup>21</sup> By

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Hoffstadt, *Normalizing the Federal Clemency Power*, 79 TEX. L. REV. 561, 565 (2001) (“The President’s pardon power, on the other hand, is largely unfettered by substantive or procedural constraints.”); Liaquat Ali Khan, *A Portfolio Theory of Foreign Affairs: U.S. Relations with the Muslim World*, 20 TRANSNAT’L L. & CONTEMP. PROBS. 377, 406 (2011) (stating that statutory constraints act as barriers in a president’s attempt to change the foreign policy statutory portfolios launched by prior administrations and fortified with federal statutes); Heidi Kitrosser, *It Came From Beneath the Twilight Zone: Wiretapping and Article II Imperialism*, 88 TEX. L. REV. 1401, 1410 (2010) (evaluating the exclusivist narrative, which posits that throughout most of American history, Congress respected presidential exclusivity, imposing few statutory constraints on presidential powers over foreign affairs or national security); Harold Hongju Koh, *Why the President (Almost) Always Wins in Foreign Affairs: Lessons of the Iran-Contra Affair*, 97 YALE L.J. 1255, 1263–64 (1988) (explaining that a number of statutes enacted in the 1970s delegated foreign affairs authority to President while subjecting the exercise of such authority to procedural constraints; however, by the late 1980s, it had become clear that the Executive was “paying only lip service” to these procedural constraints); Jason Luong, *Forcing Constraint: The Case for Amending the International Emergency Economic Powers Act*, 78 TEX. L. REV. 1181, 1201 (2000) (“[A] . . . deferential federal judiciary has effectively nullified the limited statutory constraints imposed by the [International Emergency Economic Powers Act] and the [National Emergency Act].”); Todd David Peterson, *Congressional Power Over Pardon & Amnesty: Legislative Authority in the Shadow of Presidential Prerogative*, 38 WAKE FOREST L. REV. 1225, 1252 (2003) (finding it unlikely that the Supreme Court would allow Congress to impose procedural restrictions related to pardons on the President directly); Zachary S. Price, *Funding Restrictions and Separation of Powers*, 71 VAND. L. REV. 357, 358 (2018) (evaluating congressional control over “resource-dependent” executive powers—including war powers and law enforcement—through their “near-plenary authority to restrict or condition use of available resources” relied upon to execute such powers); Stack, *Reviewability*, *supra* note 1, at 1205 (noting that the President is generally “subject to very limited procedural constraints”); Stack, *Statutory President*, *supra* note 1, at 588 (noting that procedural constraints on the president are rare, and that “the few procedural constraints [Congress] [has] impose[d] are merely consulting and reporting requirements”); Edward T. Swaine, *The Political Economy of Youngstown*, 83 S. CAL. L. REV. 263, 314–15 (2010) (“[T]he potential negative of statutory constraints is often blunted by executive branch claims that the constraints must be interpreted in light of powers reserved to Congress or to the president.”); Adrian Vermeule, *Our Schmittian Administrative Law*, 122 HARV. L. REV. 1095, 1106–31 (2009) (describing “black holes” and “grey holes”—domains in which the Executive is either explicitly or implicitly exempt from legal constraints—in national security law cases).

20. See, e.g., discussion *infra* Section III.C.1.

21. A few others have explored the merits of statutory constraints on a president. See HAROLD HONGJU KOH, *THE NATIONAL SECURITY CONSTITUTION: SHARING POWER AFTER THE IRAN-CONTRA AFFAIR* 210–12 (1990) (arguing for the imposition of procedural constraints on the



providing this consideration and incorporating the results clearly in the statute, Congress would provide the courts with both a textual and legislative history that could support future review.

This Part also acknowledges and responds to a few of the major theoretical and practical challenges for such a proposal, including unitary executive theories,<sup>22</sup> the conflation of constitutional and statutory authorities unique to the President, and the dependency on the judiciary to enforce such constraints. It nevertheless finds that the accountability and transparency merits of this proposal justify a more thoughtful analysis of the nuances of statutory national security powers that reflects a more appropriate statutory national security balance between the Executive, Legislative, and Judicial Branches.

In conclusion, this Article proposes a sliding scale of procedural constraints, tailored to the degree of the national security threat, that Congress could impose more systematically. Together, this provides Congress with a framework by which to identify the appropriate level of constraint for different situations. This proposal recognizes that not all national security threats are created equal, for the first time adopting a distinction between acute and chronic national security threats and tailoring the procedural constraints accordingly. Although this Article limits its reach to national security powers, there are much broader implications for the intersection of separation of powers and administrative law.

## I. COMPLICATIONS OF A “STATUTORY NATIONAL SECURITY PRESIDENT”

The Constitution of the United States divides the war powers of the federal government between the Legislative and Executive Branches:

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President in the execution of foreign policy initiatives); David Gray Adler, *George Bush and the Abuse of History: The Constitution and Presidential Power in Foreign Affairs*, 12 UCLA J. INT’L L. & FOREIGN AFF. 75, 130 (2007) (arguing that the Commander in Chief Clause does not support an assertion of inherent executive power; rather, the President is limited by the Constitution and statutory constraints); Gus H. Buthman, Note, *Signing Statements and the President’s Non-Enforcement Power*, 32 OKLA. CITY U. L. REV. 103, 129 (2007) (arguing that failing to impose procedural constraints on presidential exercise of non-enforcement power would violate the separation of powers doctrine).

22. See Steven G. Calabresi & Saikrishna B. Prakash, *The President’s Power to Execute the Laws*, 104 YALE L.J. 541, 543 (1994) (defining the unitary Executive as “a hierarchical executive branch, with the President in charge of all administration of the laws” (quoting Lawrence Lessig & Cass R. Sunstein, *The President and the Administration*, 94 COLUM. L. REV. 1, 4 (1994))); Martin S. Flaherty, *The Most Dangerous Branch*, 105 YALE L.J. 1725, 1755 (1996) (explaining that “a truly unitary executive” means no “legislative involvement in the manner in which the executive executes the laws”); Elena Kagan, *Presidential Administration*, 114 HARV. L. REV. 2245, 2247 (2001) (defining the unitary Executive as “a system in which all of what now counts as administrative activity is controllable by the President”).

Article I provides Congress with the power to declare war<sup>23</sup> and to raise and support the armed forces,<sup>24</sup> while Article II establishes the President as Commander in Chief of the armed forces<sup>25</sup> and directs the President with the Take Care Clause.<sup>26</sup> But as others have noted, “the precise boundaries and balance of power between the Congress and the President are left largely undefined,” reducing their usefulness in actual disputes about executive power.<sup>27</sup> As Justice Jackson has remarked, “[a] judge, like an executive adviser, may be surprised at the poverty of really useful and unambiguous authority applicable to concrete problems of executive power as they actually present themselves.”<sup>28</sup>

These ambiguities about executive power have rendered it a particularly fruitful area of scholarly analysis, particularly with regard to national security. Many scholars have focused on the grand constitutional issues such as the war powers that the Constitution divides between the Executive and Legislative Branches.<sup>29</sup> Some have focused on the famous presidential uses of emergency powers during times of war, including President Lincoln’s suspension of habeas corpus justified by the rebellion,<sup>30</sup> President Franklin Roosevelt’s order requiring Japanese Americans to be interned during World War II,<sup>31</sup> and President Harry

23. U.S. CONST. art. I, § 8, cl. 11.

24. U.S. CONST. art. I, § 8, cl. 12.

25. U.S. CONST. art. II, § 2, cl. 1.

26. U.S. CONST. art. II, § 3; *see also* RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 1 note 2 (AM. LAW INST. 1987) (citing U.S. CONST. art. II, § 3) (“In strictly domestic matters, Congress enacts laws and the President takes care that the laws be faithfully executed.”).

27. Joseph Landau, *Chevron Meets Youngstown: National Security and the Administrative State*, 92 B.U. L. REV. 1917, 1922–23 (2012).

28. *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 634 (1952) (Jackson, J., concurring).

29. *See, e.g.*, J. Richard Broughton, *What Is It Good For? War Power, Judicial Review, and Constitutional Deliberation*, 54 OKLA. L. REV. 685, 725 (2001) (“War powers disputes are constitutionally unique, however, because the Constitution itself commits the resolution of those disputes to legislators and the chief executive.”); Katharine A. Wagner, *Little v. Barreme: The Little Case Caught in the Middle of a Big War Powers Debate*, 10 J.L. SOC’Y 77, 85 (2008) (discussing how *Little v. Barreme* balances opinions of “those adhering to a strong congressional role in war and by those advocating greater deference to an inherent presidential power in time of emergency”).

30. *Compare* Habeas Corpus Suspension Act, ch. 81, § 1, 12 Stat. 755, 755 (1863), *with Ex parte Merryman*, 17 F. Cas. 144, 148 (C.C.D. Md. 1861) (No. 9,487) (holding that, under the Constitution, the President cannot suspend the privilege of the writ of habeas corpus because the Constitution gives that power to Congress alone), *and* Amanda L. Tyler, *Suspension as an Emergency Power*, 118 YALE L.J. 600, 606 (2009) (discussing how decisions of such magnitude (i.e., whether to suspend a privilege) should not be decided by one branch alone but should be reviewed by both the President and Congress).

31. *See* Exec. Order No. 9066, 7 Fed. Reg. 1407 (Feb. 19, 1942); *see also* *Korematsu v. United States*, 323 U.S. 214, 223–24 (1944) (holding that the President and Congress had the

Truman's efforts to nationalize private steel mills during the Korean War.<sup>32</sup>

This Article is different. Colin Diver has divided the President's functions into three parts: policy leader, manager, and delegate.<sup>33</sup> Whereas many scholars approach executive complications associated with the President's role as policy leader<sup>34</sup> or manager,<sup>35</sup> this Article focuses on the President as delegate. Diver's conception of the President's unique role as a "delegate" when he carries out specific responsibilities conferred by statute is "the least visible and least elevated in the President's repertoire."<sup>36</sup> This Part demonstrates that a significant amount of statutory delegations to the President involve national security. It then provides some illustrations of the varying types of national security authority that have been delegated to the President by Congress and highlights the definitional ambiguity surrounding these statutory grants. This delegation of national security powers adds a layer of complexity to an already underexplored element of the President's role as delegate. Importantly, this Part provides evidence of the extremely broad and unbounded national security powers provided to the President by Congress.

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power to exclude American citizens from certain areas based on their race because of a pressing public necessity for safety), *abrogated by* Trump v. Hawaii, 138 S. Ct. 2392 (2018); Francis P. Sempa, *The Wartime Presidency*, 26 T.M. COOLEY L. REV. 25, 44 (2009) ("Nor do I think that the Constitutional difficulty plagued him. The Constitution has not greatly bothered any wartime President. That was a question of law, which ultimately the Supreme Court must decide. And meanwhile—probably a long meanwhile—we must get on with the war." (emphasis omitted) (quoting WILLIAM H. REHNQUIST, *ALL THE LAWS BUT ONE: CIVIL LIBERTIES IN WARTIME* 48, 191–92 (1998))).

32. *Youngstown*, 343 U.S. at 585, 587 (holding that President Truman did not have the power to seize the steel mills, despite the existence of a "national emergency," and that the President's power to issue an order must stem from an act of Congress or the United States Constitution); see also Brendan Flynn, *The War Powers Consultation Act: Keeping War out of the Zone of Twilight*, 64 CATH. U. L. REV. 1007, 1012, 1026 (2015) (discussing how legal academics generally fall into one of two camps when discussing war powers—"Congress-First" or "President-First"—and how "President Truman's decision to greatly expand executive authority with respect to taking the nation to war gave his successors a powerful tool for exercising executive war-making capabilities"); Sempa, *supra* note 31, at 45 ("He did this without congressional authorization, relying on his constitutional power as Commander-in-Chief.").

33. Colin S. Diver, *Presidential Powers*, 36 AM. U. L. REV. 519, 521–22 (1987).

34. See generally Mark Seidenfeld, *A Big Picture Approach to Presidential Influence on Agency Policy-Making*, 80 IOWA L. REV. 1, 1–2 (1994); Lisa Schultz Bressman & Michael P. Vandenbergh, *Inside the Administrative State: A Critical Look at the Practice of Presidential Control*, 105 MICH. L. REV. 47 (2006).

35. See generally Cynthia R. Farina, *False Comfort and Impossible Promises: Uncertainty, Information Overload, and the Unitary Executive*, 12 U. PA. J. CONST. L. 357, 396 (2010).

36. Diver, *supra* note 33, at 521.

### A. *Statutory National Security Power*

Although many are familiar with the idea that assertions of presidential authority are not necessarily constitutionally based, this first section highlights just how much of the President's national security authority stems from statutes. Congress has included a reference to "national security" in over 2,100 statutes<sup>37</sup> and "national emergency" in over 800 statutes.<sup>38</sup> Almost 400 statutes discuss national security authority provided to the President, as opposed to other agents of the government, and over sixty provide the President with explicit power to act in the name of national security.<sup>39</sup>

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37. An advanced search on Westlaw for "national security" % PR,CA,TE,CR(rescind! Resciss! Repeal! omit!) produced all statutes that say "national security" while omitting any statutes that state any form of the words "rescind, rescission, repeal, or omit" in the prelude, caption, text, or credit. This search generated 2,179 federal statutes that referenced "[n]ational security" that had not been repealed or omitted at this time. Even this is an underestimate, given that there are other terms intended to address national security that do not use that explicit term and would not be captured by this search. *See, e.g.*, 50 U.S.C. § 4552(11) (Supp. IV 2017), which defines the term "homeland security," 50 U.S.C. § 4552(14) (Supp. IV 2017), which defines "national defense," and *infra* note 384, which discusses President Trump's interpretation of "detrimental to the interests of the United States" as a national security statute.

38. An advanced search on Westlaw for "national emergency" % PR,CA,TE,CR(rescind! Resciss! Repeal! omit!) produced all statutes that say "national emergency" while omitting any statutes that state any form of the words "rescind, rescission, repeal, or omit" in the prelude, caption, text, or credit. This search generated 812 federal statutes that referenced "[n]ational emergency" and had not been repealed or omitted at this time.

39. A search for "President" within the same sentence as "national security" in the U.S.C.A. resulted in 392 federal statutes that referenced presidential authorities relating to "national security." Thirty results gave the President the power to create exceptions, waivers, or suspend provisions in the name of national security, and thirty-four gave the President authority in the name of national security. Even back in 1939, a congressionally requested broader search for war powers resulted in "the Attorney General list[ing] ninety-nine such separate statutory grants by Congress of emergency or wartime executive powers." *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 652 (1952) (Jackson, J., concurring) (citing 39 Op. Att'y Gen. 348 (1939)). Although the scope of this Article is largely limited to "national security" statutes, the list is even broader when the search extends to statutes that provide the President with authorities to declare and address a "national emergency" *See, e.g.*, *A Guide to Emergency Powers and Their Use*, BRENNAN CENTER FOR JUSTICE (last updated Jan. 7, 2019), <https://www.brennancenter.org/analysis/emergency-powers> [<https://perma.cc/C74W-7WWT>] (identifying 136 statutory powers that may be available to the President upon declaration of a national emergency, 94 of which can be used by a President without any restrictions or constraints). In this respect, this article's focus on "national security" may be both over and under inclusive, but it provides a starting place for considering the universe of statutes that may need reconsideration. Future work would be required to address the many statutory nuances of national security, national emergencies, and those with similar impacts but without such distinct terms.

A number of national security provisions provide the President with broad and significant powers, including the power to reject sanctions,<sup>40</sup> to waive sanctions for “a significant foreign narcotics trafficker,”<sup>41</sup> to waive the prohibition against involuntary extension of enlistments of military personnel,<sup>42</sup> to waive attachment of foreign property to satisfy judgments,<sup>43</sup> and to deny a request to inspect facilities in the United States.<sup>44</sup> All of these provisions are based solely on a unilateral finding of a national security threat devoid of accountability requirements. These powers are often expansive, allowing the President to control whether or not private business enterprises can receive loans,<sup>45</sup> to build a temporary air base or fortification on private land,<sup>46</sup> to take control over communications or energy facilities,<sup>47</sup> to ration production or use of critical products,<sup>48</sup> and to instruct the Secretary of Transportation to make

40. See 50 U.S.C. § 4611(c)(1)(C) (Supp. III 2016) (“The President shall not apply sanctions under this section—(1) in the case of procurement of defense articles or defense services— . . . (C) if the President determines that such articles or services are essential to the national security under defense coproduction agreements . . .”).

41. 21 U.S.C. § 1903(g)(1) (2012) (“The President may waive the application to a significant foreign narcotics trafficker of any sanction authorized by this chapter if the President determines that the application of sanctions under this chapter would significantly harm the national security of the United States.”).

42. See 10 U.S.C. § 12305(a) (2012) (“[D]uring any period members of a reserve component are serving on active duty . . . , the President may suspend any provision of law relating to promotion, retirement, or separation applicable to any member of the armed forces who the President determines is essential to the national security of the United States.”); *Santiago v. Rumsfeld*, 425 F.3d 549, 557–59 (9th Cir. 2005) (authorizing the President’s extension of enlistment of a National Guard sergeant where the President determined that he was essential to national security and the President had issued a proclamation declaring a national emergency); *Sherman v. United States*, 755 F. Supp. 385, 387 (M.D. Ga. 1991) (explaining that the President is authorized to “extend the enlistment of members of the armed forces, regular or reserve, *if and when* ‘members of a reserve component are serving on active duty pursuant to an order to active duty’”).

43. See Foreign Sovereign Immunities Act of 1976 (FSIA), 28 U.S.C. § 1610(f)(3) (2012) (allowing the President to issue a waiver of the attachment of property of foreign states in actions to enforce judgments against them “in the interest of national security”); *Alejandro v. Republic of Cuba*, 42 F. Supp. 2d 1317, 1324 (S.D. Fla.), *vacated sub nom. Alejandro v. Telefonica Larga Distancia, de Puerto Rico, Inc.*, 183 F.3d 1277 (11th Cir. 1999); see also Oren Eisner, Note, *Extending Chevron Deference to Presidential Interpretations of Ambiguities in Foreign Affairs and National Security Statutes Delegating Lawmaking Power to the President*, 86 CORNELL L. REV. 411, 419–20 (2001) (discussing that the President is authorized to waive requirements of § 1610 in the interest of national security, which applies to foreign attached property).

44. 22 U.S.C. § 6727 (2012).

45. 50 U.S.C. § 4532 (Supp. III 2016).

46. 10 U.S.C. § 9776 (2012).

47. 47 U.S.C. § 606 (2012).

48. 50 U.S.C. § 4511 (Supp. IV 2017).

rules and regulations governing anchorage and movement in U.S. waters that may include inspecting or seizing vessels<sup>49</sup>—all in the name of national security. Because these are express statutory authorizations, a court’s analysis of these presidential actions is likely to fall into the highest and most deferential *Youngstown* category.<sup>50</sup>

A significant number of these statutory national security powers are delegated to the President without any discernible limits. For example, Congress has provided the President with the authority to force members of the armed forces to receive “an investigational new drug or a drug unapproved for its applied use” without the member’s consent “if the President determines, in writing, that obtaining consent is not in the interests of national security.”<sup>51</sup> Although forced vaccines appear to be the driving force behind this statutory authority,<sup>52</sup> one would hope that forced experimental drugs would be justified by something more than a written determination devoid of a substantive standard by which to measure any justifications. Similarly, the President can allow Coast Guard vessels to be constructed in a foreign shipyard “when the President determines that it is in the national security interest of the United States to do so.”<sup>53</sup> But the statute provides no guidance to the President on what it means to be in the “national security interest of the United States.”<sup>54</sup> This void, combined with express authorization, suggests that a court would likely default to extreme discretion to the President in such instances.

Public utilities are particularly vulnerable to these types of presidential national security actions evoked during times of national emergency. Section 706 of the Telecommunications Act of 1934,<sup>55</sup> for example, provides the President with authority to (1) suspend or amend the rules and regulations applicable to any or all jurisdictional telecommunications facilities or stations; (2) close any facility or station for wire communication and remove its equipment; and (3) allow the government to take control over any such facility or station, provided the government pay just compensation to the owners for the use of such

49. 50 U.S.C. § 191 (2012).

50. *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 637 (1952) (Jackson, J., concurring). See *infra* note 149 for a discussion of the three *Youngstown* categories.

51. 10 U.S.C. § 1107(f); see also Federal Food, Drug, and Cosmetic Act, 21 U.S.C. § 355(i)(4) (2012) (similarly requiring such informed consent).

52. Exec. Order No. 13,139, 64 Fed. Reg. 54,175 (Sept. 30, 1999).

53. 14 U.S.C. § 665(b) (2012) (“The President shall transmit notice to Congress of any such determination.”).

54. *Id.*

55. Pub. L. No. 73-416, 48 Stat. 1064 (codified as amended in scattered sections of 47 U.S.C.).

private property.<sup>56</sup> The statutory trigger for the President to exercise this authority is a proclamation by the President that “there exists war or a threat of war, or a state of public peril or disaster or other national emergency, or in order to preserve the neutrality of the United States.”<sup>57</sup> In a rare case assessing whether the conditions were necessary to trigger this statutory power, an Illinois court upheld the President’s taking control over the telephone systems during World War I as a decision lying “wholly within [his] discretion” and immunized executive agents implementing this authority from injunction.<sup>58</sup>

Even broader than the Telecommunications Act, the Federal Power Act<sup>59</sup> allows the President to take control over any energy project for “any other purpose involving the safety of the United States.”<sup>60</sup> Unlike the Telecommunications Act, the exercise of this power is not conditioned on a declaration of national emergency, but on another ambiguous national security term, “the safety of the United States.”<sup>61</sup> What exactly does that mean and what would a challenge to the President’s exercise of this authority look like?

Presidents primarily exercise these statutory national security powers through the use of executive orders.<sup>62</sup> Most executive orders contain a catch-all constitutional provision as a source of their authority to act on national security matters, with many also citing to at least one statutory provision.<sup>63</sup> As an example of such concurrent authority, President Obama’s executive order on cybersecurity reads:

By the authority vested in me as President by the  
Constitution and the laws of the United States of America,

56. 47 U.S.C. § 606(d), (e) (2012).

57. *Id.* § 606(c).

58. *Read v. Cent. Union Tel. Co.*, 213 Ill. App. 246, 254, 255 (1919) (“[T]he power of the Government in the prosecution of a war . . . is supreme . . .”).

59. Pub. L. No. 66-280, 41 Stat. 1063 (1920) (codified as amended in scattered sections of 16 U.S.C.).

60. Federal Power Act, 16 U.S.C. § 809 (2012) (“When in the opinion of the President . . . the United States shall have the right to enter upon and take possession of any project or part thereof, constructed, maintained, or operated under said license, for the purpose of manufacturing nitrates, explosives, or munitions of war, or for any other purpose involving the safety of the United States . . . [the government] shall pay . . . just and fair compensation . . .”).

61. *Id.*

62. *See generally* Henry P. Monaghan, *The Protective Power of the Presidency*, 93 COLUM. L. REV. 1, 1 (1993) (describing the use of executive orders by different presidents throughout history); Erica Newland, *Executive Orders in Court*, 124 YALE L.J. 2026, 2030–31 (2015) (discussing executive orders and their enforceability); Steven Ostrow, *Enforcing Executive Orders: Judicial Review of Agency Action Under the Administrative Procedure Act*, 55 GEO. WASH. L. REV. 659, 664–65 (1987) (“[E]xecutive orders have become an important weapon in the arsenal of presidential policymaking.”).

63. *See, e.g.*, Exec. Order No. 13,694, 80 Fed. Reg. 18,077 (Apr. 1, 2015).

including the International Emergency Economic Powers Act (50 U.S.C. 1701 *et seq.*) (IEEPA), the National Emergencies Act (50 U.S.C. 1601 *et seq.*) (NEA), section 212(f) of the Immigration and Nationality Act of 1952 (8 U.S.C. 1182(f)), and section 301 of title 3, United States Code . . . .<sup>64</sup>

But a number of executive orders rely on the “Constitution and the laws of the United States” without reference to any specific statutory authority.<sup>65</sup> Appendix A provides examples of three and a half years of executive orders related to national security, as well as the President’s stated source of authority.<sup>66</sup> Out of thirty executive orders, almost half of them were issued by a president acting under statutory authority.<sup>67</sup> One of the critical implications of all of these statutory delegations of national security power is that all of these statutes involve the President making a national security finding.

### B. *The Challenge of Defining National Security*

Although Congress frequently delegates national security authority to the President, it rarely defines the critical terms. In fact, national security has proved to be a slippery term. Although “national security” is used in over a thousand federal statutes, Congress has rarely included it as a defined term.<sup>68</sup> In fact, a search on Westlaw for “national security” as a defined term produced only three examples.<sup>69</sup> Two of the statutes define national security as “the national defense and foreign relations of the United States,”<sup>70</sup> while the third statute defines it as “the national defense, foreign relations, or economic interests of the United States.”<sup>71</sup> Though it

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64. *Id.*

65. *See, e.g.*, Exec. Order No. 13,587, 76 Fed. Reg. 63,811 (Oct. 7, 2011) (“By the authority vested in me as President by the Constitution and the laws of the United States . . .”).

66. *See infra* Appendix A.

67. *See infra* Appendix A.

68. *See, e.g.*, Trade Expansion Act of 1962, Pub. L. No. 87-794, § 232(b), 76 Stat. 872, 877 (codified as amended at 19 U.S.C. § 1862(b) (2012)); *see also* David Scott Nance & Jessica Wasserman, *Regulation of Imports and Foreign Investment in the United States on National Security Grounds*, 11 MICH. J. INT’L L. 926, 935 (1990) (“Significantly, the phrase ‘threaten to impair the national security’ is neither defined nor discussed in the statute or in the agency’s regulations. Nor is there any meaningful discussion of the standard in the legislative history. This omission highlights the extent to which determination under section 232 were intended to be discretionary, and emphasizes the flexibility accorded both the ITA and the President in making such determinations.” (footnote omitted)).

69. A search in the USCA on Westlaw for “national security” within 250 words of “definition,” using the search terms “national security” /250 definition, yielded 421 statutes.

70. 10 U.S.C. § 801(16) (2012); Classified Information Procedures Act, 18 U.S.C. app. § 1(b) (2012).

71. 8 U.S.C. § 1189(d)(2) (2012).



does not define “national security” explicitly, 50 U.S.C. § 3003(5) defines “intelligence related to national security” as involving “(i) threats to the United States, its people, property, or interests; (ii) the development, proliferation, or use of weapons of mass destruction; or (iii) any other matter bearing on United States national or homeland security.”<sup>72</sup> Very few courts have attempted to define the term, and even fewer cases have been litigated with an intention of gauging the meaning of the trigger of statutory power.<sup>73</sup>

Section 721(f) of the Foreign Investment and National Security Act of 2007 (FINSIA)<sup>74</sup> also provides eleven categories to help guide a determination of what constitutes national security: (1) domestic production for national defense; (2) capability and capacity of domestic industries for national defense; (3) control of domestic industries by foreign citizens; (4) potential effects of military sales; (5) potential effects of international technology leadership transactions; (6) critical infrastructure, including energy; (7) critical technologies; (8) foreign government-controlled transactions; (9) transactions with a country with questionable compliance with nonproliferation controls and cooperation with the United States on terrorism; (10) long-term needs for energy and other critical resources; and (11) any other factors the President or Committee deem appropriate.<sup>75</sup> But such guidance gives little assistance in determining whether an activity within any of these categories rises to the level of a national security threat.

Similar complications arise when researching national emergency powers. Although a “national emergency” is often defined as a declaration of emergency by the President or Congress,<sup>76</sup> there are a number of references to “emergencies” that are much broader, including natural disasters,<sup>77</sup> a significant home energy supply disruption,<sup>78</sup> or “any occasion or instance for which, in the determination of the President, Federal assistance is needed.”<sup>79</sup>

72. 50 U.S.C. § 3003(5) (Supp. II 2015).

73. See *Cole v. Young*, 351 U.S. 536, 538, 544 (1956); but see Laura K. Donohue, *The Limits of National Security*, 48 AM. CRIM. L. REV. 1573, 1577–78 (2011).

74. Foreign Investment and National Security Act of 2007, Pub. L. No. 110-49, 121 Stat. 246 (codified as amended at 50 U.S.C. § 4565 (Supp. III 2016)).

75. *Id.* at 253–54 (codified as amended at 50 U.S.C. § 4565(f)).

76. See, e.g., 10 U.S.C. § 1064(c)(3) (2012); 50 U.S.C. § 98h-3(2) (2012); 20 U.S.C. § 1098ee(4) (2012).

77. 49 U.S.C. § 5324(a)(2) (2012).

78. 42 U.S.C. § 8622(1)(B) (2012).

79. *Id.* § 5122(1). President Trump’s recent indications that he could use his statutory authority under the National Emergencies Act to build a border wall is yet another example of a presidential stretch of statutory interpretation of a “national emergency.” Eli Watkins, et al., *Trump: ‘May declare a national emergency’ to build wall*, CNN (Jan. 7, 2019, 9:44 AM),

These definitional analyses are further complicated by the blurring distinctions between related terms like war and non-war<sup>80</sup> and foreign and domestic national security threats.<sup>81</sup> Courts disagree about what conditions must exist for the nation to be considered at war. For example, the U.S. District Court for the District of Massachusetts created a test to determine if a conflict constitutes a war for the purposes of the Wartime Suspension of Limitations Act (the WSLA).<sup>82</sup> This test included the following factors:

(1) the extent of the authorization given by Congress to the President to act; (2) whether the conflict is deemed a “war” under accepted definitions of the term and the rules of international law; (3) the size and scope of the conflict (including the cost of the related procurement effort); and (4) the diversion of resources that might have been expended on investigation frauds against the government.<sup>83</sup>

Conversely, the U.S. District Court for the Southern District of California came to the opposite conclusion in *United States v. Western Titanium, Inc.*,<sup>84</sup> holding that the term “at war” encompassed “only those wars which have been formally declared by Congress.”<sup>85</sup> Even the

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<https://www.cnn.com/2019/01/06/politics/adam-schiff-trump-wall-cnntv/index.html> [<https://perma.cc/3GQ3-BKCK>] (“I may declare a national emergency [to secure money for a border wall between the U.S. and Mexico] dependent on what’s going to happen over the next few days . . .”).

80. See MARY L. DUDZIAK, *WAR TIME: AN IDEA, ITS HISTORY, ITS CONSEQUENCES* 8 (2012) (“[W]artime has become normal time in America. . . . Wartime has become the only kind of time we have, and therefore is a time within which American politics must function.”); Claire Jabbour, *Combating Impunity: Contractor Liability for Torture During Times of War Under the Wartime Suspension of Limitations Act*, 5 AM. U. BUS. L. REV. 137, 138 (2015) (“In 2008, Congress redefined war . . . to include a modern interpretation; war is not limited to official declarations, but it also includes congressional or presidential authorizations of military force. Numerous wars have occurred between the end of WWII and 2008, all without formal declarations of war by Congress.” (footnote omitted)).

81. See *Mitchell v. Forsyth*, 472 U.S. 511, 533 (1985) (distinguishing surveillance of foreign threats to national security from surveillance of domestic threats to national security); see also Norman C. Bay, *Executive Power and the War on Terror*, 83 DENV. U. L. REV. 335, 376–77 (2005); Roy E. Brownell II, *The Coexistence of United States v. Curtiss-Wright and Youngstown Sheet & Tube v. Sawyer in National Security Jurisprudence*, 16 J.L. & POL. 1, 14–15 (2000) (proposing six categories within the *Youngstown* framework, further distinguishing between foreign and domestic national security affairs).

82. *United States v. Proserpi*, 573 F. Supp. 2d 436, 449, 454–55 (D. Mass. 2008).

83. *Id.* at 449.

84. No. 08-CR-4229-JLS, 2010 WL 2650224 (S.D. Cal. July 1, 2010).

85. *Id.* at \*3.

Supreme Court has noted that the answer to whether the nation is at war may change depending on the context.<sup>86</sup>

As the social and technological landscapes of the United States develop and change, the methods of war change as well. With the rise of technology, the weapons of “cyber war” have become equally, if not more, devastating—with the added bonus of never having to leave the country.<sup>87</sup> “Thus, [the] lack of perceptibility and the general sense of detachment citizens feel from cyber-related activities could allow for the U.S. Government, at the sole direction of the President, to prepare for and engage in a perpetual state of cyber war.”<sup>88</sup> As just one example, the recent indictment against thirteen Russian nationals for interference in the 2016 presidential elections<sup>89</sup> has been described as an “act of war.”<sup>90</sup> In short, the ease of initiating cyberattacks has begun to blur the lines between when the country is at war and peace.<sup>91</sup> The fact that “war” is no longer reserved solely for nations, but now also includes non-state actors, has also changed the landscape of what constitutes modern-day war.<sup>92</sup>

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86. *Lee v. Madigan*, 358 U.S. 228, 231 (1959) (“Congress in drafting laws may decide that the Nation may be ‘at war’ for one purpose, and ‘at peace’ for another. It may use the same words broadly in one context, narrowly in another.”).

87. Tyler K. Lowe, *Mapping the Matrix: Defining the Balance Between Executive Action and Legislative Regulation in the New Battlefield of Cyberspace*, 17 *SCHOLAR* 63, 90 (2015). For example, Russia is allegedly hacking into databases and email systems of the U.S. Departments of Defense and State to obtain personnel information, as well as targeting the electric grids. Deborah Barfield Berry & Erin Kelly, *States Move to Protect Voting Systems from Russia with Little Help from Congress*, USA TODAY (Feb. 16, 2018, 12:00 PM), <https://www.usatoday.com/story/news/politics/2018/02/16/states-move-protect-voting-systems-russia-little-help-congress/338411002/> [<https://perma.cc/S8QZ-5RB6>]; Ellen Nakashima, *Hacks of OPM Databases Compromised 22.1 Million People, Federal Authorities Say*, WASH. POST (July 9, 2015), [https://www.washingtonpost.com/news/federal-eye/wp/2015/07/09/hack-of-security-clearance-system-affected-21-5-million-people-federal-authorities-say/?utm\\_term=.831b264f735a](https://www.washingtonpost.com/news/federal-eye/wp/2015/07/09/hack-of-security-clearance-system-affected-21-5-million-people-federal-authorities-say/?utm_term=.831b264f735a) [<https://perma.cc/5CPW-TRS9>]; David E. Sanger, *Russian Hackers Appear to Shift Focus to U.S. Power Grid*, N.Y. TIMES (July 27, 2018), <https://www.nytimes.com/2018/07/27/us/politics/russian-hackers-electric-grid-elections-.html> [<https://perma.cc/EG4Q-NLM7>].

88. Lowe, *supra* note 87.

89. *See generally* Indictment, *United States v. Internet Research Agency LLC*, No. 1:18-cr-00032-DLF, 2018 WL 914777 (D.D.C. Feb. 16, 2018) (putting forth the specific charges against each Russian for interference in the election).

90. Natasha Bertrand, *Mueller’s Indictment Puts Details Behind Claims of Russian Interference*, ATLANTIC (Feb. 16, 2018), <https://www.theatlantic.com/politics/archive/2018/02/muellers-indictment-reveals-details-of-russian-election-interference/553625/> [<https://perma.cc/3PCD-CD4W>].

91. John Yoo, *Embracing the Machines: Rationalist War and New Weapons Technologies*, 105 CAL. L. REV. 443, 446 (2017).

92. *Id.* at 458 (“States no longer have a monopoly on international violence that can rise to the level of armed conflict. . . . By expanding the area of conflict and employing asymmetric, unconventional tactics and weapons, al-Qaeda showed that nonstate actors could wield the destructive power once held only by national militaries. . . . The evolution of nonstate actors into

Others note the persistence of this definitional problem, and that “it is all the more troubling in an era in which wars are increasingly being fought by and against individuals who are members of loosely organized groups, under no formal military command, who wear no uniforms, and who never have and likely never will sign an international protocol or treaty.”<sup>93</sup> Even the Supreme Court in *United States v. Curtiss-Wright Export Corp.*<sup>94</sup> made a distinction between international and domestic problems, suggesting that domestic national security issues may be treated with less deference or more procedural constraints than foreign national security issues.<sup>95</sup>

Multiple sources discuss the inability of the government to define “national security” for multiple reasons, including the U.S. Court of Appeals for the District of Columbia, which has stated that “national security defies precise definition because it is preambulatory in nature.”<sup>96</sup> *Cole v. Young*<sup>97</sup> remains one of the only Supreme Court cases where the Court tried to define “national security” as it was used in the Summary Suspension Act.<sup>98</sup> That statute provided the “heads of certain departments and agencies of the Government summary suspension and unreviewable dismissal powers over their civilian employees, when deemed necessary ‘in the interest of the national security of the United States.’”<sup>99</sup> Although the Court affirmed the President’s extension of this removal power to employees of all Government agencies,<sup>100</sup> including the plaintiff in that case, who had been discharged for his association with communists,<sup>101</sup> the Court held that “national security” had to actually concern the safety of the nation and not be a simple catch-all for general welfare.<sup>102</sup> The

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organized, military operatives contributes a more general uncertainty of what constitutes ‘war’ in the modern era.”).

93. Gordon Silverstein & John Hanley, *The Supreme Court and Public Opinion in Times of War and Crisis*, 61 HASTINGS L.J. 1453, 1456 (2009).

94. 299 U.S. 304 (1936).

95. *Id.* at 319–29. This foreign/domestic distinction can also be found in the Fourth Amendment context. See *United States v. United States District Court for the Eastern District of Michigan, Southern Division*, 407 U.S. 297, 321–22 (1972) (holding that a judicial warrant must issue before the government may engage in electronic surveillance of domestic threats to national security, but “express[ed] no opinion as to [the surveillance of the] activities of foreign powers”).

96. *Am. Sec. Council Ed. Found. v. FCC*, 607 F.2d 438, 456 & n.38 (D.C. Cir. 1979) (“One could no more define with specificity ‘national security’ than one could define ‘a more perfect Union,’ ‘Justice,’ ‘domestic Tranquility,’ ‘the common defence,’ ‘the general Welfare,’ ‘the Blessings of Liberty,’ or, for that matter, ‘the pursuit of Happiness.’”).

97. 351 U.S. 536 (1956).

98. *Id.* at 538.

99. *Id.*

100. *Id.* at 542.

101. *Id.* at 540.

102. *Id.* at 544.

Court ruled that the term “national security” was used in the Act in a definite and limited sense, relating to activities “directly concerned with the protection of the Nation from internal subversion or foreign aggression, and not those which contribute to the strength of the Nation only through their impact on the general welfare.”<sup>103</sup>

Those seeking to challenge any such executive orders that rely on statutory power need to overcome hurdles related to standing,<sup>104</sup> the political question doctrine,<sup>105</sup> separation of powers,<sup>106</sup> and other threshold questions.<sup>107</sup> These issues are not addressed in this Article, but they have been addressed in depth elsewhere. Even if plaintiffs prevail on such threshold questions, the lack of statutory definitions leaves substantial ambiguity surrounding a president who invokes these powers.<sup>108</sup>

This lack of statutory definition is particularly troubling where Congress conditions a presidential exercise of authority upon a national

103. *Id.* If Congress intended “interest of the national security” to be equated with the general welfare of the United States, Congress would not have limited the Act to the enumerated agencies. *Id.* at 544–45.

104. *See* *Hein v. Freedom from Religion Found., Inc.*, 551 U.S. 587, 608–09 (2007); *Utah Ass’n of Ctys. v. Bush*, 455 F.3d 1094, 1098 (10th Cir. 2006); *Chenoweth v. Clinton*, 181 F.3d 112, 113 (D.C. Cir. 1999); *United Presbyterian Church in the U.S.A. v. Reagan*, 738 F.2d 1375, 1378 (D.C. Cir. 1984); *Ostrow*, *supra* note 62, at 669–70 (explaining that courts have found standing to enforce agency actions that fail to comply with an executive order).

105. *See* *Baker v. Carr*, 369 U.S. 186, 211, 217 (1962) (holding that a political question would exist in a case where there is an “impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion”); *Chi. & S. Air Lines v. Waterman S.S. Corp.*, 333 U.S. 103, 111 (1948) (“[T]he very nature of executive decisions as to foreign policy is political, not judicial. Such decisions are wholly confided by our Constitution to the political departments of the government, Executive and Legislative. They are delicate, complex, and involve large elements of prophecy. They are and should be undertaken only by those directly responsible to the people whose welfare they advance or imperil. They are decisions of a kind for which the Judiciary has neither aptitude, facilities nor responsibility and which [have] long been held to belong in the domain of political power not subject to judicial intrusion or inquiry.”); *El-Shifa Pharm. Indus. Co. v. United States*, 607 F.3d 836, 845 (D.C. Cir. 2010) (precluding the claim against the President’s decision to launch a strike as being consistent with the War Powers Resolution, the court held that “the decision to take military action is a ‘policy determination of a kind clearly for nonjudicial discretion’” (quoting *Baker*, 369 U.S. at 217)).

106. *No Oilport! v. Carter*, 520 F. Supp. 334, 352 (W.D. Wash. 1981) (citing separation of powers as the basis of their decision).

107. *See generally* *Newland*, *supra* note 62 (discussing the challenges involved with judicial review of executive orders). Additionally, courts have held that citizens cannot sue for the enforcement of an executive order that finds its power under Article II of the Constitution, making it more difficult for Congress to know which executive orders are still valid. *Id.* at 2076. *But see* Jonathan R. Siegel, *Suing the President: Nonstatutory Review Revisited*, 97 COLUM. L. REV. 1612 (1997) (arguing that nonstatutory review, which avoids the sovereign immunity of the United States by making the fictional assumption that a suit against a government officer is not against the government, could be used against the President).

108. *See* *Newland*, *supra* note 62, at 2053–54.

security finding. With undefined terms and broad delegated powers, a president is free to make the requisite finding with limited accountability. Judicial review remains the most likely opportunity for providing a check on a statutory Executive, but, as discussed below, the lack of a defined deference standard—combined with historical deference to the Executive on national security—neutralizes the hope that the judiciary will serve as an effective external constraint. Regardless of one’s constitutional philosophy on checks and balances, this situation should cause some concern. The lack of a more precise statutory definition results in a president who is unfettered when interpreting a statutory national security provision and courts that are uncertain in how to address challenges to a president’s exercise of statutory national security. This ambiguity in statutory terms related to national security necessarily leads to discussions about the proper level of deference provided to a president interpreting them.

## II. THE DEFERENCE DILEMMA OF A STATUTORY NATIONAL SECURITY PRESIDENT

Historically, presidents acting in the name of national security are provided great deference in the law.<sup>109</sup> The deference analysis becomes even more complicated when a president is acting under *statutory* national security power.<sup>110</sup> In these situations, Congress, a branch under the Constitution, has also been charged with shared authority over foreign affairs and national security, and has delegated specific powers to the President.<sup>111</sup> This delegation raises many of the same administrative law questions that arise when an agency interprets a statute. Was there reasoned decision-making? What is the basis for this interpretation? How much deference should be provided to the President’s interpretation of a statute? Such an analysis could easily get tied up in a *Curtiss-Wright*, *Youngstown*, *Chevron* knot, and this is where most scholarship has placed its focus—deference.

If these statutory provisions related to national security were to be interpreted by agencies, the problems would be constrained to the world

109. “Deference—the substitution by a decisionmaker of someone else’s judgment for its own—is a pervasive tool of constitutional doctrine.” Horwitz, *supra* note 7, at 1061; *accord infra* Section II.A.

110. This analysis assumes that there is a clear grant of statutory national security authority at issue. It is even more complicated when the source of statutory authority is unclear, as in *Regan v. Wald*, *Snepp v. United States*, and *Haig v. Agee*, where “inferences from executive power have prevailed over countervailing inferences from constitutional rights, with the result that congressional authorization of executive action has been found on the basis of unclear or fragmentary legislative materials.” Peter E. Quint, *Reflections on the Separation of Powers and Judicial Review at the End of the Reagan Era*, 57 GEO. WASH. L. REV. 427, 433 (1989).

111. U.S. CONST. art. I, § 8.

of administrative law and *Chevron* deference. But, for better or worse, Congress often decides to delegate power directly to the President himself, particularly in matters of national security.<sup>112</sup> Congress has been particular in choosing the procedures for invoking different statutory powers related to national security. In a number of statutes, Congress provides full authority to the head of an agency to assess the national security threat.<sup>113</sup> In a number of other statutes, Congress provides a two-tiered system under which the President acts only after being prompted by an agency.<sup>114</sup> In yet a third category, Congress leapfrogs over the relevant agency head and provides full discretion to the President to initiate action as a response to a national security threat. It is this last category of statutory national security that is the focus of this Article.

This Part explains the historical backdrop of the Statutory National Security President, then proceeds to explain how the deference to a president on national security actions is complicated by the Supreme Court's holding that neither the APA nor *Chevron* applies to the President's interpretation of a statute. Despite decades of analysis, the deference jurisprudence and scholarship leave a number of ambiguities surrounding presidential interpretation of a national security statute unresolved.

### A. *Constitutional National Security Deference*

The judiciary has spent the last century exploring the appropriate limits, if any, on a president acting "in the name of national security." Before initiating a broader discussion focused on the Statutory National Security President, this Section provides the historical foundation, primarily based on a president's constitutional national security powers,

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112. Koh, *supra* note 19, at 1263 ("The vast majority of the foreign affairs powers the President exercises daily are not inherent constitutional powers, but rather, authorities that Congress has expressly or impliedly delegated to him by statute.").

113. 5 U.S.C. § 7532 (2012) ("[T]he head of an agency may suspend without pay an employee of his agency when he considers that action necessary in the interests of national security. To the extent that the head of the agency determines that the interests of national security permit, the suspended employee shall be notified of the reasons for the suspension."). Section 824a of the Federal Power Act provides that the Department of Energy may determine that "an emergency exists by reason of a sudden increase in the demand for electric energy, or a shortage of electric energy or of facilities for the generation or transmission of electric energy, or of fuel or water for generating facilities, or other causes, the Commission shall have authority, either upon its own motion or upon complaint, with or without notice, hearing, or report, to require by order such temporary connections of facilities and such generation, delivery, interchange, or transmission of electric energy as in its judgment will best meet the emergency and serve the public interest." 16 U.S.C. § 824a(c)(1) (Supp. III 2016).

114. *See, e.g.*, Trade Expansion Act of 1962, Pub. L. No. 87-794, § 232(b), 76 Stat. 872, 877 (codified as amended at 19 U.S.C. § 1862(b)(1)(A) (2012)).

from *United States v. Curtiss-Wright Export Corp.*,<sup>115</sup> to *Youngstown Sheet & Tube Co. v. Sawyer*.<sup>116</sup>

On one side of the debate are those who adhere to *Curtiss-Wright* and national security exceptionalism, a concept that stems from the President's near absolute constitutional powers over foreign affairs and national security, extreme deference to the President's national security acts, and limited to no judicial review.<sup>117</sup> National security exceptionalism applies different rules to executive decision-making in contexts where there is a perceived need to protect national security interests.<sup>118</sup> Defenders of national security exceptionalism argue that policymaking in the national security context is fundamentally different and necessitates greater deference to the Executive as the authority on foreign policy and national security affairs.<sup>119</sup> Many of these scholars point to political constraints as a sufficient check on the Executive in such situations.<sup>120</sup> Some adherents to a unitary executive theory also find that external checks beyond the political process disrupt the President's authority.<sup>121</sup>

These supporters of a unitary Executive on national security also find strong support in the jurisprudence. Based on theories of national security exceptionalism and separation of powers, courts have rejected judicial review of executive orders where the President relies upon statutory power devoid of discernible limits or definitions. For example, a number of decisions hold that abuse of discretion claims against the President are

115. 299 U.S. 304 (1936).

116. 343 U.S. 579 (1952).

117. See *Curtiss-Wright Exp. Corp.*, 299 U.S. at 319–29; Sudha Setty, *Obama's National Security Exceptionalism*, 91 CHI.-KENT L. REV. 91, 99–108 (2016).

118. SUDHA SETTY, NATIONAL SECURITY SECRECY: COMPARATIVE EFFECTS ON DEMOCRACY AND THE RULE OF LAW 5 (2017); Setty, *supra* note 117, at 92.

119. See, e.g., Robert Knowles, *National Security Rulemaking*, 41 FLA. ST. U. L. REV. 883, 919 (2014); Setty, *supra* note 117, at 92. See generally, Margaret B. Kwoka, *The Procedural Exceptionalism of National Security Secrecy*, 97 B.U. L. REV. 103 (2017) (discussing the different procedural defaults available to decision makers who deal with national security issues).

120. See, e.g., Kwoka, *supra* note 119, at 163–64 (discussing the importance of public oversight of governmental secrecy—especially that which surrounds national security); Daryl J. Levinson, *Foreword: Looking for Power in Public Law*, 130 HARV. L. REV. 31, 66 (2016) (discussing positive effects of short-term executive constraints, i.e. presidential productivity and public support for the Executive Branch). *But see*, e.g., Jules Lobel, *Emergency Power and the Decline of Liberalism*, 98 YALE L. J. 1385, 1431 (1989) (documenting the expansion of the Executive's emergency power to confront foreign dangers and proposing new directions for limiting emergency powers through development of a more multinational system).

121. See, e.g., Steven G. Calabresi & Kevin H. Rhodes, *The Structural Constitution: Unitary Executive, Plural Judiciary*, 105 HARV. L. REV. 1153, 1158 (1992); Kagan, *supra* note 22, at 2364; Lessig & Sunstein, *supra* note 22, at 97–99; Warren F. Schwartz & Wayne McCormack, *The Justiciability of Legal Objections to the American Military Effort in Vietnam*, 46 TEX. L. REV. 1033, 1045 (1968).



beyond the reach of judicial review, particularly during wartime.<sup>122</sup> During World War I, for example, Congress passed a resolution granting the President power to take possession and control of communication systems for the duration of the war “whenever he shall deem it necessary for the national security or defense.”<sup>123</sup> In 1919, the Supreme Court in *Dakota Central Telephone Co. v. South Dakota*<sup>124</sup> declined to review the President’s exercise of this power, explaining that questions of potential abuse of executive discretion are beyond the reach of judicial review, and created the “reviewability doctrine.”<sup>125</sup> Decades later, in *Dalton v. Specter*,<sup>126</sup> the Supreme Court again held that “[w]here a statute, such as the [Defense Base Closure and Realignment Act of 1990], commits decisionmaking to the discretion of the President, judicial review of the President’s decision is not available.”<sup>127</sup> Similarly, in *In re Spier Aircraft Corp.*,<sup>128</sup> the U.S. Third Circuit Court of Appeals withheld review of the President’s use of statutory authority to make requisitions of machinery tools “whenever he determines that the need is immediate and that ‘all other means of obtaining the use of such property upon fair and reasonable terms have been exhausted.’”<sup>129</sup>

Supporters of national security exceptionalism also often point to the Supreme Court’s decision in *Curtiss-Wright*, which stated that if “success for our aims [is to be] achieved, congressional legislation . . . within the

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122. See, e.g., *Dakota Cent. Tel. Co. v. South Dakota*, 250 U.S. 163, 181, 183–84 (1919) (finding H.R.J. Res. 309, 65th Cong. (1918) properly vested the President with exclusive control of the telephone service during wartime); *Motions Sys. Corp. v. Bush*, 437 F.3d 1356, 1359, 1362 (Fed. Cir. 2006) (declining to review a president’s invocation of statutory authority in a non-national security setting).

123. H.R.J. Res. 309; see also *Dakota Cent.*, 250 U.S. at 181–83 (discussing H.R.J. Res. 309 and the power it conferred upon the President); *Motions Sys.*, 437 F.3d at 1361 (declining to review a president’s invocation of statutory authority in a non-national security setting).

124. 250 U.S. 163 (1919).

125. *Id.* at 184; see also Stack, *Reviewability*, *supra* note 1, at 1173 (“The reviewability doctrine represented in *Dakota Central* grew into a general barrier to review of the determinations that public officials, [including] the President, made to satisfy the conditions for exercising statutory powers.”).

126. 511 U.S. 462 (1994).

127. *Id.* at 477; see also *Chi. & S. Air Lines, Inc. v. Waterman S.S. Corp.*, 333 U.S. 103, 112 (1948) (“We therefore agree that whatever of [the Civil Aeronautics Act] emanates from the President is not susceptible of review by the Judicial Department.”); *United States v. George S. Bush & Co.*, 310 U.S. 371, 380 (1940) (“No question of law is raised when the exercise of [presidential] discretion is challenged.”).

128. 137 F.2d 736 (3d Cir. 1943).

129. *Id.* at 739 (footnote omitted) (quoting 50 U.S.C. app. § 721 (1940)) (citing *Hirabayashi v. United States*, 320 U.S. 81, 93 (1943)) (“The scope for the exercise of judgment and discretion by the President . . . to meet the exigencies of war is a wide one and it is not for the courts to sit in review of the action taken in organizing war effort at home or the operation of armed forces in direct contact with the enemy.”).

international field must often accord to the President a degree of discretion . . . which would not be admissible were domestic affairs alone involved.”<sup>130</sup> The deference accorded to the President in the international realm is based in Article II of the Constitution, which has often been interpreted to carry with it certain inherent powers to represent the nation in foreign matters and to protect security interests.<sup>131</sup> Because of these inherent powers and the structure of Article II, the courts are highly deferential to the President when reviewing actions pursuant to statutes relating to “command of the armed forces, empowering him to act in foreign crises, and implementing treaties that he has negotiated.”<sup>132</sup> Although *Curtiss-Wright* did not involve the President’s statutory national security powers, scholars have argued that such a statutory delegation would further strengthen its deferential presumption.<sup>133</sup>

Other scholars have noted the persistency of *Curtiss-Wright*’s strong deference to the President on national security matters, pointing to cases like *Dames & Moore v. Regan*,<sup>134</sup> where the Supreme Court upheld an executive order by President Carter that suspended pending lawsuits of American citizens against Iran as part of his negotiations during the Iran Hostage Crisis.<sup>135</sup> Even where the President’s executive orders harm U.S. citizens, as was the case here, courts are still prone to extreme deference where the domestic impacts are incidental to some larger foreign action.<sup>136</sup> Important for our purposes, the Court analyzed the matter on statutory as opposed to constitutional grounds without explicit discussion of the President’s statutory power to suspend lawsuits against Iran.<sup>137</sup>

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130. *United States v. Curtiss-Wright Exp. Corp.*, 299 U.S. 304, 320 (1936); *accord* Jide Nzelibe, *The Uniqueness of Foreign Affairs*, 89 IOWA L. REV. 941, 943–44, 959 (2004).

131. *See* U.S. CONST. art. II; *Curtiss-Wright*, 299 U.S. at 322 (referencing the inherent power of the President to represent the nation in foreign affairs and to protect security interests as legal reason to defer to the judgment of the President); William N. Eskridge, Jr. & Lauren E. Baer, *The Continuum of Deference: Supreme Court Treatment of Agency Statutory Interpretations from Chevron to Hamdan*, 96 GEO. L.J. 1083, 1100–01 (2008) (premising the *Curtiss-Wright* deference standard on the President’s Article II powers).

132. Eskridge & Baer, *supra* note 131, at 1164; *accord* *Al-Bihani v. Obama*, 619 F.3d 1, 38–39 (D.C. Cir. 2010) (Kavanaugh, J., concurring in the denial of rehearing en banc) (stating that the practice of judicial restraint when a president is acting pursuant to a national security provision of a statute “stems from at least three interpretive sources . . . one based on Article II of the Constitution”).

133. *See* Eskridge & Baer, *supra* note 131 (citing *Curtiss-Wright*, 299 U.S. at 320) (arguing that while *Curtiss-Wright* deference rests on authority granted by Article II, the level of deference increases when Congress delegates power pursuant to its Article I authority).

134. 453 U.S. 654 (1981).

135. *Id.* at 686.

136. Brownell, *supra* note 81, at 104.

137. *Dames & Moore*, 453 U.S. at 680–82. Looking to Congress’s intent in passing federal statutes, such as the International Claims Settlement Act of 1949, the Court reasoned

Instead, the Court relied on the statutory history of the International Emergency Economic Powers Act (IEEPA) and the Hostage Act to uphold the President's sanctions, finding that "Congress acquiesced in the President's action[s]."<sup>138</sup> What Professor Harold Koh calls "executive initiative, congressional acquiescence, and judicial tolerance" ensures that "the President almost invariably wins in foreign affairs"—and national emergencies.<sup>139</sup> Although courts have relied upon *Curtiss-Wright* for the better part of a century for the proposition that the President retains certain extraconstitutional powers in matter of foreign affairs and national security,<sup>140</sup> its influence has waned over time as judges and scholars alike have expressed skepticism about the notion of a president's "inherent powers."<sup>141</sup>

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"Congress . . . implicitly approved the practice of claim settlement by executive agreement." *Id.* at 680. Supporting this decision was the Court's decision in *United States v. Pink* (and implicitly *United States v. Belmont*), which recognized the President's power to "enter into executive agreements without obtaining the advice and consent of the Senate." *Id.* at 682 (citing *United States v. Pink*, 315 U.S. 203 (1942)); *see also* *United States v. Belmont*, 301 U.S. 324, 330 (1937) ("[T]he Executive had authority to speak as the sole organ of that government. The assignment and the agreement in connection therewith did not . . . require the advice and consent of the Senate."); Landau, *supra* note 27, at 1945 (discussing the "expanded national security power[s]" given to the President by the Court in *Dames & Moore*).

138. *Dames & Moore*, 453 U.S. at 688.

139. Koh, *supra* note 19, at 1291.

140. *See* Michael D. Ramsey, *The Myth of Extraconstitutional Foreign Affairs Power*, 42 WM. & MARY L. REV. 379, 380–81 & n.8 (2000) ("For prominent judicial citations of *Curtiss-Wright*, see *Clinton v. City of New York*, 524 U.S. 417, 445–46 (1998) (citing *Curtiss-Wright* as evidence of the President's broad discretion in foreign affairs); *Sale v. Haitian Ctrs. Council, Inc.*, 509 U.S. 155, 188 (1993) (same); *Perpich v. Department of Defense*, 496 U.S. 334, 354 n.28 (1990) (quoting with approval *Curtiss-Wright*'s assertion of extraconstitutional power in foreign affairs); *Webster v. Doe*, 486 U.S. 592, 605–06 (1988) (citing *Curtiss-Wright* in support of the President's broad role in foreign affairs); *Toll v. Moreno*, 458 U.S. 1, 10 (1982) (citing *Curtiss-Wright* as evidence of the federal government's "broad authority over foreign affairs"); *National Foreign Trade Council v. Natsios*, 181 F.3d 38, 50 (1st Cir. 1999) (quoting with approval *Curtiss-Wright*'s observations about extraconstitutional power in foreign affairs), *aff'd on other grounds sub nom. Crosby v. National Foreign Trade Council*, 120 S. Ct. 2888 (2000); *see also Velasquez v. Frapwell*, 160 F.3d 389, 392–93 (7th Cir. 1998) (referring to the inconclusive historical debate over *Curtiss-Wright*), *vacated in part*, 165 F.3d 593 (7th Cir. 1999)." (italics added).

141. *See* Zivotofsky *ex rel. Zivotofsky v. Kerry*, 135 S. Ct. 2076, 2090 (2015) ("*Curtiss-Wright* did not hold that the President is free from Congress's lawmaking power in the field of international relations."); KOH, *supra* note 21, at 94 (describing the "withering criticism" of *Curtiss-Wright*); Erwin Chemerinsky, *Controlling Inherent Presidential Power: Providing a Framework for Judicial Review*, 56 S. CAL. L. REV. 863, 886 (1983) ("Commentators are in almost universal agreement . . . that 'Sutherland uncovered no constitutional ground for upholding a broad, inherent, and independent power in foreign relations.'" (quoting Charles A. Lofgren, *United States v. Curtiss-Wright Export Corporation: An Historical Reassessment*, 83 YALE L.J. 1, 30 (1973))); Louis Fisher, *The Law: Presidential Inherent Power: The "Sole Organ" Doctrine*, 37 PRESIDENTIAL STUD. Q. 139, 149 (2007) ("Most of the scholarly studies of *Curtiss-Wright* in professional journals and books have been highly critical of Sutherland's decision."); Michael J.

Applying these national security principles to the Statutory National Security President, one might expect the President to be near bulletproof. But these judicial decisions have been narrowed by other cases which have found that there are many instances where judicial review of the President's decision is appropriate.<sup>142</sup> These cases provide ammunition for those concerned by an unfettered President, devoid of checks and balances, acting with a blank check on national security matters. Critics of national security exceptionalism argue that using a more deferential standard for national security policymaking threatens democratic values.<sup>143</sup> They point to the inadequate safeguards against the President limited only by political constraints.<sup>144</sup>

In *Youngstown Sheet & Tube Co. v. Sawyer*, the Supreme Court famously struck down President Truman's executive order that directed his Commerce Secretary to seize and take over the operation of most of the country's steel mills during the Korean War.<sup>145</sup> Fearing a strike by United Steelworkers of America, President Truman justified this order by stating that a halt in production of weapons and ammunition would

Glennon, *Two Views of Presidential Foreign Affairs Power: Little v. Barreme or Curtiss-Wright?*, 13 YALE J. INT'L L. 5, 12 (1988) ("The first thing to be said about this breathtaking exegesis concerning 'plenary powers' is that it is the sheerest of *dicta*."); Julius Goebel, Jr., *Constitutional History and Constitutional Law*, 38 COLUM. L. REV. 555, 572 n.46 (1938) (calling *Curtiss-Wright* a "perversion"); C. Perry Patterson, *In re the United States v. the Curtiss-Wright Corporation*, 22 TEX. L. REV. 286, 297 (1944) (describing *Curtiss-Wright* as "(1) contrary to American history; (2) violative of our political theory; (3) unconstitutional, and (4) unnecessary, undemocratic, and dangerous"); Ramsey, *supra* note 140, at 380 ("Much academic labor has been devoted to proving *Curtiss-Wright* wrong.").

142. See, e.g., *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 588–89 (1952).

143. See Setty, *supra* note 117, at 91–92, 111–12. See generally Ganesh Sitaraman & Ingrid Wuerth, *The Normalization of Foreign Relations Law*, 128 HARV. L. REV. 1897, 1935–49, 1963, 1972 (2015) (arguing that "[d]eclarations of blanket exceptionalism should no longer be a justification for divergent treatment" of foreign and domestic affairs).

144. See Thomas P. Crocker, *Presidential Power and Constitutional Responsibility*, 52 B.C. L. REV. 1551, 1557 (2011) ("It is not enough to say that separation of powers is 'obsolete,' or that the political process is sufficient to check the modern executive (as some do) without also acknowledging the normative constraint of the executive's constitutional responsibilities." (footnote omitted)); David A. O'Neil, *The Political Safeguards of Executive Privilege*, 60 VAND. L. REV. 1079, 1083 (2007) ("There is no reason to believe—and, in fact, powerful reason to doubt—that the political process alone will yield a satisfactory allocation of authority . . . ."); Setty, *supra* note 117, at 106 ("Further, a variety of political and structural incentives have created a situation where exceptionalism reigns and accountability from Congress or the courts does not exist: ideological alignment with the president, concern that national security is an issue within the president's sole jurisdiction, complacency, and an overly formalistic judiciary that chooses to defer to the president instead of engaging in its counter majoritarian obligation to protect fundamental rights have all contributed to the lack of engagement on the question of redress for violations of human and civil rights." (footnote omitted)).

145. *Youngstown Sheet & Tube Co.*, 343 U.S. at 589; Exec. Order No. 10,340, 17 Fed. Reg. 3139 (Apr. 8, 1952).

“immediately jeopardize and imperil our national defense,”<sup>146</sup> claiming authority under the Vesting Clause and the Take Care Clause.<sup>147</sup> Important for our purposes, the Supreme Court struck down the order in part because no statute authorized the President to take possession of private property, noting that presidential military power does not extend to labor disputes.<sup>148</sup>

Although President Truman did not rely on any statutory powers in his efforts to nationalize steel mills, Justice Jackson’s famous concurring opinion provides a three-category framework for providing deference to a president acting under congressional authorization in times of national security, finding that statutory authority plays a critical role in the analysis.<sup>149</sup> Justice Jackson’s concurrence suggests that statutory powers provide additional legitimacy beyond constitutional powers. As he noted, “[i]n view of the ease, expedition and safety with which Congress can grant and has granted large emergency powers, certainly ample to embrace this crisis, I am quite unimpressed with the argument that we should affirm possession of them without statute.”<sup>150</sup>

Courts have been especially willing to engage in more robust judicial review where constitutional rights are implicated. In *Rostker v. Goldberg*,<sup>151</sup> for instance, the Supreme Court acknowledged that even for issues regarding national security, courts still have the “ultimate responsibility to decide the constitutional question.”<sup>152</sup> In *Holder v.*

146. Exec. Order No. 10,340, 17 Fed. Reg. 3139.

147. *Youngstown Sheet & Tube Co.*, 343 U.S. at 587; Exec. Order No. 10,340, 17 Fed. Reg. 3139; Christopher S. Yoo et al., *The Unitary Executive in the Modern Era, 1945–2004*, 90 IOWA L. REV. 601, 621 (2005).

148. *Youngstown Sheet & Tube Co.*, 343 U.S. at 585–87.

149. The first category consists of situations where the President acts under direct express or implied statutory authorization. *Id.* at 635 (Jackson, J., concurring). In these instances, actions are accorded “the strongest of presumptions and the widest latitude of judicial interpretation.” *Id.* at 637. The second category consists of situations where the President acts on an issue on which Congress is silent. *Id.* In those cases, the President “can only rely upon his own independent powers, but there is a zone of twilight in which he and Congress may have concurrent authority, or in which its distribution is uncertain.” *Id.* The third category consists of situations where the President acts directly contrary to the intent of Congress. *Id.* In those situations, the President’s claim to power must be “scrutinized with caution, for what is at stake is the equilibrium established by our constitutional system.” *Id.* at 638; see also *Dep’t of Navy v. Egan*, 484 U.S. 518, 530 (1988) (stating that “courts traditionally have been reluctant” to limit the President’s exercise of authority as it relates to foreign affairs “unless Congress specifically has provided otherwise”).

150. *Youngstown Sheet & Tube Co.*, 343 U.S. at 653.

151. 453 U.S. 57 (1981).

152. *Id.* at 67 (“We of course do not abdicate our ultimate responsibility to decide the constitutional question, but simply recognize that the Constitution itself requires such deference to congressional choice.”).

*Humanitarian Law Project*,<sup>153</sup> the Supreme Court again reiterated the importance of the judiciary in reviewing presidential national security actions.<sup>154</sup> The Court stated that litigation that “implicates sensitive and weighty interests of national security and foreign affairs” warrants deference to Congress’s authority over national defense and military affairs, but that “concerns of national security and foreign relations do not warrant abdication of the judicial role.”<sup>155</sup>

### B. *Statutory Presidential Deference*

Amidst this backdrop of judicial review of constitutional national security actions lies the added complications associated with reviewing presidential actions mingled with statutory national security authority. As expected, judicial review of these actions focuses largely on questions of deference.<sup>156</sup> Although there are also questions associated with the degree of deference given to a president’s assessment of the relevant facts,<sup>157</sup> this Section focuses on *Chevron*-like deference and the President’s authorization to interpret a statutory provision, including the triggers and limits of such authorization.

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153. 561 U.S. 1 (2010).

154. *Id.* at 34.

155. *Id.* at 33–34 (“We do not defer to the Government’s reading of the First Amendment, even when such interests are at stake. We are one with the dissent that the Government’s ‘authority and expertise in these matters do not automatically trump the Court’s own obligation to secure the protection that the Constitution grants to individuals.’”); *see also Rostker*, 453 U.S. at 64–65 (discussing the Court’s role in “judg[ing] the constitutionality of an Act of Congress”); *United States v. U.S. Dist. Court*, 407 U.S. 297, 320 (1972) (“We cannot accept the Government’s argument that internal security matters are too subtle and complex for judicial evaluation. Courts regularly deal with the most difficult issues of our society. There is no reason to believe that federal judges will be insensitive to or uncomprehending of the issues involved in domestic security cases.”).

156. *See, e.g., Hamlily v. Obama*, 616 F. Supp. 2d 63, 69 (D.D.C. 2009).

157. *See Utah Ass’n of Ctys. v. Bush*, 316 F. Supp. 2d 1172, 1186 (D. Utah 2004) (explaining that, in reviewing the President’s action, courts do not have the authority to inquire into “the existence of facts on which [the President’s] discretionary judgment is based,” but do have a limited scope of review to “ensure [the President] was in fact exercising the authority conferred by the act”); Robert M. Chesney, *National Security Fact Deference*, 95 VA. L. REV. 1361, 1363 (2009) (“[M]any arguments in favor of deference are unpersuasive, but that deference nonetheless may be justified in limited circumstances.”); Emily A. Kile, Note, *Executive Branch Fact Deference as a Separation of Powers Principle*, 92 IND. L.J. 1635, 1637–38 (2017) (citing *Zivotofsky ex rel. Zivotofsky v. Kerry*, 135 S. Ct. 2076 (2015); *Holder v. Humanitarian Law Project*, 561 U.S. 1 (2010)) (arguing Executive Branch fact deference serves the functionally same separation of powers role as political question doctrine); Pearlstein, *supra* note 9, at 801–07 (“[T]he deference the Court appears to be exercising [in *Munaf v. Geren*, 553 U.S. 674 (2008)] is not to an interpretation by the executive of its own legal authority, but rather to its assessment of the relevant facts . . .”).

Long before *Chevron*, the Supreme Court doctrine evolved to reflect “the reviewability doctrine,” in which the Court “exclude[d] judicial review of the determinations or findings the President makes to satisfy conditions for invoking grants of statutory power.”<sup>158</sup> In 1946, Congress enacted the APA, which allowed for review of these public officials.<sup>159</sup> Forty years later, the Supreme Court developed the *Chevron* doctrine, providing a two-part test for review of an agency’s interpretation of a statute that provides agencies with significant deference.<sup>160</sup> This led to a robust application of *Chevron* and mounds of scholarship exploring its implications for administrative law.<sup>161</sup>

Yet just a few years after *Chevron* was decided, a lesser known Supreme Court case made an important clarification. In *Franklin v. Massachusetts*,<sup>162</sup> the Supreme Court held that the APA does not authorize judicial review of presidential action.<sup>163</sup> As Professor Evan Criddle has noted, the Court recognized that although

“[t]he President is not explicitly excluded from the APA’s purview,” it stressed that “he is not explicitly included, either,” and expressed concern that extending administrative procedure to presidential action could implicate “separation of powers and the unique constitutional position of the President.” In the absence of a particularly clear statement from Congress, the Court reasoned that it should not construe the APA to limit presidential lawmaking. The Court thus construed the APA to categorically exempt presidential lawmaking from the ordinary requirements of administrative procedure.<sup>164</sup>

In the aftermath of *Franklin*, courts have determined that the President’s actions “are not reviewable for abuse of discretion under the APA,”<sup>165</sup> and have declined to apply *Chevron* deference to presidential

158. Stack, *Reviewability*, *supra* note 1.

159. Pub. L. No. 79-404, § 8, 60 Stat. 237, 242 (1946).

160. *See supra* note 16 and accompanying text.

161. A search for law review articles with *Chevron* in the title results in 465 articles. *See, e.g.*, Peter H. Schuck & E. Donald Elliott, *To the Chevron Station: An Empirical Study of Federal Administrative Law*, 1990 DUKE L.J. 984 (1990); Richard J. Pierce, Jr., *Chevron and Its Aftermath: Judicial Review of Agency Interpretations of Statutory Provisions*, 41 VAND. L. REV. 301 (1988).

162. 505 U.S. 788 (1992).

163. *Id.* at 801.

164. Evan J. Criddle, *When Delegation Begets Domination: Due Process of Administrative Lawmaking*, 46 GA. L. REV. 117, 198–99 (2011) (alteration in original) (footnotes omitted) (quoting *Franklin*, 505 U.S. at 800).

165. *Detroit Int’l Bridge Co. v. Canada*, 133 F. Supp. 3d 70, 101 (D.D.C. 2015) (quoting *Franklin*, 505 U.S. at 801); *accord* *Detting v. United States*, 948 F. Supp. 2d 1116, 1128–29 (D.

interpretations of statutes.<sup>166</sup> But if not *Chevron*, what deference? Should presidents receive more or less than *Chevron* deference from the courts? “In the absence of review under the APA, [some] courts have continued to apply this reviewability doctrine in suits challenging the President’s claims of statutory power.”<sup>167</sup>

Many courts have invoked Justice Jackson’s scaled deference in place of applying *Chevron* deference.<sup>168</sup> Courts often begin by asking whether a challenged presidential action is authorized by statute.<sup>169</sup> Once the court finds authorization, the level of deference given to the President to interpret gaps or ambiguity within the statute varies.<sup>170</sup> Courts strike down presidential action in the name of national security where it is overbroad.<sup>171</sup> And where presidential action is contrary to a statute, for instance, triggering Justice Jackson’s third category and analysis, courts have found the President to have exceeded his authority.<sup>172</sup> Many have

Haw. 2013); *Ancient Coin Collectors Guild v. U.S. Customs & Border Prot.*, 801 F. Supp. 2d 383, 403 (D. Md. 2011), *aff’d*, 698 F.3d 171 (4th Cir. 2012).

166. *See, e.g.*, *Alejandre v. Cuba*, 42 F. Supp. 2d 1317, 1334 (S.D. Fla. 1999) (“The Court finds that the principle enunciated by the Supreme Court in *Chevron* does not apply to the case at hand. . . . The President’s decision to exercise his waiver is given great deference by this Court; however, his interpretation of the breadth of that waiver cannot belie the legislative authority from which it stems. Accordingly, the Court declines to adopt the Government’s argument that it apply *Chevron* in order to defer to the President’s interpretation of section 117(d)’s waiver authority.”), *vacated sub nom. Alejandre v. Telefonica Larga Distancia de P.R., Inc.*, 183 F.3d 1277 (11th Cir. 1999).

167. *Stack, Reviewability*, *supra* note 1, at 1173.

168. *See Al-Bihani v. Obama*, 619 F.3d 1, 45 (D.C. Cir. 2010) (Kavanaugh, J., concurring in the denial of rehearing en banc) (“When interpreting a statute, a court ascertains what the statute means by looking at the text and employing various interpretive principles and canons of statutory construction.”); *Landau, supra* note 27, at 1948 (“[T]he Supreme Court has tended to return to the ordinary administrative law requirement of a delegation as a necessary [requirement] of judicial deference.”); *Stack, Statutory President*, *supra* note 1, at 557 (“In [*Youngstown*]’s framework, the question of whether the president acted with statutory authority is a critical trigger . . .”).

169. *See, e.g.*, *Hamlily v. Obama*, 616 F. Supp. 2d 63, 68–69 (D.D.C. 2009) (“It is [the] limited role [of the courts] to determine whether definitions crafted by either the Executive or the Legislative branch, or both, are consistent with the President’s authority . . . .” (quoting *Boumediene v. Bush*, 583 F. Supp. 2d 133, 134 (D.D.C. 2008))).

170. *See, e.g., id.* at 69 (“Although there is some disagreement regarding the extent of the deference owed the Executive in this setting, it is beyond question that some deference is required.”).

171. *See Indep. Gasoline Marketers Council, Inc. v. Duncan*, 492 F. Supp. 614, 616, 618–21 (D.D.C. 1980) (striking down the President’s efforts to impose a ten cent per gallon “conservation fee” where the President argued that reliance on foreign oil threatened national security, but the court noted that such a conservation fee would affect *all* gasoline sales and the impact on imports would be only indirect).

172. *See, e.g., Chamber of Commerce v. Reich*, 74 F.3d 1322, 1332, 1339 (D.C. Cir. 1996) (finding the President had exceeded his authority under the Procurement Act in issuing an Executive Order barring federal contractors from hiring replacement workers during an economic



acknowledged the limitations of *Youngstown*,<sup>173</sup> however, noting that the concurrence remains silent as to what level of deference courts should accord the President in interpreting statutes.<sup>174</sup>

Courts and scholars have yet to agree on a uniform standard to apply in these situations. In *Hamdan v. Rumsfeld*,<sup>175</sup> the Supreme Court declined to apply *Chevron*, instead invalidating a presidential order on the grounds that the order violated the Uniform Code of Military Justice (UCMJ).<sup>176</sup> The Court only allowed the Executive to provide factual materials relevant to the Court's own interpretation, but the Court ultimately interpreted the statute.<sup>177</sup> Writing for the majority, Justice John Paul Stevens stated that a lower degree of deference was due to the President's determinations because of Congress's choice of language in the statute at issue.<sup>178</sup> The Court contrasted the language between two sections of the UCMJ, the first of which allows military-court rules to depart from federal-court rules whenever the President "considers" conformity impracticable, and the second of which requires uniformity across different military courts "insofar as practicable."<sup>179</sup> In his concurrence, Justice Anthony Kennedy found that the second section calls for a lower degree of presidential deference because the language does not ask for a subjective determination by the President of what he "considers" to be practicable.<sup>180</sup> In his dissent, Justice Clarence Thomas advocated for "a heavy measure of [judicial] deference" to presidential interpretations of statutory grants of authority.<sup>181</sup>

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strike because the Order was preempted by an independent statute, the National Labor Relations Act).

173. See, e.g., Vermeule, *supra* note 19, at 1141–42 ("In a world of multiple and very vague statutory delegations bearing on national security, foreign relations, and emergency powers, judges have a great deal of freedom—not infinite freedom, of course—to assign *Youngstown* categories to support the decisions they want to reach, rather than reach decisions based on the *Youngstown* categories.").

174. See *id.* at 1127 ("[Some] courts say that it is unsettled whether and when *Chevron* supplies the relevant framework for presidential and administrative interpretations of statutes bearing on national security and foreign relations."); Stack, *Statutory President*, *supra* note 1, at 557–59; see also Landau, *supra* note 27, at 1927 (noting the difficulties in determining whether presidential action is taken with overt or "implicit" congressional backing in the *Youngstown* analytical framework).

175. 548 U.S. 557 (2006).

176. *Id.* at 624–25; see also Eskridge & Baer, *supra* note 131, at 1122 n.148 ("For example . . . the Court declined to apply the *Chevron* framework, notwithstanding strong arguments that . . . the President . . . [was] acting pursuant to congressional delegations of lawmaking authority.").

177. *Hamdan*, 548 U.S. at 622–24.

178. *Id.* at 623–24.

179. *Id.* at 622 (emphasis omitted) (quoting 10 U.S.C. § 836(b) (2000)).

180. *Id.* at 640 (Kennedy, J., concurring in part).

181. *Id.* at 680 (Thomas, J., dissenting).

Other courts, however, have accorded the President *Chevron*-like deference and argued for a standard of review comparable to that applied to agency interpretations. In *Chamber of Commerce of the United States v. Reich*,<sup>182</sup> the Chamber of Commerce brought an action challenging an executive order on the grounds that the order was contrary to the National Labor Relations Act, the Procurement Act, and the Constitution.<sup>183</sup> The U.S. District Court for the District of Columbia ruled that the judicial deference accorded to the President's interpretation of a statute granting his authority should be analogous to the deference given to agency interpretation of statutes which the agency administers.<sup>184</sup> Citing *Chevron*, the court stated the President's interpretation, "so long as it is reasonable and not inconsistent with the plain language of the statute," is entitled to deference.<sup>185</sup> The D.C. Circuit acknowledged the district court's application of *Chevron* to the President's interpretation, but neither party challenged the court's degree of deference.<sup>186</sup> The D.C. Circuit again cited to *Chevron* in *Al-Bihani v. Obama*<sup>187</sup> for the assertion that "in situations where deference to the Executive is considered appropriate, such as cases implicating national security—the court defers to the Executive's authoritative interpretation of the statute if the Executive's interpretation falls within [the] zone of reasonableness."<sup>188</sup> In a separate statement, Circuit Judge Stephen Williams clarified that while he agreed that presidential interpretations are owed "great weight," he did not "see much if any daylight between 'great weight' and the *Chevron* deference."<sup>189</sup> In addition, the U.S. District Court for the Eastern District of Virginia has used the rationale behind *Chevron* to argue for similar deference in presidential interpretation of a treaty.<sup>190</sup>

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182. 897 F. Supp. 570, *rev'd*, 74 F.3d 1322 (D.C. Cir. 1996).

183. *Id.* at 573–74.

184. *Id.* at 577–78.

185. *Id.* (citing *Chevron, U.S.A., Inc. v. Nat. Res. Def. Counsel, Inc.*, 467 U.S. 837, 844 (1984)).

186. *Chamber of Commerce v. Reich*, 74 F.3d 1322, 1325 (D.C. Cir. 1996).

187. 619 F.3d 1 (D.C. Cir. 2010) (en banc).

188. *Id.* at 45 (Kavanaugh, J., concurring in the denial of rehearing en banc) (citing *Chevron*, 467 U.S. at 842–45); *see also* Landau, *supra* note 27, at 1976 & n.378 (stating that *Al-Bihani* is an example of a court giving "broad deference to the Executive Branch").

189. *Al-Bihani*, 619 F.3d at 55 (Williams, J., concurring in the denial of rehearing en banc).

190. *United States v. Lindh*, 212 F. Supp. 2d 541, 556 (E.D. Va. 2002) ("The rationale of *Chevron* is that a statutory ambiguity is essentially a delegation of authority by Congress to the reasonable agency to resolve the ambiguity. By analogy, treaty interpretation and application warrants similar *Chevron* deference to the President's interpretation of a treaty, as American treaty-makers may be seen as having delegated this function to the President in light of his constitutional responsibility for the conduct of foreign affairs and overseas military operations.").

Similarly, in *Hamdi v. Rumsfeld*,<sup>191</sup> the Supreme Court extended *Chevron*-like deference toward a presidential interpretation of a statute.<sup>192</sup> The Authorization for Use of Military Force (AUMF)<sup>193</sup> grants the President with statutory authority to use “all necessary and appropriate force against . . . nations, organizations, or persons” associated with the September 11, 2001, terrorist attacks.<sup>194</sup> Although the statutory power was premised, in part, on “national security,”<sup>195</sup> Congress required no showing by the President to exercise this broad authority. Accordingly, the President detained an enemy combatant indefinitely, arguing that the statutory authority included this implied power to detain.<sup>196</sup> The Court upheld the President’s action based on the President’s reasonable interpretation of the statutory language despite the fact that there was explicit congressional authorization forbidding the United States from detaining a U.S. citizen “except pursuant to an Act of Congress.”<sup>197</sup>

Scholars are similarly divided,<sup>198</sup> but most seem to support the application of something akin to *Chevron* deference to the President.<sup>199</sup>

191. 542 U.S. 507 (2004) (plurality opinion).

192. *Id.* at 527.

193. Pub. L. No. 107-40, 115 Stat. 224 (2001), as reprinted in 50 U.S.C. § 1541 (2012).

194. *Id.* § 2(a); see also *Hamdi*, 542 U.S. at 516–17 (“The Government maintains that no explicit congressional authorization is required, because the Executive possesses plenary authority to detain pursuant to Article II of the Constitution.”).

195. 115 Stat. at 224.

196. See *Hamdi*, 542 U.S. at 516–17.

197. *Id.* at 517 (quoting 18 U.S.C. § 4001(a) (2000)); Landau, *supra* note 27, at 1951; cf. *Chevron*, 467 U.S. at 844 (“[C]onsiderable weight should be accorded to an executive department’s construction of a statutory scheme it is entrusted to administer . . .”).

198. Pearlstein, *supra* note 9, at 783, 786 (expressing skepticism about *Chevron*’s ability to resolve the deference dilemma in foreign relations law); see, e.g., Peter L. Strauss, *Overseer, or “The Decider”?* *The President in Administrative Law*, 75 GEO. WASH. L. REV. 696, 755–56 (2007) (“[I]f the President is entitled to control what the administrator says the statute means, . . . we have a single, and infinitely political, generalist actor handcuffing the courts in their oversight of the administrative state.”). Strauss has compared each side of the argument: On one hand, if the President can decide statutory meaning, then this could be a persuasive “political response;” on the other hand, keeping the President out of agency statute interpretation keeps the “influence of raw politics” out of delegated responsibilities. *Id.* at 756; see also Note, *Context-Sensitive Deference to Presidential Signing Statements*, 120 HARV. L. REV. 597, 605 (2006) (“Primarily, commentators argue that reliance on the President’s interpretation of a statute would violate the separation of powers principle.”).

199. See, e.g., Harold H. Bruff, *Judicial Review and the President’s Statutory Powers*, 68 VA. L. REV. 1, 32 (1982) (“[C]ourts should defer to presidential statutory interpretations that are reasonable and consistent with ascertainable legislative intent, much as they do for agency heads.”); Michael Herz, *Imposing Unified Executive Branch Statutory Interpretation*, 15 CARDOZO L. REV. 219, 271 (1993) (claiming that “[t]he President has the constitutional authority to insist on his own reading of Congress’s statutes rather than the agency’s” because of the obligation bestowed on him with the Take Care Clause); Cass R. Sunstein, *Administrative Law*

A few have even explored *Chevron's* application to statutory national security provisions.<sup>200</sup> Much of Stack's work on the "statutory President" argues that presidential actions with express statutory authorization should be subject to the APA and *Chevron* review.<sup>201</sup> Others have questioned the quasi-legislative acts of presidents that have used statutory authority to take actions not contemplated by Congress;<sup>202</sup> some explore the limits of deference to the President's factual findings;<sup>203</sup> some have argued for hard look review of foreign affairs actions;<sup>204</sup> some focus on the courts' role as observer;<sup>205</sup> and others have supported the courts' use of Article II to uphold presidential power to complete statutory schemes, which the President does by prescribing incidental details needed to execute a legislative scheme in the absence of congressional authorization to complete that scheme.<sup>206</sup> Significant scholarship has also

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*Goes to War*, 118 HARV. L. REV. 2663, 2672 (2005) [hereinafter Sunstein, *Administrative Law*] (noting that the President has a great deal of power to interpret ambiguities in congressional enactments—"in war no less than in peace," but interpretive principles call for a narrow construction of presidential authority to invade constitutionally sensitive interests); Cass R. Sunstein, *Beyond Marbury: The Executive's Power to Say What the Law is*, 115 YALE L.J. 2580, 2603–04 (2005) (arguing for a reading of *United States v. Mead Corp.*, 533 U.S. 218 (2001) that allows the President to qualify for *Chevron* deference).

200. Eisner, *supra* note 43 (arguing for *Chevron* deference for presidential national security statutory interpretation); Eskridge & Baer, *supra* note 131, at 1085–179 (providing a comprehensive treatment of deference to executive actors, including the President); Julian Ku & John Yoo, *Hamdan v. Rumsfeld: The Functional Case for Foreign Affairs Deference to the Executive Branch*, 23 CONST. COMMENT. 179, 195–97 (2006) (arguing that the Supreme Court should have applied *Chevron* deference to the President's interpretations of statutes and treaties in *Hamdan*); Landau, *supra* note 27, at 1949; Eric A. Posner & Cass R. Sunstein, *Chevronizing Foreign Relations Law*, 116 YALE L.J. 1170, 1204 (2007) ("[C]ourts should defer to the executive's judgment unless it is plainly inconsistent with the statute, unreasonable, or constitutionally questionable.").

201. See, e.g., Stack, *Statutory President*, *supra* note 1, at 590–99. Stack made similar arguments with respect to reviews under *Mead*. Stack, *Statutory Powers*, *supra* note 1, at 304–10 (citing *Mead*, 533 U.S. 218).

202. Abbe R. Gluck et al., *Unorthodox Lawmaking, Unorthodox Rulemaking*, 115 COLUM. L. REV. 1789, 1820–21 (2015) (citing President Obama's "We Can't Wait" initiative, President Obama's directive to EPA to regulate climate change under the Clean Air Act, and President Clinton's directive to the FDA to interpret the Food, Drug, and Cosmetic Act to regulate tobacco as examples).

203. See *supra* notes 164, 167 and accompanying text.

204. Ganesh Sitaraman, *Foreign Hard Look Review*, 66 ADMIN. L. REV. 489, 489 (2014) (arguing that courts can use hard look review when reviewing foreign affairs).

205. Ashley S. Deeks, *The Observer Effect: National Security Litigation, Executive Policy Changes, and Judicial Deference*, 82 FORDHAM L. REV. 827, 827 (2013) (arguing that courts play an important role as observers).

206. Jack Goldsmith & John F. Manning, *The President's Completion Power*, 115 YALE L.J. 2280, 2280 (2006) ("[T]he completion power sheds light on a structural symmetry that cuts across

explored the limits on presidential power over administrative agencies and officials.<sup>207</sup> In short, Stack rightly noted that “American public law has no answer to the question of how a court should evaluate the [P]resident’s assertion of statutory authority”<sup>208</sup> and “neither *Youngstown* nor Justice Jackson articulated a framework for how a court is to judge whether the President’s claim of statutory power is valid.”<sup>209</sup>

### C. *The Limits of Deference*

This Article builds upon this important work by first recognizing the difficulties with judicial holdings that use ambiguous deference language. For instance, the Supreme Court in *Curtiss-Wright* stated that “if, in the maintenance of our international relations, embarrassment . . . is to be avoided and success for our aims achieved, congressional legislation . . . must often accord to the President a degree of discretion and freedom from statutory restriction.”<sup>210</sup> But as David Zaring questions, “what does ‘often’ mean? Should Congress always defer to the [P]resident in foreign affairs?”<sup>211</sup>

These deference analyses are important, but these deference discussions suffer from some significant flaws. As a threshold matter, degrees of deference have always been difficult to discern. The mounds of scholarship trying to parse out the differences between *Chevron*, *Auer v. Robbins*,<sup>212</sup> and *Motor Vehicle Manufacturers Ass’n of the United*

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Articles I, II, and III of the Constitution – namely, that each of the three branches has some degree of inherent power to carry into execution the powers conferred upon it.”)

207. See, e.g., Kagan, *supra* note 22, at 2375 (“The courts, by contrast, have ignored the President’s role in administration action in defining the scope of the *Chevron* doctrine. . . . Courts grant (or decline to grant) step-two deference to administrative interpretations of law irrespective whether the President potentially could, or actually did, direct or otherwise participate in their promulgation.”); Strauss, *supra* note 198, at 703 (arguing that the President does not have a non-statutory power over how executive officials who have been statutorily delegated authority implement laws).

208. Stack, *Statutory President*, *supra* note 1, at 539, 591 (“Of course, the Court in *Chevron* also justified deference in virtue of the administrative agency’s ‘greater expertise’ in the field of regulation. It might be objected that a generalist [P]resident does not have the same expertise as an agency. . . . Nothing prevents a president from requiring the work of members of an agency in drafting a detailed executive order. As a result, even if we concede that the [P]resident may have less expertise than an agency—although how much is not clear—that deficit does not unseat the strong grounds for applying *Chevron* to presidential orders based on the [P]resident’s heightened accountability, visibility, and ability to coordinate policy.” (footnote omitted)).

209. Stack, *Constitutional Foundations*, *supra* note 1, at 1014.

210. *United States v. Curtiss-Wright Exp. Corp.*, 299 U.S. 304, 320 (1936).

211. David Zaring, *CFIUS as a Congressional Notification Service*, 83 S. CAL. L. REV. 81, 82 (2009).

212. 519 U.S. 452 (1997).

*States v. State Farm Mutual Automobile Insurance Co.*<sup>213</sup> on arbitrary and capricious review of agency action provide yet one example.<sup>214</sup> Determining the appropriate amount of deference for the Statutory National Security President is even more complicated. For instance, courts may find it difficult to isolate out the appropriate deference to provide to the Statutory National Security President given the perpetual backdrop of constitutional national security powers.

Additionally, without a clear standard that courts can apply to presidential interpretations of a statute, the resulting jurisprudence is too arbitrary. The haphazard way that courts approach the President's use of statutory national security authority fails to provide a predictable approach for future presidential actions based on statutory authority. The randomness in judicial approaches therefore provide limited predictability for presidents and the public.

Furthermore, given the historic deference to the President on national security issues, there is little disciplining of presidential decision-making.<sup>215</sup> If a president knows that she can survive judicial review with scant evidence, if any, of a national security threat, the merits of having external constraints in the first place become moot. Deference also involves back-end analysis, challenging the President's decision-making long after it has occurred and the consequences of the action have already been realized. The efficacy of external constraints is further reduced by the President's ability to claim confidentiality on the basis of national security actions, further neutering the judiciary's ability to effectively review the presidential action. This lack of transparency has obvious implications for reduced accountability.

Lastly, the focus on deference necessarily places analytical emphasis on the powers of the judiciary to check a president relying on statutory power when Congress has an important role to play in checking these statutory powers. Perhaps even more so in the case of national security matters, neither the judiciary nor Congress is sufficiently strong enough to temper actions of the Executive. More than ever, the two branches need to work together to provide a workable approach to judicial review.

In short, this approach fails to provide a satisfying balance between a president's need for nimble decision-making in national security emergencies and the public's need for accountability and transparency of the President invoking such considerable powers. This inner turmoil concerning deference suggests it may be time for a fresh approach to limits on presidential statutory power. Specifically, the next Part changes the focus from deference to constraints, exploring whether consideration

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213. 463 U.S. 29 (1983).

214. See, e.g., David Zaring, *Reasonable Agencies*, 96 VA. L. REV. 135, 143 (2010).

215. Robert F. Turner, *The Constitutional Foundation for Fact Deference in National Security Cases*, 95 VA. L. REV. BRIEF 87, 95 (2009).

of constraints can provide a more systematic check on the Statutory National Security President.

### III. RECONSIDERING PROCEDURAL CONSTRAINTS

As the previous Part demonstrates, debating deference will only get us so far. Because of the shortcomings of judicial review described in Part II, this Part urges an alternative and more effective means of disciplining presidents acting under their statutory national security authority. It argues against the conventional wisdom that focuses solely on the degree of deference courts should afford the President through statutory interpretation. Instead, it urges a closer focus on the procedural constraints—and perhaps substantive, as well—that can be imposed on the President’s use of statutory national security power.

Before one turns to statutory constraints, it is important to acknowledge one powerful form of constraint found in other parts of the Constitution: the protection of individual rights. As Professor Robert Turner has noted, “the modern reality is that the line between ‘national security’ and ‘individual rights’ is not always a clear one. Obviously, to the extent fundamental constitutional rights are at issue, the case for judicial deference to the Executive on national security issues weakens.”<sup>216</sup> Despite assertions of national security, courts have repeatedly struck down presidential action in favor of protecting First, Fourth, and Fifth Amendment rights. For example, a court struck down the President’s attempts to suspend the entry of foreign nationals from seven Islamic countries as violating the First Amendment.<sup>217</sup> “Although the Supreme Court has certainly encouraged deference in our review of immigration matters that implicate national security interests, it has not countenanced judicial abdication, especially where constitutional rights, values, and principles are at stake.”<sup>218</sup>

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216. *Id.*

217. See *Int’l Refugee Assistance Project v. Trump*, 857 F.3d 554, 572 (4th Cir. 2017) (holding that although the President has power to deny entry to aliens, the President’s power is not absolute and does not allow disfavoring of one religion over another by issuing an executive order denying entry to aliens from seven predominantly Muslim countries), *vacated*, 138 S. Ct. 353 (2017); see also *N.Y. Times Co. v. United States*, 403 U.S. 713, 714–15 (1971) (Black, J., concurring) (discussing the President’s attempts to censor newspapers) (“I believe that every moment’s continuance of the injunctions against these newspapers amounts to a flagrant, indefensible, and continuing violation of the First Amendment.”); *Hawaii v. Trump*, 859 F.3d 741, 755 (9th Cir. 2017) (per curiam) (deciding similarly to *Int’l Refugee Assistance Project* for a second, revised executive order), *vacated*, 138 S. Ct. 377 (2017).

218. *Int’l Refugee Assistance Project*, 857 F.3d at 587 (citation omitted).

Courts also have struck down the President's attempts at warrantless wiretaps as violating the Fourth Amendment.<sup>219</sup> And courts have rejected the President's attempts to require a Chinese company to divest its interests in a wind farm in the name of national security as violating the Fifth Amendment.<sup>220</sup> Notably, the Court imposed this constitutional constraint on the President despite a provision in the statute that precludes judicial review of "actions of the President."<sup>221</sup>

While not minimizing the value of these constitutional constraints, this Part instead focuses on non-constitutional procedural constraints as underappreciated sources of limits on the Statutory National Security President. Specifically, it urges Congress to consider whether imposing substantive and procedural constraints may be appropriate and desirable in a broader set of circumstances than currently exists. These constraints could come in the form of one comprehensive general statute or in individual statutes that delegate national security power to the President. Such a proposal would be consistent with Supreme Court jurisprudence like *Franklin v. Massachusetts*, where the Court demanded "an express statement by Congress before assuming it intended the President's performance of his statutory duties to be reviewed for abuse of

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219. *United States v. U.S. Dist. Court*, 407 U.S. 297, 320 (1972) ("Security surveillances are especially sensitive because of the inherent vagueness of the domestic security concept, [and] the necessarily broad and continuing nature of intelligence gathering . . . . We recognize . . . the constitutional basis of the President's domestic security role, but we think it must be exercised in a manner compatible with the Fourth Amendment."); *see also* *United States v. Ehrlichman*, 376 F. Supp. 29, 33–34 (D.C. Cir. 1974) (rejecting executive action on national security wiretaps because it "would give the Executive a blank check to disregard the very heart and core of the Fourth Amendment and the vital privacy interests that it protects"); *Am. Civil Liberties Union v. Nat'l Sec. Agency*, 438 F. Supp. 2d 754, 778 (E.D. Mich. 2006) ("In this case, the President has acted, undisputedly, as [the Foreign Intelligence Surveillance Act (FISA)] forbids. FISA is the expressed statutory policy of our Congress. The presidential power, therefore, was exercised at its lowest ebb and cannot be sustained."), *vacated*, 493 F.3d 644 (6th Cir. 2007).

220. *Ralls Corp. v. Comm. on Foreign Inv. in the U.S.*, 758 F.3d 296, 319 (D.C. Cir. 2014). The President relied on statutory authority in the Defense Production Act, 50 U.S.C. § 4565(d)(1) (Supp. III 2016), that authorizes a president "to *suspend or prohibit* any covered transaction that threatens to impair the national security of the United States." *Ralls Corp.*, 758 F.3d at 311 (quoting 50 U.S.C. app. § 2170(d)(1) (2012) (current version at 50 U.S.C. § 4565(d)(1))).

221. Brief for Appellees at 27, *Ralls Corp.*, 758 F.3d 296 (No. 13–5315) ("The sweeping language of the Defense Production Act encompasses the President's choice not to provide Ralls with more notice than it had already received, his decision not to confide in Ralls his national security concerns, and his judgment about the appropriate level of detail with which to publicly articulate his reasoning."). The Court adopted a plain language interpretation of this provision, holding "that courts are barred from reviewing final 'action[s]' the President takes 'to *suspend or prohibit* any covered transaction that threatens to impair the national security of the United States,'" but not from reviewing "a constitutional claim challenging the *process* preceding such Presidential action." *Ralls Corp.*, 758 F.3d at 311 (alteration in original) (quoting 50 U.S.C. app. § 2170(d)(1)).



discretion.”<sup>222</sup> It would provide the congressional act with the “express statement” that was missing in the APA.<sup>223</sup>

In addition to eliminating a default legislative approach that “exudes deference,”<sup>224</sup> these constraints would also force more deliberative presidential decision-making, enhancing the accountability and transparency of the Executive. This Part identifies several such instances where Congress has imposed procedural constraints on the President’s statutory authority.<sup>225</sup> It then proceeds to argue for a broader application of such constraints, exploring both the merits of process protections generally and the complications associated with such a proposal.

### A. *Merits of Process Protections*

“Procedure and law are inseparable.”<sup>226</sup> Countless processes intersect nearly every facet of the legal system, including “processes for designating officials, for creating various forms of law,” and for enforcing and implementing the law.<sup>227</sup> Due process is embedded in our Constitution and is often an essential means to a just result, but has inherent value in itself as a vehicle of fairness and transparency, assuring the presence of rationality in legal and political processes.<sup>228</sup> The imposition of process requirements also serves to enhance the accountability of decision makers to those affected by such decisions through disclosure and public vetting.<sup>229</sup> Some procedural requirements, such as those imposed by the National Environmental Policy Act, also

222. *Franklin v. Massachusetts*, 505 U.S. 788, 801 (1992).

223. *Id.*

224. *Trump v. Hawaii*, 138 S. Ct. 2392, 2400 (2018).

225. Notably, for clarity’s sake, this excludes procedural constraints provided by the Fifth Amendment, categorizing those as constitutional constraints even though they do force particular procedures on the President.

226. Min Zhou, *A Comparative Analysis of Contemporary Constitutional Procedure*, 30 CASE W. RES. J. INT’L L. 149, 155 (1998).

227. Robert S. Summers, *Evaluating and Improving Legal Processes—A Plea for “Process Values,”* 60 CORNELL L. REV. 1, 7–8 (1974); *see also* Zhou, *supra* note 226, at 155–58 (discussing the relationship between procedure and law).

228. U.S. CONST. amend. XIV, § 1 (“[n]o State shall . . . deprive any person of life, liberty, or property, without due process of law.”); *see also* Edward H. Stiglitz, *Delegating For Trust*, 166 U. PA. L. REV. 633, 641 (2018); *see also* Summers, *supra* note 227, at 20–27 (providing a catalogue of process values).

229. *See* Robert W. Adler, *In Defense of NEPA: The Case of the Legacy Parkway*, 26 J. LAND RESOURCES & ENVTL. L. 297, 299–300 (2006); Ellen Hey, *Increasing Accountability for the Conservation and Sustainable Use of Biodiversity: An Issue of Transnational Global Character*, 6 COLO. J. INT’L ENVTL. L. & POL’Y 1, 2, 4 (1995); Erin Ryan, *Response to Heather Gerken’s Federalism and Nationalism: Time for a Détente?*, 59 ST. LOUIS U. L.J. 1147, 1157, 1160 (2015); Summers, *supra* note 227, at 21–22.

promote sound decision-making by explicitly requiring extensive consideration of potential impacts of a proposed action.<sup>230</sup>

Congress often imposes process requirements on decision makers as a prerequisite to releasing delegated power, requirements that can be divided into three categories. Sometimes Congress imposes *significant* procedural constraints on agencies, requiring consultations with Congress, justifications, reports, and shared implementation with other agencies.<sup>231</sup> Sometimes Congress imposes *moderate* procedural constraints on agencies, requiring specific findings before the agency can act.<sup>232</sup> And sometimes, Congress imposes *minimal* constraints that merely require the agency to provide notice before acting.<sup>233</sup> Congress has even enacted the Congressional Review Act (CRA),<sup>234</sup> which allows legislators to overturn executive regulations by joint resolution within sixty legislative days of publication.<sup>235</sup> The narrowness of the circumstances where this would normally be activated<sup>236</sup> precludes its

230. Sharon Buccino, *NEPA Under Assault: Congressional and Administrative Proposals Would Weaken Environmental Review and Public Participation*, 12 N.Y.U. ENVTL. L.J. 50, 51 (2003).

231. *See, e.g.*, 8 U.S.C. § 1379(4) (2012) (requiring the Attorney General and the Secretary of State to consult with the Secretary of Treasury and report to Congress every two years describing the “implications of the technology standard” to confirm identity); 16 U.S.C. § 1536(a)(2) (2012) (requiring every federal agency to consult with the Secretary of the Interior before taking any action to insure that their actions are “not likely to jeopardize . . . endangered species or threatened species”); 49 U.S.C. § 32902(i) (2012) (requiring the Secretary of Transportation to consult with the Secretary of Energy in prescribing regulations for average fuel economy standards).

232. *See, e.g.*, 42 U.S.C. § 4332(C) (2012) (requiring that the responsible official “include [an Environmental Impact Assessment] in every recommendation or report on proposals for legislation and other major Federal actions significantly affecting the quality of the human environment”).

233. *See, e.g.*, 10 U.S.C. § 1613(b) (2012) (requiring the Secretary of Defense to notify Congress of any regulations made to carry out the Defense-Wide Intelligence Personnel Policy); 20 U.S.C. § 6571(c)(1) (2012) (requiring the Secretary of Education to provide a Senate and House committee notice of intent to issue a notice of proposed rulemaking fifteen business days prior to the notice).

234. Pub. L. No. 104-121, 110 Stat 868 (1996) (codified as amended at 5 U.S.C. §§ 801–08 (2012)).

235. 5 U.S.C. § 802.

236. Historically, the window occurs where there is a change in administration and Congress is unhappy with the prior administration’s regulatory efforts. *See* Steven Greenhouse, *House Joins Senate in Repealing Rules on Workplace Injuries*, N.Y. TIMES (Mar. 8, 2001), <https://www.nytimes.com/2001/03/08/us/house-joins-senate-in-repealing-rules-on-workplace-injuries.html> [https://perma.cc/DB3E-H72Y] for a description of Congress invoking this authority to overturn President Clinton’s ergonomic workplace regulations in 2001. *See also* Stephen Dinan, *GOP Rolled Back 14 of 15 Obama Rules Using Congressional Review Act*, WASH. TIMES (May 15, 2017), <https://www.washingtontimes.com/news/2017/may/15/gop-rolled-back-14-of-15-obama-rules-using-congres/> [https://perma.cc/54GR-RA3P] (describing how Congress used

frequent use, but the Congressional Review Act reflects congressional intent to “check” the Executive Branch.

The arguments in favor of process protections apply with similar force when applied to the President. A president performing obligations dictated by statute “occupies a position quite similar to that of any other administrative officer in that his legal sanction to carry out those responsibilities is derived solely from the enacted law.”<sup>237</sup> Disciplining the fact finder, facilitating transparency, and providing accountability can enhance the legitimacy of both the Presidency and presidential decisions. President Obama appeared to understand the value of process constraints, grounding many of his decisions in statutory authority.<sup>238</sup> These actions helped establish legitimacy and fend off some of the political attacks that President Bush had faced in connection with his presidential decisions on torture.<sup>239</sup> In this way, operating under the statutory constraints became a source of political power.

Similarly, some scholars have argued that the external checks that Congress and the judiciary were meant to provide on the President have eroded since 9/11.<sup>240</sup> Professor Neal Katyal has argued that this weakening of government checks and balances is the result of a combination of factors, including judicial doctrines of deference that allow broad interpretation of statutes authorizing executive power in the area of foreign affairs, the inability of Congress to correct that interpretation because of the presidential veto and the need for a supermajority override, and the entrenchment of the party system.<sup>241</sup> Professor Dawn Johnsen also argues for more robust internal legal constraints on

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the Congressional Review Act to roll back fourteen regulations). *See generally* Nina A. Mendelson, *Agency Burrowing: Entrenching Policies and Personnel Before a New President Arrives*, 78 N.Y.U. L. REV. 557 (2003) (discussing Executive action taken before a new President takes office).

237. Colin S. Diver, *Presidential Powers*, 36 AM. U. L. REV. 519, 522 (1987).

238. Laurence H. Tribe, *Transcending the Youngstown Triptych: A Multidimensional Reappraisal of Separation of Powers Doctrine*, 126 YALE L.J. FORUM 86, 86–87 (2016).

239. Jessica M. Stricklin, *The Most Dangerous Directive: The Rise of Presidential Memoranda in the Twenty-First Century as a Legislative Shortcut*, 88 TUL. L. REV. 397, 405–06 (2013); Peter M. Shane, *The Presidential Statutory Stretch and the Rule of Law*, 87 U. COLO. L. REV. 1231, 1249–50 (2016).

240. *See, e.g.*, Neal Kumar Katyal, *Internal Separation of Powers: Checking Today’s Most Dangerous Branch from Within*, 115 YALE L.J. 2314, 2319–20 (2006) (arguing Congress’s failure to affirm or deny the President’s actions after 9/11 led to the “demise of the congressional checking function”). *See generally* THE FEDERALIST NO. 51 (James Madison) (explaining that the constant aim of our system of government “is to divide and arrange the several offices in such a manner as that each may be a check on the other”).

241. Katyal, *supra* note 240, at 2321.

executive power.<sup>242</sup> She questions the adequacy of after-the-fact external review of questionable executive action or executive excesses and argues that “Presidents also must face effective internal constraints in the form of Executive Branch processes and advice aimed at ensuring the legality of the multitude of executive decisions.”<sup>243</sup> She views legal advice from within the Executive Branch as an essential component of efforts to safeguard civil liberties.<sup>244</sup>

In response, many scholars are engaged in discussions about the need for internal controls on the Executive Branch to counteract the weakening external controls.<sup>245</sup> For some, like Katyal, these internal controls take the shape of agencies putting checks on other agencies.<sup>246</sup> Katyal argues that bureaucracy is a critical mechanism to support internal constraints as it “creates a civil service not beholden to any particular administration and a cadre of experts with a long-term institutional worldview.”<sup>247</sup> Katyal suggests a variety of bureaucratic mechanisms to support internal separation of powers, including “overlapping cabinet offices, mandatory review of government action by different agencies, civil-service

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242. See Dawn E. Johnsen, *Faithfully Executing the Laws: Internal Legal Constraints on Executive Power*, 54 UCLA L. REV. 1559, 1601 (2007) (arguing that current internal legal constraint practices are insufficient and Congress, the courts, and the public should work together to empower Executive Branch legal advisors to constrain the President to his constitutional authority and obligations).

243. *Id.* at 1564.

244. *Id.*

245. See, e.g., Anya Bernstein, *The Hidden Costs of Terrorist Watch Lists*, 61 BUFF. L. REV. 461, 465 (2013) (arguing that the secret algorithms used in creating watch lists have little appreciable value in court, so internal regulation is necessary); Katyal, *supra* note 240, at 2318 (proposing internal check designs that allow for “temporary departures when the need is great”); Gillian E. Metzger, *The Interdependent Relationship Between Internal and External Separation of Powers*, 59 EMORY L.J. 423, 457 (2009) (calling for the reinforcing of internal Executive Branch constraints in addition to achieving separation of powers goals); Paul Ohm, *Electronic Surveillance Law and the Intra-Agency Separation of Powers*, 47 U.S.F. L. REV. 269, 271 (2012) (arguing that intra-agency separation of powers, pitting the Justice Department against itself, would create competition for interpretations of the law); M. Elizabeth Magill, *Can Process Cure Substance? A Response to Neal Katyal’s “Internal Separation of Powers,”* 116 YALE L.J. FORUM (Nov. 3, 2006), <https://www.yalelawjournal.org/forum/can-process-cure-substance-a-response-to-neal-katyal-a8217s-a8220internal-separation-of-powers-a8221> [<https://perma.cc/KDF9-VANT>] (arguing that administrative controls were in place after September 11th, but the courses of action were taken despite the objections).

246. Katyal, *supra* note 240, at 2318; see also Bernstein, *supra* note 245 (“[W]e must look to institutional design and internal self-regulation to solve those problems that cannot reach the courts.”); Ohm, *supra* note 245 (proposing “intra-agency separations of powers” to create competition between agencies for statutory and constitutional interpretations).

247. Katyal, *supra* note 240, at 2317.

protections for agency workers, reporting requirements to Congress, and an impartial decision-maker to resolve inter-agency conflicts.”<sup>248</sup>

Professor Gillian Metzger, on the other hand, has noted that internal constraints, while preferable to no checks at all, can be of limited effect in checking aggrandized presidential authority.<sup>249</sup> She argues for a broader focus on the interrelationship between internal and external constraints and reasons that internal checks reinforce, and are in turn supported by, external forces, “including not just Congress and the courts, but also state and foreign governments, international bodies, the media, and civil society organizations.”<sup>250</sup> Dean Elizabeth Magill is similarly skeptical of the need for enhanced bureaucratic structure,<sup>251</sup> and others have noted the practical limitations of requiring co-equal executive departments.<sup>252</sup>

### B. *A Spectrum of Procedural Constraints*

Despite the merits of procedural constraints, all too often scholars have acknowledged and dismissed procedural constraints on a president as ineffective.<sup>253</sup> This Part urges a reconsideration of procedural constraints, not only for the actual power they currently wield, but for their potential power to provide more workable limits on the Statutory National Security President.<sup>254</sup> It identifies a number of these procedural constraints and demonstrates how they work to temper unitary executive power over national security matters.

Imposing additional constraints on the President is not a new concept. As Evan Criddle has noted, “[v]iewed from a republican perspective, the prospect of procedurally unfettered presidential lawmaking is deeply troubling.”<sup>255</sup> Similarly, Professor Daniel Abebe has noted the importance of courts in limiting the President’s “ability to act

248. *Id.* at 2318.

249. Metzger, *supra* note 245, at 425.

250. *Id.*

251. Magill, *supra* note 245 (arguing against a system that would air all possible views and promoting deeper consideration of disagreement among views).

252. *See, e.g.,* Ohm, *supra* note 245, at 270–71 (questioning its feasibility in the realm of electronic surveillance because law enforcement needs to have full control over the criminal investigations).

253. *See supra* note 19 and accompanying text.

254. Instead of invalidating statutes along the lines of the non-delegation doctrine in *A. L. A. Schechter Poultry Corp. v. United States*, 295 U.S. 495 (1935), and *Panama Refining Co. v. Ryan*, 293 U.S. 388 (1935), this Section urges a reexamination of procedural constraints to enhance accountability. Kagan, *supra* note 22, at 2365–66 (“[A]wesome substantive breadth of [the] delegation [in *Schechter Poultry*], combined with its lack of procedural constraints and its effective subdelegation of authority to private parties, made it ripe for invalidation . . .”).

255. Criddle, *supra* note 164, at 199.

independently or unilaterally.”<sup>256</sup> As Professor Jack Goldsmith has noted, “if Congress does not want the President to act imperially, it should be more careful when it gives the President discretion to implement the laws it passes.”<sup>257</sup> As Professor Harold Koh described, the 1970s resulted in a generation of statutes where Congress subjected “the President’s delegated foreign affairs powers to stringent procedural constraints,” such as “elaborate statutory procedures, including factual findings, public declarations, prior reporting, subsequent consultation requirements, and the legislative veto—the congressional control technique of choice in the post-Vietnam era.”<sup>258</sup> Stack has also focused on contingent delegations where Congress granted the President power conditioned upon his determination that certain events have transpired.<sup>259</sup>

Because courts have been reluctant to allow an abuse of discretion claim against a statutory President where the statute “contains no limitations on the President’s exercise of that authority,”<sup>260</sup> it therefore follows that abuse of discretion claims have a chance of succeeding where Congress “places discernible limits on the President’s discretion,”<sup>261</sup> including procedural constraints. The D.C. Circuit has supported this approach, because “[j]udicial review in such instances does not implicate separation of powers concerns to the same degree as where the statute did ‘not at all limit’ the discretion of the President.”<sup>262</sup> This Section identifies a number of such procedural constraints and

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256. Daniel Abebe, *The Global Determinants of U.S. Foreign Affairs Law*, 49 STAN. J. INT’L L. 1, 15–16 (2013).

257. Jordan A. Brunner, *The (Cyber) New Normal: Dissecting President Obama’s Cyber National Emergency*, 57 JURIMETRICS J. 397, 425 (2017) (citing Jack Goldsmith, *Why Congress is Effectively Powerless to Stop the Iran Deal (and Why the Answer is Not the Iran Review Act)*, LAWFARE (July 20, 2015, 8:23 AM), <https://www.lawfareblog.com/why-congress-effectively-powerless-stop-iran-deal-and-why-answer-not-iran-review-act> [<https://perma.cc/28EA-8XPN>]).

258. Koh, *supra* note 19; see also BRUCE ACKERMAN, *BEFORE THE NEXT ATTACK: PRESERVING CIVIL LIBERTIES IN AN AGE OF TERRORISM* 4 (2006) (arguing for an “emergency constitution” framework statute that would limit a president’s emergency powers to an extremely short-term response that would lapse unless a majority of both houses voted to continue them, requiring reauthorization every two months by increasing supermajorities of Congress).

259. Stack, *Reviewability*, *supra* note 1, at 1174.

260. *Mountain States Legal Found. v. Bush*, 306 F.3d 1132, 1136 (D.C. Cir. 2002) (citing *Chamber of Commerce of U.S. v. Reich*, 74 F.3d 1322, 1331 (D.C. Cir. 1996)).

261. *Id.*; see also *Authorization for Use of Military Force*, Pub. L. No. 107-40, § 2, 115 Stat. 224, 224 (2001), as reprinted in 50 U.S.C. § 1541 note (2012) (authorizing the President “to use all necessary and appropriate force” against those responsible for the September 11, 2001 terrorist attacks); *Reich*, 74 F.3d at 1331 (noting no abuse of discretion claims against a president where the statute “contains no limitations on the President’s exercise of that authority”).

262. *Mountain States*, 306 F.3d at 1136 (quoting *Dalton v. Specter*, 511 U.S. 462, 476 (1994)).

organizes them into three categories: (1) significant, (2) moderate, and (3) minimal.

### 1. Significant Procedural Constraints

Over the years, Congress has utilized a number of statutory provisions to impose significant procedural constraints on the President's exercise of those delegated statutory powers. Constraints in this category require the President to make specific findings, as well as take some additional measures such as consultations, reports, or congressional approval. In 1977, Congress enacted the International Emergency Economic Powers Act (IEEPA)<sup>263</sup> to limit executive abuses of the national emergency powers conferred on the President sixty years earlier by the Trading with the Enemy Act (TWEA).<sup>264</sup> Under the IEEPA, the President was required to find an "unusual and extraordinary threat, which has its source in whole or substantial part outside the United States, to the national security, foreign policy, or economy of the United States, if the President declares a national emergency with respect to such threat."<sup>265</sup>

But Congress went further, imposing substantive limits on the President, requiring the President to "consult" with Congress before using these powers,<sup>266</sup> specifying under what authority the President is declaring a national emergency,<sup>267</sup> and requiring the President to submit reports to Congress every six months.<sup>268</sup> Harold Koh has noted how Congress differentiated the constraints on a president depending on whether it was wartime or nonwartime.<sup>269</sup> Nonwartime activities required significant additional procedural constraints, conditioning the President's

263. Pub. L. No. 95-223, 91 Stat. 1626 (1977) (codified as amended at 50 U.S.C. §§ 1701–06 (2012)).

264. Pub. L. No. 65-90, 40 Stat. 411 (1917) (codified as amended in scattered sections of 50 U.S.C.); *Regan v. Wald*, 468 U.S. 222, 227–28 (1984).

265. 50 U.S.C. § 1701; *see also* *United States v. Amirnazmi*, 645 F.3d 564, 576 (3d Cir. 2011) (discussing the requirements for activating IEEPA).

266. 50 U.S.C. § 1703(a) ("The President, in every possible instance, shall consult with the Congress before exercising any of the authorities granted by this chapter and shall consult regularly with the Congress so long as such authorities are exercised.").

267. *Id.* § 1703(b) ("Whenever the President exercises any of the authorities granted by this chapter, he shall immediately transmit to the Congress a report specifying— . . . (3) the authorities to be exercised and the actions to be taken in the exercise of those authorities to deal with those circumstances . . .").

268. *Id.* § 1703(c) ("At least once during each succeeding six-month period after transmitting a report pursuant to subsection (b) of this section . . . the President shall report to the Congress with respect to the actions taken, since the last such report, in the exercise of such authorities, and with respect to any changes which have occurred . . .").

269. Koh, *supra* note 19, at 1264.

exercise of emergency powers upon prior congressional consultation, subsequent review, and legislative veto termination provisions.<sup>270</sup>

Similarly, where the President determines the existence of a “critical shortage of any raw material, commodity, or product which jeopardizes the health or safety of the people of the United States or its national security or welfare” with no end in sight or hope to resolve the shortage without governmental intervention, the President can propose conservation measures and submit them to Congress.<sup>271</sup> Importantly, Congress prevents unilateral action by requiring the President to make a submission to Congress that triggers both hearings and legislative action, as well as a number of procedural findings. Specifically, the President must include a justification of the circumstances that require the conservation measures, a detailed procedure and budget, the degree of curtailment required, and “[a] complete record of the factual evidence upon which his recommendations are based, including all information provided by any agency of the Federal Government which may have been made available to him in the course of his consideration of the matter.”<sup>272</sup>

Apparently realizing that it had failed to initially impose sufficient constraints on the President with respect to sanctions, Congress recently amended the sanction programs related to Iran, North Korea, and Russia by imposing new sanctions on these countries, as well as additional procedural constraints on the President’s use of statutory national security powers. In July of 2017, Congress passed the Countering America’s Adversaries Through Sanctions Act (CAATSA),<sup>273</sup> severely limiting the President’s use of the sanction powers with respect to the Russian Federation. Specifically, Congress now *requires* the President to “submit to the appropriate congressional committees and leadership a report that describes the proposed action [related to sanctions] and the reasons for that action.”<sup>274</sup> Congress goes farther, specifying details that must be included in the report.<sup>275</sup> Importantly, Congress prohibits the President from acting during the thirty to sixty days while Congress is reviewing the report,<sup>276</sup> and bars the President from taking such action should both Houses of Congress pass a joint resolution of disapproval.<sup>277</sup> Such strong

270. *Id.*

271. 15 U.S.C. § 713d-1(a) (Supp. III 2016).

272. *Id.*

273. Pub. L. No. 115-44, 131 Stat. 886 (2017) (codified in scattered sections of 22 U.S.C.).

274. 22 U.S.C. § 9511(a)(1) (Supp. V 2018).

275. *Id.* § 9511(a)(3)–(4).

276. *Id.* § 9511(b)(1)–(3) (“[T]he President may not take that action unless a joint resolution of approval with respect to that action is enacted in accordance with subsection (c).”).

277. *Id.* § 9511(b)(6) (“Notwithstanding any other provision of law, if a joint resolution of disapproval relating to a report submitted under subsection (a)(1) proposing an action described



procedural constraints reflect a critical balance between expediency, accountability, and the separation of powers generally. Reportedly, some in Congress hope to use this as a model to amend other statutes that provide the President with sanction powers.<sup>278</sup>

Another strong form of presidential constraint comes in the form of shared implementation of a statute. Many statutes share authority between the President and the executive agencies. For instance, although the Federal Power Act<sup>279</sup> provides the President with the statutory authority to identify a “grid security emergency,” the statute then provides the Secretary of Energy with the discretion to act on this emergency, noting he “may . . . issue such orders for emergency measures as are necessary in the judgment of the Secretary to protect or restore the reliability of critical electric infrastructure or of defense critical electric infrastructure during such emergency.”<sup>280</sup> Importantly, Congress also requires the President to make a specific finding, providing a “written directive or determination identifying a grid security emergency.”<sup>281</sup> Congress further limited the Secretary’s issuance of such orders by requiring consultation with a number of entities, including Canada and Mexico.<sup>282</sup> In theory, such procedural limitations on the Secretary extend to the President, since the President’s identification of a grid security emergency is moot without the Energy Secretary’s orders to address it. But in practice, many scholars have suggested the executive agencies are mere pawns of the President,<sup>283</sup> which would suggest consolidated power despite an apparent statutory constraint.

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in subsection (a)(2) is enacted in accordance with subsection (c), the President may not take that action.”).

278. Emily Cadei, *Russian Sanctions: Congress Attempts to Reassert Power Over White House*, NEWSWEEK (June 14, 2017, 6:21 P.M.), <https://www.newsweek.com/congress-power-russia-sanctions-trump-625832> [<https://perma.cc/SG9E-QUBD>] (reporting that Senator Crapo stated “[w]e intend to use this review model on all sanctions regimes moving forward, and I intend to work to apply it to Iran”).

279. Pub. L. No. 66-280, 41 Stat. 1063 (1920) (codified as amended in scattered sections of 16 U.S.C.).

280. 16 U.S.C. § 824o-1(b)(1) (Supp. V. 2018).

281. *Id.*

282. *Id.* § 824o-1(b)(3).

283. Akhil Reed Amar, *The President, the Cabinet, and Independent Agencies*, 5 U. ST. THOMAS J.L. & PUB. POL’Y 36, 50 (2010) (discussing how the President has a broad set of powers over so-called independent agencies, and that “this casual label of independent agency shouldn’t blind us to the key point that these officials, quote-unquote, independent, falls wholly within the executive branch, albeit with varied rules of composition authority and removal”); Anderson P. Heston, *The Flip Side of Removal: Bringing Appointment into the Removal Conversation*, 68 N.Y.U. ANN. SURV. AM. L. 85, 95–96 (2012) (“[T]he President possesses powerful tools to bring his influence to bear on the independent agencies, such that uncooperative officials attempting to implement policies other than the President’s preferred ones will find themselves swimming

Similarly, in the Trade Expansion Act of 1962 (TEA),<sup>284</sup> Congress provided the President with statutory authority to adjust the flow of imports of a commodity upon his conclusion that the commodity is being imported in such quantities or under such circumstances “to threaten to impair the national security of the United States.”<sup>285</sup> Before the President may take such action, “the Secretary of Commerce . . . shall immediately initiate an appropriate investigation to determine the effects on the national security of imports of the article” and submit a recommendation to the President, who then decides whether to adjust the imports.<sup>286</sup> Section 1862 of the TEA fails to define the phrase “threaten to impair the national security” of the United States, thereby granting the President broad discretion to restrict or bar imports if he determines that the imports threaten national security.<sup>287</sup> In an amendment to the TEA, however, the House Ways and Means Committee offered some guidance to the President in determining whether imports were threatening to impair national security.<sup>288</sup> Section 1862 now lists relevant factors for the President and Secretary to consider in making a determination as to whether or not to take action.<sup>289</sup> Actions taken by the President under the

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upstream. Resignation (and a subsequent private sector position) may seem a more appealing alternative than doing battle with the President of the United States.”).

284. Pub. L. No. 87-794, 76 Stat. 872 (codified as amended in scattered sections of 19 U.S.C.).

285. 19 U.S.C. § 1862(c) (2012).

286. *Id.* § 1862(b).

287. *See id.* § 1862. Proposed Amendment to the Global Trade Accountability Act of 2017 would provide Congressional review of the imposition of duties and other trade measures by the Executive Branch: “Safeguarding national security. Section 232(c)(1)(B) of the Trade Expansion Act of 1962 (19 U.S.C. 1862(c)(1)(B)) is amended by inserting ‘subject to approval under section 155 of the Trade Act of 1974,’ after ‘shall.’” S. 177, 115th Cong. § 155(c)(8) (2017).

288. *See Nance & Wasserman, supra note 68, at 928–29* (citing H.R. REP. NO. 1761, at 13–15 (1958)). The statute was first entered into law as the Trade Expansion Act of 1954. *Id.* at 928.

289. 19 U.S.C. § 1862(d) (“[T]he Secretary and the President shall, in light of the requirements of national security and without excluding other relevant factors, give consideration to domestic production needed for projected national defense requirements, the capacity of domestic industries to meet such requirements, existing and anticipated availabilities of the human resources, products, raw materials, and other supplies and services essential to the national defense, the requirements of growth of such industries and such supplies and services including the investment, exploration, and development necessary to assure such growth, and the importation of goods in terms of their quantities, availabilities, character, and use as those affect such industries and the capacity of the United States to meet national security requirements. In the administration of this section, the Secretary and the President shall further recognize the close relation of the economic welfare of the Nation to our national security, and shall take into consideration the impact of foreign competition on the economic welfare of individual domestic industries; and any substantial unemployment, decrease in revenues of government, loss of skills or investment, or other serious effects resulting from the displacement of any domestic products by excessive imports shall be considered, without excluding other factors . . .”).

TEA have been challenged on numerous grounds, but the courts seem to be appeased where Congress has provided additional guidelines to assist in the decision-making process.<sup>290</sup>

## 2. Moderate Procedural Constraints

Congress has also imposed a category of more moderate procedural constraints—those that only require the President to make specific findings before acting on the power. For example, Congress amended the Defense Production Act of 1950<sup>291</sup> with the Foreign Investment and National Security Act of 2007 (FINSIA).<sup>292</sup> Section 6 granted the President broad authority to suspend or prohibit a foreign investment if the President finds that the investment threatens to impair the national security of the United States.<sup>293</sup> Congress conditions this power on specific findings on the part of the President.<sup>294</sup> The President must first find (1) “there is credible evidence that leads the President to believe that the foreign interest exercising control might take action that threatens to impair the national security;” and (2) other laws would be inadequate “for the President to protect the national security in the matter before the President.”<sup>295</sup> The statute provides the President with some guidance as to what constitutes a threat which could “impair national security,” as discussed *supra* at Section II.A.<sup>296</sup>

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290. *Fed. Energy Admin. v. Algonquin SNG, Inc.*, 426 U.S. 548, 569–70 (1976) (“[T]he broad ‘national interest’ language of the proposal, together with its lack of any standards for implementing that language, stands in stark contrast with . . . § 232(c)’s articulation of standards to guide the invocation of the President’s powers under § 232(b). In light of these clear differences between the rejected proposal and § 232(b), we decline to infer . . . that Congress felt that the President had no power to impose monetary exactions under § 232(b).”); *Consumers Union of U.S., Inc. v. Kissinger*, 506 F.2d 136, 143 (D.C. Cir. 1974) (“The President is not bound in any way to refrain from taking such steps if he later deems them to be in the national interest, or if consultation proves unavailing to meet unforeseen difficulties . . . .”); *Massachusetts v. Simon*, Nos. 75-0192, 75-0130, 1975 WL 3636, at \*3 (D.D.C. 1975) (“Furthermore, Section 232 provides certain standards, even though general and somewhat imprecise.”).

291. Pub. L. No. 81-774, 64 Stat. 798 (codified as amended in scattered sections of 50 U.S.C.).

292. Pub. L. No. 110-49, 121 Stat. 246 (codified as amended at 50 U.S.C. § 4565 (Supp. III 2016)).

293. *Id.* § 6 (codified as amended at 50 U.S.C. § 4565(d)).

294. 50 U.S.C. § 4565(d)(4).

295. *Id.*

296. *Id.* § 4565(a). This power has been exercised three times by presidents to block investments, such as a divestiture of United States aerospace manufacturer, MAMCO, by Chinese National Aero-Technology Import and Export Corporation, a divestiture of wind farm companies from Ralls, a Chinese company, and the purchase of Aixtron. *Ralls Corp. v. Comm. on Foreign Inv. in the U.S.*, 758 F.3d 296, 306 (D.C. Cir. 2012); Proclamation No. 3195, 55 Fed. Reg. 3935 (Feb. 1, 1990); Proclamation No. 9550, 81 Fed. Reg. 88,607 (Dec. 7, 2016).

In yet another example of moderate constraints, where the President wants to transfer expensive military defense equipment, the President must issue a certification that justifies the use of the statutory emergency authority.<sup>297</sup> Such certification normally becomes effective thirty days after consent, but the President can require that consent be effective immediately where the President states in the certification that “an emergency exists.”<sup>298</sup> Importantly, Congress imposed constraints on the President’s exercise of this power, requiring that “the President shall set forth in the certification a detailed justification for his determination, including a description of the emergency circumstances which necessitate immediate consent to the transfer and a discussion of the national security interests involved.”<sup>299</sup>

### 3. Minimal Procedural Constraints

Lastly, Congress has imposed a number of minimal procedural constraints on statutory Presidents, merely requiring the President to provide notice to Congress prior to exercising national security power. For instance, to waive the application of sanctions imposed on other countries in relation to the control of chemical and biological weapons where such waiver is “essential to the national security interests of the United States,” the President need only notify congressional committees fifteen days before the waiver takes effect to exercise this power.<sup>300</sup> Similarly, the President is authorized to waive the prohibition on using journalists as agents to collect intelligence information with a mere “written determination that the waiver is necessary to address the overriding national security interest of the United States” and notification to the relevant congressional committees.<sup>301</sup>

In some statutes, the President need only notify congressional committees *after* acting upon the statutory authority, failing to provide any procedural constraint, but arguably providing some accountability. For instance, under the Intelligence Authorization Act for Fiscal Year 1995<sup>302</sup> the President may waive the requirements related to the sharing of classified information with the Federal Bureau of Investigation where “essential to meet extraordinary circumstances affecting vital national

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297. 22 U.S.C. § 2753(d)(1) (2012).

298. *Id.* § 2753(d)(2)(A), (C); *see also id.* § 2776(d)(2)(B) (similarly requiring thirty days, “unless the President states in his certification that an emergency exists”).

299. *Id.* § 2753(d)(2)(C).

300. *Id.* § 5605(d)(1)(A)(i).

301. 50 U.S.C. § 3324(b) (Supp. II 2015).

302. Pub. L. No. 103-359, 108 Stat. 3423 (codified as amended in scattered sections of 50 U.S.C.).

security interests of the United States.”<sup>303</sup> The statute requires that “[s]uch waiver shall be in writing and shall fully state the justification for such waiver” and be provided to the relevant congressional committees within thirty days of issuance of the waiver.<sup>304</sup> These provisions do raise questions concerning the number of statutory provisions in existence that impose no procedural constraints, rendering some statutory executive actions regarding national security virtually invisible.

### C. Constraint Complications

Any proposal to impose additional limits on the President acting in the name of national security is sure to generate controversy. Far from a perfect solution, this proposal does not minimize its complications. First, on a theoretical level, there are many who will be adamantly opposed to any further limitations on the President acting in the name of national security. Second, on a practical level, the difficulties of isolating constitutional from statutory authority may allow the President to evade any statutory procedural constraints by relying solely on the Constitution. Lastly, the effectiveness of any procedural constraints will depend on their judicial enforcement against the President. Each of these is discussed below.

#### 1. Limiting Executive Power

Staunch unitary executive supporters are likely to argue that additional procedural constraints usurp critical presidential discretion to determine whether a national security emergency exists.<sup>305</sup> They are unlikely to be swayed by the enhanced accountability and transparency that can be gained with these additional constraints if it means that the commander in chief is in any way limited in her ability to respond swiftly and effectively to national threats.<sup>306</sup> This is particularly true where it is difficult to demonstrate that these procedural constraints will improve outcomes.

But we know that while there are costs from the agent’s errors, there are also costs from restricting the agent’s capacity to act. If we begin with the assumption that

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303. 50 U.S.C. § 3381(d)(5).

304. *Id.*

305. Heidi Kitrosser, *The Accountable Executive*, 93 MINN. L. REV. 1741, 1762 (2009) (“[O]ne could reasonably envisage a unitarian argument against such limitations on the basis that presidential discretion to implement statutes is full and final and may not be made subject to judicial second-guessing or procedural constraints.”).

306. THE FEDERALIST No. 70 (Alexander Hamilton) (“Energy in the executive is a leading character in the definition of good government. It is essential to the protection of the community against foreign attacks . . .”).

the President is most competent in foreign affairs, or at least has a resource advantage and institutional expertise, we would need some confidence that oversight would improve outcomes, namely that foreign affairs decisionmaking would be improved by additional review. If such review has no effect on the agent's compliance but constrains the agent from achieving the principal's goals, the costs of oversight outweigh the benefits.<sup>307</sup>

While these are legitimate concerns when evaluating presidential actions that stem solely from constitutional authority, these concerns are less troubling when evaluating statutory national security authority. This is because these powers are delegated to the President by the Legislative Branch and the President always has constitutional national security powers latent in the background should an exigent need arise that is inconsistent with a statutory procedural constraint.<sup>308</sup> This makes them more amenable to limitation, as Congress has demonstrated through a number of statutory constraints on the President's national security powers.<sup>309</sup>

Furthermore, Congress has acknowledged the shared responsibility over national security that requires "joint efforts and mutual respect by Congress and the President."<sup>310</sup> In findings made regarding the 1998 amendments to the Inspector General Act of 1978,<sup>311</sup> Congress went as far as to note that

Congress, as a co-equal branch of Government, is empowered by the Constitution to serve as a check on the executive branch; in that capacity, it has a 'need to know' of

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307. Abebe, *supra* note 256, at 14. Others may question whether the three categories should be adjusted, not ranked on whether the procedural constraint itself is minimal, moderate, or significant, but whether the *effect* of the procedural constraint is such. Notice, for instance, may not always have minimal effects on the proposed action. The administrative difficulties of applying procedural constraints based on the effects may be prohibitive, however, as the effects may be too particularized and not apparent until after the constraint has been implemented. Should Congress eventually be able to identify a pattern that emerges, the effects should definitely be taken into account and the constraints imposed can be adjusted.

308. See, e.g., Jonathan Masur, *A Hard Look or a Blind Eye: Administrative Deference and Military Deference*, 56 HASTINGS L.J. 441, 460 (2004) (citing *Padilla v. Bush*, 233 F. Supp. 2d 564 (S.D.N.Y. 2002) ("[T]he President's constitutional powers, in addition to the powers delegated to him by Congress, compel[] the judiciary to afford the Executive wide deference with regard to its wartime factual assertions.")).

309. See *supra* Section III.A.

310. Intelligence Community Whistleblower Protection Act of 1998, Pub. L. No. 105-272, § 701(b)(1), 112 Stat. 2413, 2413, *as reprinted in* 5 U.S.C. app. at 32 (2000).

311. Pub. L. No. 95-452, 92 Stat 1101 (codified as amended at 5 U.S.C. app. §§ 1-13 (Supp. V 2018)).

allegations of wrongdoing within the executive branch, including allegations of wrongdoing in the Intelligence Community . . . .<sup>312</sup>

The Supreme Court also has held in *Ziglar v. Abbasi*<sup>313</sup> that “national security policy . . . is the prerogative of the Congress and the President,”<sup>314</sup> and others have noted the Court’s “insistence on meaningful dual-branch solutions to national security.”<sup>315</sup>

One cannot deny that both the Legislative and Judicial Branches have imposed constraints on presidents and their use of statutory national security powers at different points in time.<sup>316</sup> These constraints have not been deemed to be unwarranted intrusions on a president’s authority, but important components of the delicate system of checks and balances. Importantly, and perhaps most comforting to those who are skeptical of procedural constraints on statutory power, under this framework, the President still retain full presidential discretion when acting under his constitutional Article II powers.

## 2. Conflating Constitutional and Statutory Authority

Even if one accepts the argument that Congress is capable of imposing such procedural constraints, parsing out constitutional and statutory national security authority is difficult.<sup>317</sup> While courts have found a

312. Intelligence Community Whistleblower Protection Act of 1998 § 701(b)(3), as reprinted in 5 U.S.C. app. at 32.

313. 137 S. Ct. 1843 (2017).

314. *Id.* (citing *Dep’t of Navy v. Egan*, 484 U.S. 518, 530 (1988) (emphasis added)).

315. Landau, *supra* note 27, at 1977.

316. *See, e.g., Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 662 (1952) (Clark, J., concurring) (“I conclude that where Congress has laid down specific procedures to deal with the type of crisis confronting the President, he must follow those procedures in meeting the crisis . . . . I cannot sustain the seizure in question because here, as in *Little v. Barreme*, Congress had prescribed methods to be followed by the President in meeting the emergency at hand.”); *see also* Jason Luong, *Forcing Constraint: The Case for Amending the International Emergency Economic Powers Act*, 78 TEX. L. REV. 1181, 1192 (2000) (“Although it fails to provide substantive limits on presidential action, the IEEPA does restrict the [P]resident’s power with several procedural constraints.”).

317. *See* RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 1 note 2 (AM. LAW INST. 1987) (“In foreign affairs, however, the President is clearly a separate source of law . . . . He perhaps has other law-making authority, although its scope is not agreed, and at least some of it may be subject to control by Congress.”); Koh, *supra* note 19, at 1263 (“The vast majority of the foreign affairs powers the President exercises daily are not inherent constitutional powers, but rather, authorities that Congress has expressly or impliedly delegated to him by statute. Yet closer examination of the foreign affairs areas in which Congress has extensively legislated reveals a pattern of executive ascendancy in statutory realms even more striking than the President’s continued domination of the constitutional realms of warmaking and treaty affairs.”); Jonathan Turley, *Through A Looking Glass Darkly: National Security and Statutory Interpretation*, 53

president to have constitutional powers that exist independently of statutory powers,<sup>318</sup> the converse is not true. Statutory authority for the President to act on a national security threat never exists in isolation. The President's constitutional war powers authority is always lurking in the background, even absent congressional authorization.<sup>319</sup> But if all agree that the President's national security powers derived from the Constitution are broader than those conferred by statute, and procedural constraints only apply to the President's exercise of statutory power, what would prevent the President from trying to evade the procedural constraints by claiming only constitutional powers?

Courts are typically reluctant to narrowly construe national security statutes that authorize executive action because courts hesitate to define the scope of the President's Article II powers in national security absent additional congressional authorization.<sup>320</sup> In *Al-Bihani v. Obama*, the court considered whether the international law-of-war principles had a role in the interpretation of the Authorization for Use of Military Force (AUMF).<sup>321</sup> The court stated that if the President's congressionally delegated authority granted under the AUMF was determined to be limited by international law, the President would not be subject to judicially enforced limits because of his independent authority under Article II.<sup>322</sup> The court stated that "Article II constitutes an alternative source of authority."<sup>323</sup> Under the President's Article II authority, the

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SMU L. REV. 205, 207 (2000) ("The isolation of national security cases from traditional statutory interpretation critiques is evident in judicial decisions.").

318. *See, e.g., Egan*, 484 U.S. at 527 (holding that the authority of the President "to classify and control access to information bearing on national security and to determine whether an individual is sufficiently trustworthy to occupy a position in the Executive Branch that will give that person access to such information flows primarily from this constitutional investment of power in the President [to serve as Commander in Chief] and exists apart from any explicit congressional grant").

319. *E.g., Al-Bihani v. Obama*, 619 F.3d 1, 50 (D.C. Cir. 2010) (Kavanaugh, J., concurring in the denial of rehearing en banc) ("In 1995, President Clinton deployed troops to Bosnia without congressional authorization, citing only his independent Article II authority . . . . President Clinton again acted without congressional authorization when he ordered air strikes in Kosovo . . . . Similarly, President George W. Bush invoked only his Article II authority when he deployed U.S. military forces to Haiti without congressional authorization in 2004.").

320. *See, e.g., Sunstein, Administrative Law, supra* note 199, at 2671 ("[S]tatutory enactments involving core executive authority should be construed . . . so as to avoid the constitutional difficulties that a narrow construction would introduce.").

321. *Al-Bihani*, 619 F.3d at 48 (Kavanaugh, J., concurring in the denial of rehearing en banc).

322. *Id.*

323. *Id.* (citing *Hamdi v. Rumsfeld*, 542 U.S. 507, 517 (2004) (plurality opinion)).



Executive “possesses significant authority to act without congressional authorization in the national security and foreign policy realms.”<sup>324</sup>

In *Cole v. Young*, the Supreme Court again stated that an executive order which was “to authorize dismissal of executive employees whose further employment [the President] believe[d] to be inconsistent with national security” should not be struck down if doing so would raise a question as to the constitutional power of the President.<sup>325</sup> While the power did not arise from a direct statutory authorization from Congress, Article II may still provide the President with the authority to exercise this power.<sup>326</sup>

The *Youngstown* approach provides a counter to the concern that a president could avoid procedural constraints by relying solely on constitutional powers.<sup>327</sup> Despite the broader constitutional national security power, courts have been more inclined to uphold executive power where the President is acting under “the express or implied will of Congress.”<sup>328</sup> And under Justice Jackson’s third category, a president will have a difficult time claiming he is acting under his constitutional powers if that exercise is in direct conflict with a statutory provision. Courts are typically less willing to defer to the President’s interpretation of a statute where the interpretation is seemingly inconsistent with the statute. For example, in *Miller v. Youakim*,<sup>329</sup> the Supreme Court stated that the “construction of a statute by those charged with its execution should be followed unless there are compelling indications that it is wrong.”<sup>330</sup> In *Levy v. Urbach*,<sup>331</sup> the Ninth Circuit would only overturn an executive action if it was “plainly inconsistent with the statute.”<sup>332</sup> Similarly, in *United States v. Wilson*,<sup>333</sup> the court ruled that “when the President’s narrowing construction of a statute does not contradict the express language of the statute, it is entitled to some deference, and [the court] will not normally disturb that construction.”<sup>334</sup> Therefore, Congress has the opportunity to try to prevent at least some unwanted presidential action by passing laws in direct contradiction.

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324. *Al-Bihani*, 619 F.3d at 50 n.28 (Kavanaugh, J., concurring in the denial of rehearing en banc).

325. 351 U.S. 536 at 568–69 (1956).

326. *Id.*

327. *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 662 (1952) (Clark, J., concurring).

328. *Id.* at 637–38 (Jackson, J., concurring).

329. 440 U.S. 125 (1979).

330. *Id.* at 145 n.25 (quoting *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367, 381 (1969)).

331. 651 F.2d 1278 (9th Cir. 1981).

332. *Id.* at 1283.

333. 76 M.J. 4 (C.A.A.F. 2017).

334. *Id.* at 6.

### 3. Judicial Enforcement of Constraints

Even if one accepts the argument that constraints are an essential element in the balance of powers between the three branches, there remains the problem of limited judicial enforcement against the President.<sup>335</sup> Whether that hesitation to hold the President to task when she invokes statutory national security powers stems from remnants of the political question doctrine or whether it is a historical reluctance to interfere in issues of national security, plaintiffs injured by the President's exercise of statutory national security powers must still demonstrate standing and the courts must find the issue to be justiciable.<sup>336</sup> Others, however, argue for the important structural role that the Judiciary plays in constraining the Executive.<sup>337</sup>

As one example of a failed judicial constraint, Harold Koh has masterfully documented the interplay between the TWEA and the IEEPA, describing how courts have watered down the IEEPA's procedural limitations.<sup>338</sup> As discussed earlier, he noted that although "TWEA had authorized the President to wield an enormous store of delegated power in both wartime and nonwartime situations, simply by declaring the existence of a national emergency," Congress responded by narrowing "the President's authority in *nonwartime* situations, conditioning his exercise of emergency powers upon prior congressional consultation, subsequent review, and legislative veto termination provisions."<sup>339</sup> Koh continues to note, however, how "three successive Supreme Court decisions quickly emasculated IEEPA's various congressional control devices," again reducing the procedural constraints to declarations of a national emergency.<sup>340</sup>

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335. See the interesting work of Silverstein and Hanley, *supra* note 93, at 1457, finding that that courts are more willing to uphold presidential actions where the President is enjoying high public opinion approval ratings.

336. See *supra* notes 104–06 and accompanying text.

337. Pearlstein, *supra* note 9, at 790 ("Delegation could be tolerated, but only because it was possible to maintain an offsetting power through judicial review. In this view, to the extent a doctrine of deference disables the courts from helping to maintain that system of 'dynamic equilibrium,' it impermissibly encroaches on the structural mandate of the judicial power." (footnotes omitted)).

338. *Supra* Section III.B.1.

339. Koh, *supra* note 19, at 1264.

340. *Id.* at 1264–65 & n.37 ("Presidents rarely terminated TWEA national emergencies. See Note, *The International Emergency Economic Powers Act: A Congressional Attempt to Control Presidential Emergency Power*, 96 HARV. L. REV. 1102, 1104 (1983) ([explaining that] while Congress was considering IEEPA's enactment in 1977, President Roosevelt's 1933 TWEA declaration of national banking emergency was still in force). Thus, 'TWEA emergency authority operated as a one-way ratchet to enhance greatly the President's discretionary authority over foreign policy.' *Regan v. Wald*, 468 U.S. 222, 245 (1984) (Blackmun, J., dissenting)."); see also

Similarly, the Trade Expansion Act (TEA) provides an example of a long, iterative discourse between the three branches.<sup>341</sup> The statute granted authority to the President to limit imports on national security grounds.<sup>342</sup> The President tried to limit imports under this statute, but the court struck down that act as exceeding the scope of the authority granted by Congress.<sup>343</sup> Congress stepped in to amend the act to provide explicit factors for the President to consider when determining whether there was a national security emergency, and the courts responded with more deference for the President.<sup>344</sup>

Another example of questionable judicial enforcement can be found in the National Emergencies Act (NEA).<sup>345</sup> Concerned about excessive presidential power during national emergencies, Congress passed the NEA in 1976 to provide a check on presidential power during national emergencies.<sup>346</sup> As Jordan Brunner describes,

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Brunner, *supra* note 257, at 407 (“[T]here have been virtually no substantive limits placed on a [P]resident acting in a national emergency as a result of the IEEPA’s passage.”).

341. See S. REP. NO. 100-71, at 135–36 (1987) (discussing § 232(b) of the Trade Expansion Act of 1962).

342. See *id.*

343. *Indep. Gasoline Marketers Council, Inc. v. Duncan*, 492 F. Supp. 614, 620–21 (D.D.C. 1980). The court ruled that “TEA does not authorize the President to impose general controls on domestically produced goods either through a monetary mechanism or through a quantitative device.” *Id.* at 618.

344. See, e.g., *Fed. Energy Admin. v. Algonquin SNG, Inc.*, 426 U.S. 548, 548 (1976).

Taken as a whole then, the legislative history of § 232(b) belies any suggestion that Congress, despite its use of broad language in the statute itself, intended to limit the President’s authority to the imposition of quotas and to bar the President from imposing a license fee system like the one challenged here. To the contrary, the provision’s original enactment, and its subsequent re-enactment in 1958, 1962, and 1974 in the face of repeated expressions from Members of Congress and the Executive Branch as to their broad understanding of its language, all lead to the conclusion that § 232(b) does in fact authorize the actions of the President challenged here. Accordingly, the judgment of the Court of Appeals to the contrary cannot stand.

*Id.* at 570–71.

345. Pub. L. No. 94-412, 90 Stat. 1255 (1976) (codified as amended at 50 U.S.C. §§ 1601, 1621, 1622, 1631, 1641, 1651 (2012)).

346. *Id.* § 1621(a) (“the President is authorized to declare such national emergency”), but § 1601(a) was to provide for termination of the majority of national emergencies within two years of its passage. See also Memorandum Opinion for the Counsel to the President: Applicability of the National Emergencies Act to Statutes That Do Not Expressly Require the President to Declare a National Emergency 1 (Aug. 24, 2016) <https://www.justice.gov/opinion/file/914396/download> [<https://perma.cc/X7C3-VLN6>] (finding that the NEA’s “coverage is not limited to statutes that expressly require the President to declare a national emergency, but rather extends to any statute “conferring powers and authorities to be exercised during a national emergency,” unless Congress has exempted such a statute from the Act.”)

In the time leading up to the NEA's passage, two large problems emerged: (1) "the forty-year emergency," . . . and (2) "approximately 470 separate sections of the United States Code were found . . . to delegate to the President a vast range of powers embracing every aspect of American life." The latter powers range from controlling production and regulating private capital to assigning military forces abroad and controlling all communication, transportation, and travel in areas the [P]resident designates. To manage these problems, Congress passed the NEA. The NEA sought to rein in presidential power by, among other things, terminating all open-ended states of national emergency in existence within two years after its passage. It also placed numerous reporting requirements on the [P]resident. The NEA applies to all national emergencies unless the statutory authority referenced is explicitly exempted from the NEA's provisions.<sup>347</sup>

"Presidents declared an additional thirty-eight national states of emergency between 1976 and mid-2004 under the National Emergencies Act, above and beyond any of the natural disaster declarations."<sup>348</sup> Commentators have noted, however, how courts have failed to enforce any of these provisions.<sup>349</sup>

Judicial enforcement may also be limited because there will be times when the President cannot explain fully a decision to act in the name of national security without disclosing sources or methods of intelligence-gathering. For instance, the state secrets privilege allows the federal government to unconditionally withhold sensitive materials from

347. *Id.* (footnotes omitted) (quoting Aaron S. Klieman, *Preparing for the Hour of Need: The National Emergencies Act*, 9 PRESIDENTIAL STUD. Q. 47, 54 (1979)). See generally S. REP. NO. 93-549, at 14 (1973), <https://ia802500.us.archive.org/3/items/senate-report-93-549/senate-report-93-549.pdf> [<https://perma.cc/F3QV-LXC4>] ("[A] legislative formula needs to be devised . . . by which Congress can exercise effective oversight over . . . actions . . . taken pursuant to a state of national emergency as well as providing a regular and consistent procedure for the termination of such grants of authority.").

348. Kim Lane Scheppele, *Small Emergencies*, 40 GA. L. REV. 835, 843-44 (2006); As of 2019, 31 emergencies remain active, many of which have been active for more than two years. Ryan Struyk, *Trump's Wall Would Be the 32<sup>nd</sup> Active National Emergency*, (Jan. 10, 2019, 12:46 PM), <https://www.cnn.com/2019/01/07/politics/trump-wall-active-national-emergency/index.html> [<https://perma.cc/N6Y2-FKRU>].

349. "[D]uring the 40 years the law has been in place, Congress has not met even once, let alone every six months, to vote on whether to end" the national emergencies. See Elizabeth Goitein, *What the President Could Do If He Declares a State of Emergency*, (Jan./Feb. 2019), <https://www.theatlantic.com/magazine/archive/2019/01/presidential-emergency-powers/576418/> [<https://perma.cc/75TK-BB3H>]; See also, Koh *supra* note 19, at 1291 ("[T]he President has won because the federal courts have usually *tolerated* his acts, either by refusing to hear challenges to those acts, or by hearing those challenges and then affirming his authority on the merits.").

evidentiary records in court cases.<sup>350</sup> Furthermore, “[s]ince the enactment of the [Freedom of Information Act], courts have ruled on hundreds of cases involving classified information, affirming the government’s decision to withhold the requested information in nearly every case,”<sup>351</sup> many times on the grounds of national security. This is due to many reasons: “[f]ailure to maintain secrecy could injure a country when classified national security information is crucial to present day foreign-policy decisions, place diplomacy at a relative disadvantage, involve active military operations, derive from covert sources who were either promised anonymity or remain active, or sire an unwarranted and undesirable public repercussion.”<sup>352</sup> The President, and the government in general, has to strike a delicate balance between safety and transparency when it comes to information regarding matters of national security. While “[n]ational security secrecy prerogatives and executive privileges have permitted many administrations to veil highly controversial actions and misdeeds,”<sup>353</sup> there are also many situations in which not disclosing national security secrets has helped protect the American people.<sup>354</sup> At one point, Congress itself had even “gone so far as to impose an affirmative obligation on the Director of the CIA to protect intelligence sources.”<sup>355</sup> Courts are not likely to be willing to second guess a president who alleges that she cannot disclose information that was critical to her decision because its disclosure would compromise sources and methods.

There are a number of counterexamples, however, where courts have employed their powers of judicial review to overturn presidential exercises of statutory national security authority. The D.C. Circuit has

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350. Faaris Akremi, *Does Justice “Need to Know”?: Judging Classified State Secrets in the Face of Executive Obstruction*, 70 STAN. L. REV. 973, 976 (2018).

351. Robert P. Deyling, *Judicial Deference and De Novo Review in Litigation Over National Security Information Under the Freedom of Information Act*, 37 VILL. L. REV. 67, 67 (1992) (footnote omitted).

352. Robert Bejesky, *National Security Information Flow: From Source to Reporter’s Privilege*, 24 ST. THOMAS L. REV. 399, 402–03 (2012) (footnote omitted) (“White House Executive Orders designate what *should* be a classified secret, but the [P]resident has considerable interpretive latitude and the ultimate decision over what, how, and to what extent information should be classified or declassified is generally unreviewable.”).

353. *Id.* at 426.

354. *See, e.g.*, Devin S. Schindler, *Between Safety and Transparency: Prior Restraints, FOIA, and the Power of the Executive*, 38 HASTINGS CONST. L.Q. 1, 12–13, 22 (2010) (discussing the battle between the ACLU and the Department of Defense over photographs, documentation, and other information regarding the torture of prisoners detained at Abu Ghraib prison, and arguing that “[t]he case . . . highlights the dilemma faced by the Executive when confronted with a demand to release nonconfidential information the President and his agents legitimately believe will cause substantive, physical harm to Americans”).

355. *Id.* at 30; accord 50 U.S.C. § 401 note (2006) (Savings Provisions).

rejected the President's claim to have satisfied a procedural constraint where the President issued an executive order barring the federal government from contracting with employers who hire permanent replacements during a lawful strike: "We think it untenable to conclude that there are no judicially enforceable limitations on presidential actions, besides actions that run afoul of the Constitution or which contravene direct statutory prohibitions, so long as the President *claims* that he is acting pursuant to the Procurement Act in the pursuit of governmental savings."<sup>356</sup> A mere claim was not enough.

Even where Congress has attempted to preclude judicial review of statutory national security power, courts have found a way to review such executive action. For instance, Congress included a provision in FINSA stating that certain actions of the President "shall not be subject to judicial review";<sup>357</sup> a finding that was upheld by the Supreme Court in *Dalton*.<sup>358</sup> The D.C. Circuit clarified that *Dalton*'s holding simply meant that "when a statute entrusts a discrete specific decision to the President and contains no limitations on the President's exercise of that authority, judicial review of an abuse of discretion claim is not available."<sup>359</sup> With this clarification, the court proceeded to exercise judicial review in that case, where the President "independently violate[d] the NLRA, a statute that delegates no authority to the President to interfere with an employer's right to hire permanent replacements during a lawful strike."<sup>360</sup>

Moreover, the presence of procedural constraints does nothing to minimize the Judiciary's responsibility to review a Statutory National Security President. In *Ralls Corp. v. Committee on Foreign Investment in the United States*,<sup>361</sup> the court affirmed its proper place in reviewing a president's statutory national security actions, even where the statute otherwise provided for some congressional oversight of the President through an annual report the President was required to submit.<sup>362</sup> The court said: "We hardly think that, by reserving to itself such limited review of presidential actions and critical technology assessments, the Congress intended to abrogate the courts' traditional role of policing

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356. Chamber of Commerce of the U.S. v. Reich, 74 F.3d 1322, 1332 (D.C. Cir. 1996).

357. Foreign Investment and National Security Act of 2007, Pub. L. No. 110-49, § 6, 121 Stat. 246, 256 (codified as amended at 50 U.S.C. § 4565 (Supp. III 2016)) ("[t]he actions of the President under paragraph (1) of subsection (d) and the findings of the President under paragraph (4) of subsection (d) shall not be subject to judicial review").

358. *Dalton v. Specter*, 511 U.S. 462, 473 (1994).

359. *Reich*, 74 F.3d at 1331.

360. *Id.* at 1332.

361. 758 F.3d 296 (D.C. Cir. 2014).

362. *Id.* at 312. See *supra* note 220–21 for a discussion of the Defense Production Act.

governmental procedure for constitutional infirmity and perform that function itself.”<sup>363</sup>

Most recently, in Justice Sotomayor’s dissent in *Trump v. Hawaii*,<sup>364</sup> she alleged that “the majority empowers the President to hide behind an administrative review process that the Government refuses to disclose to the public.”<sup>365</sup> She analogized this case to *Korematsu v. United States*,<sup>366</sup> where “the Government was unwilling to reveal its own intelligence agencies’ views of the alleged security concerns to the very citizens it purported to protect.”<sup>367</sup> Although *Korematsu* involved constitutional, and not statutory authority, Justice Jackson’s dissenting opinion that Justice Sotomayor cites is just as relevant here: “upholding the Government’s policy would prove to be ‘a far more subtle blow to liberty than the promulgation of the order itself,’ for although the executive order was not likely to be long lasting, the Court’s willingness to tolerate it would endure.”<sup>368</sup>

#### IV. CHANGING THE DEFAULT ASSUMPTIONS ABOUT STATUTORY NATIONAL SECURITY POWER

The last piece of the puzzle involves imposing a default set of procedural constraints on a president seeking to exercise statutory powers that are conditioned on a national security provision. This Part provides mechanisms to tailor such a proposal in a way to better effectuate the balance of powers over national security threats. It does not specify whether Congress should address existing grants of statutory national security authority, future grants of authority, or both. Should Congress decide to pass one comprehensive, retrospective law akin to the NEA, it need not apply to all statutory references to national security. Instead, Congress would be able to catalogue the numerous provisions containing these terms and separate them into two groups: those which use the terms as triggers of presidential power and those that simply use the terms as descriptors.<sup>369</sup> Should Congress include model constraints in prospective

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363. *Ralls Corp.*, 758 F.3d at 312.

364. 138 S. Ct. 2392 (2018).

365. *Id.* at 2443 (Sotomayor, J., dissenting).

366. 323 U.S. 214 (1944), *abrogated by* *Trump v. Hawaii*, 138 S. Ct. 2392 (2018).

367. *Trump v. Hawaii*, 138 S. Ct. at 2447 (Sotomayor, J., dissenting).

368. *Id.* at 2448 (quoting *Korematsu*, 323 U.S. at 245–46 (Jackson, J., dissenting)).

369. *See, e.g.*, 50 U.S.C. § 3021 (Supp. IV 2017) (describing the function and membership of the National Security Council); 50 U.S.C.A. § 3314 (West 2018) (describing how to submit reports about national security systems to Congress); 50 U.S.C. § 3617 (Supp. IV 2017) (describing the establishment and duties of the National Security Agency Emerging Technologies Panel). The foregoing are the types of statutory provisions that would be excluded as mere descriptive references. Congress may also want to separate those statutes that have national security as their primary purpose from those where the national security provisions are merely

individual statutes, there may be less ambiguity about what form of constraints along the sliding scale is appropriate to that specific power. Those decisions are left to Congress.

But this Part does urge Congress to consider constraints. The basic premise for these constraints is that a statutory president should earn the deference a court provides her by providing legitimate justifications for the exercise of such legislatively delegated power. This leads to at least two initial questions. First, what type of procedural constraint would be required of the President? Second, how would one narrowly tailor the constraints to provide both flexibility and accountability? This Section answers both.

This Article is also the first to suggest a distinction to allow for a sliding scale of constraints that may be more workable than past efforts—namely, whether the national security threat is acute or chronic. This approach carries its own challenges, but it may be more effective when considering the imposition of procedural constraints on the President. This is because a primary objection to imposing such constraints on the President with regards to national security is that it will hinder that president from making necessarily swift decisions. However, distinguishing acute from chronic threats can provide a procedural sliding scale that provides the President flexibility when it is needed (acute threats), but requires a greater showing when time and circumstances allow (chronic threats). In short, it sets forth suggestions for how to narrowly tailor these additional constraints in a way that best allows for both accountability and responsiveness to coexist.

#### A. *Sliding Scale of Procedural Constraints*

The range of procedural constraints that could be imposed on a president acting under statutory national security powers is vast, as evidenced by those documented in Section III.A. Congress could also adopt procedural requirements from the APA; the National Environmental Policy Act of 1969 (NEPA);<sup>370</sup> or a host of other statutes that require more mindful decision-making through some mixture of notice, reasoned decision-making, or the development of a written record. The default requirement, however, should be a presidential finding of a national security threat that entails more than a mere assertion or claim without any justification. Complying with such procedures allows a

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incidental to the primary purposes of the statute. Congress also may be limited in this approach by the president's veto authority. One possibility that eliminates this problem for future statutes is the use of sunset provisions. *See generally*, Emily Berman, *The Paradox of Counterterrorism Sunset Provisions*, 81 *FORDHAM L. REV.* 1777 (2013).

370. Pub. L. No. 91-190, 83 Stat. 852 (1970) (codified as amended in scattered sections of 42 U.S.C.).



president to “earn” the deference he seeks from courts on such matters, but also suffers from temporal limits as any additional procedural hurdles will delay implementation.

Requiring greater demonstration by the President of the actual security threat used to invoke statutory powers is not a new idea, as evidenced by support from a number of courts.<sup>371</sup> In *Stagg P.C. v. U.S. Department of State*,<sup>372</sup> for instance, the Second Circuit stated that the government could not simply invoke national security as a vague generality, but must set forth specific concerns to “technical data” as defined in the International Traffic in Arms Regulation.<sup>373</sup> Similarly, one court has noted that it wants more than a mere assertion of national security:

National security is too ambiguous and broad a term. The memory of lawlessness that masqueraded as ‘national security’ searches is too close to the memory of this court. . . . Without any qualification or explanation of what is meant by national security an investigation can be initiated on the assertions of an overzealous public official who disagrees with the unorthodox, yet constitutionally protected political views of a group or person.<sup>374</sup>

Similarly, in *Meshal v. Higgenbotham*,<sup>375</sup> the court required the Government to provide sufficient detail before making an assertion that national security was at risk:

Before declining to recognize a cause of action because of national security concerns, the court should require the

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371. See *Hamdi v. Rumsfeld*, 542 U.S. 507, 526–33 (2004) (plurality opinion) (rejecting the government proposal that a president must show “some evidence” to support executive action from a congressional delegation and finding the President’s generalized finding about the viability of criminal trials was “insufficient”); *Cole v. Young*, 351 U.S. 536, 551 (1956) (requiring specific evidence to show that the nation’s safety was imperiled). A similar justification has been imposed on executive agencies. See, e.g., *Burkhart v. Saxbe*, 397 F. Supp. 499, 504 (E.D. Pa. 1975) (holding that the defendants (FBI) could not dismiss a claim under § 2520 by simply stating that defendants were within a national security exemption without supported statements which would show that (1) surveillance was done for national security purposes and (2) the allegation of national security comported with the congressional purpose of 18 U.S.C. § 2511(3)). *But see* *United States v. U.S. Dist. Court*, 407 U.S. 297, 320 (1972) (arguing on behalf of the government that the courts lack knowledge and techniques necessary to determine whether there was a probable cause to believe that surveillance was necessary to protect national security).

372. 673 F. App’x 93 (2d Cir. 2016).

373. *Id.* at 95–96 (citing *N.Y. Times Co. v. United States*, 403 U.S. 713, 719 (1971) (Black, J., concurring)). The court added that considerable deference is accorded to the Executive in evaluating the facts. *Id.* at 96.

374. *Paton v. La Prade*, 469 F. Supp. 773, 782 (D.N.J. 1978).

375. 804 F.3d 417 (D.C. Cir. 2015).

government to provide a concrete, plausible, and authoritative explanation as to why the suit implicates national security concerns. That judges cannot “forecast” on our own whether or how this suit might affect national security only underscores why we must require that the government take responsibility for invoking any such rationale. If this case indeed raises national security concerns, our law provides the United States with the opportunity to advance them, and gives courts more nuanced and focused ways to address such concerns.<sup>376</sup>

This approach parallels that of scholars such as Evan Criddle, who has advocated for a greater role for due process in presidential decision-making. After recounting the nondelegation doctrine’s history, *Panama Refining Co. v. Ryan*,<sup>377</sup> and *A. L. A. Schechter Poultry Corp. v. United States*,<sup>378</sup> Criddle noted that “the Court took pains in both cases to emphasize the dearth of administrative procedure in the President’s decisionmaking process.”<sup>379</sup> He explored the options for enhancing presidential accountability, including a rejection of *Franklin v. Massachusetts*, an extension of the APA to the President, and Congressional legislation providing a general framework for presidential administrative procedure.<sup>380</sup>

Other courts have demonstrated their willingness to demand more of a president acting under statutory authority, even when such procedural constraints are only implied. Section 1182(f) of the Immigration and Nationality Act of 1952 (INA),<sup>381</sup> for instance, provides express statutory authority without discernible limits.<sup>382</sup> It states that:

[w]henver the President finds that the entry of any aliens or of any class of aliens into the United States would be detrimental to the interests of the United States, he may by proclamation, and for such period as he shall deem necessary, suspend the entry of all aliens or any class of aliens as immigrants or nonimmigrants, or impose on the entry of aliens any restrictions he may deem to be appropriate.<sup>383</sup>

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376. *Id.* at 445 (citation omitted).

377. 293 U.S. 388 (1935)

378. 295 U.S. 495 (1935).

379. Criddle, *supra* note 164, at 198–201.

380. *Id.*

381. Pub. L. No. 82-414, 66 Stat. 163 (codified as amended in scattered sections of 8 U.S.C.).

382. 8 U.S.C. § 1182(f) (2012).

383. *Id.*

Relying on this statutory national security authority, President Trump issued Executive Order 13,769, which included several provisions explicitly limiting the entry of refugees and aliens from seven countries into the United States.<sup>384</sup> Although this provision did not contain an explicit reference to national security, the government defended the presidential action in the name of national security.<sup>385</sup>

When challenged in two different jurisdictions, both courts acknowledged the constitutional constraints that limited such executive action, citing the Establishment Clause of the First Amendment.<sup>386</sup> The United States District Courts of Maryland and Hawaii, along with two appellate courts, disagreed with the President's interpretation of the scope of executive authority under the INA.<sup>387</sup> President Trump appealed *International Refugee Assistance Project v. Trump*<sup>388</sup> from the District Court of Maryland to the United States Court of Appeals for the Fourth Circuit, which affirmed in part the district court's issuance of the nationwide preliminary injunction against enforcement of Section 2(c).<sup>389</sup> The President subsequently issued a revised order, Executive Order 13,780 to address these concerns, revoking Executive Order 13,769.<sup>390</sup>

But perhaps more importantly for our purposes, both the Fourth and Ninth Circuits implied procedural constraints on presidential action even where they were not explicit in the statute. This is a bold assertion of unitary judicial power. The Fourth Circuit stated that the Government was unable to show that national security was the primary purpose of implementing Section 2(c).<sup>391</sup> The court acknowledged its duty to ensure that the President is choosing a constitutionally permissible means of

384. Exec. Order No. 13,769, 82 Fed. Reg. 8977 (Jan. 27, 2017), *revoked by* Exec. Order No. 13,780, 82 Fed. Reg. 13,209 (Mar. 6, 2017).

385. *See id.*; *Hawai'i v. Trump*, 245 F. Supp. 3d 1227, 1235 (D. Haw.) (“According to the Government, the Court must afford the President deference in the national security context and should not ‘look behind the exercise of [the President’s] discretion’ taken ‘on the basis of a facially legitimate and bona fide reason.’” (alteration in original) (quoting Gov’t Memorandum in Opposition to Motion for TRO at 42–43, *Hawai'i v. Trump*, 245 F. Supp. 3d 1227 (No. 17-0050 DKW-KSC), ECF No. 145)), *aff’d in part and vacated in part*, 859 F.3d 741 (9th Cir.), *vacated*, 138 S. Ct. 377 (2017).

386. *See Int’l Refugee Assistance Project v. Trump*, 857 F.3d 554, 586–87 (4th Cir.), *vacated*, 138 S. Ct. 353 (2017).

387. *See Hawai'i v. Trump*, 245 F. Supp. 3d. at 1237; *see also Int’l Refugee Assistance Project*, 241 F. Supp. 3d. at 554–56 (explaining that the INA does not provide the President a basis to act discriminatorily in an Executive Order).

388. 857 F.3d 554 (4th Cir.), *vacated*, 138 S. Ct. 353 (2017).

389. *Id.* at 572.

390. Exec. Order No. 13,780, 82 Fed. Reg. 13,209 (Mar. 6, 2017).

391. *Int’l Refugee Assistance Project*, 857 F.3d at 596.

exercising immigration power.<sup>392</sup> The Fourth Circuit chastised the Government:

The Government argues that we should simply defer to the executive and presume that the President's actions are lawful so long as he utters the magic words "national security." But our system of checks and balances established by the Framers makes clear that such unquestioning deference is not the way our democracy is to operate. Although the executive branch may have authority over national security affairs, it may only exercise that authority within the confines of the law . . . .<sup>393</sup>

The Ninth Circuit similarly upheld a preliminary injunction issued by the United States District Court for the District of Hawaii to block enforcement of Section 2(c), finding that the President had exceeded his authority under 1182(f) of the INA, and stating that "[t]he actions taken . . . require the President first to make sufficient findings that the entry of nationals from the six designated countries and the entry of all refugees would be detrimental to the interests of the United States."<sup>394</sup> The court also found that the order did "not provide a rationale explaining why permitting entry of nationals from the six designated countries under current protocols would be detrimental to the interests of the United States."<sup>395</sup> Therefore, the Ninth Circuit concluded that the President did not satisfy the precondition to exercising his authority because the order did not offer any legally sufficient findings that the nationality of the barred individuals would render them a national security concern, warranting their restricted entry.<sup>396</sup> The court added that "[n]ational security is not a 'talismanic incantation' that, once invoked, can support any and all exercise of executive power under § 1182(f)."<sup>397</sup> These decisions reflect a broader willingness to hold statutory national security Presidents to a standard higher than the explicit statute, but these courts took a risk in so holding in the absence of explicit constraints in the text

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392. *Id.* at 593–94.

393. *Id.* at 632 (citation omitted).

394. *Hawaii v. Trump*, 859 F.3d 741, 776 (9th Cir.), *vacated*, 138 S. Ct. 377 (2017).

395. *Id.* at 773. The court compared this to other Presidents that have invoked their authority under § 1182(f) by tying exclusion of classes of persons to culpable conduct of barred aliens. *Id.* at 772 n.13.

396. *Id.* at 776.

397. *Id.* at 774 (citing *United States v. Robel*, 389 U.S. 258, 263–64 (1967)); *see also* *Def. Distributed v. U.S. Dep't of State*, 838 F.3d 451, 476 (5th Cir. 2016) (Jones, J., dissenting) (rejecting the government's "vague invocation" of national security interests); *Paton v. La Prade*, 469 F. Supp. 773, 781 (D.N.J. 1978) ("Thus the court dispels the myth that national security is an incantation with which the government can circumvent the Constitution or the law of the land.").

of the statute. Specifically, they required a rationale and legally sufficient findings that the target of the presidential action was a national security concern. In other words, the courts unilaterally imposed procedural constraints.

Before the second Executive Order expired, President Trump issued Proclamation No. 9645, seeking to improve vetting procedures for foreign nationals traveling to the United States by imposing a permanent restriction on travel.<sup>398</sup> Plaintiffs challenged it in the Supreme Court as violating both a statute (Immigration and Nationality Act) and the Constitution (Establishment Clause).<sup>399</sup> In June of 2018, the Supreme Court consolidated the cases and reversed both lower courts, upholding the President's lawful exercise of "broad discretion granted to him" under the statute.<sup>400</sup> The Court placed "the admission and exclusion of foreign nationals" squarely within the "fundamental sovereign attribute[s] exercised by the Government's political departments largely immune from judicial control."<sup>401</sup> Despite these findings, the Court engaged in a review of the deference provided by the statutory terms, finding that "detrimental to the interests of the United States" is a statutory requirement that "exudes deference to the President."<sup>402</sup> This suggests that a Congressional grant of statutory authority that was not as broad may trigger greater scrutiny.

Plaintiffs had asserted that the statute "requires the President to make a finding" that entry of these foreigners "would be detrimental to the interests of the United States," as well as "explain that finding with sufficient detail to enable judicial review."<sup>403</sup> The Court found this premise "questionable," but proceeded to evaluate both whether (1) the findings are persuasive; and (2) whether the findings are sufficient. It proceeded, "assuming that some form of inquiry into the persuasiveness of the President's findings is appropriate."<sup>404</sup> But it rejected any attempt to attack the sufficiency, noting that "such a searching inquiry is inconsistent with the broad statutory text and the deference traditionally accorded the President in this sphere."<sup>405</sup> The Court made note of the "comprehensive evaluation" conducted by the agencies and the "extensive findings" issued with the Proclamation that assess the other

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398. Proclamation No. 9645, 82 Fed. Reg. 45,161 (Sept. 24, 2017).

399. *Trump v. Hawaii*, 138 S. Ct. 2392, 2406 (2018).

400. *Id.* at 2400.

401. *Id.* at 2418 (quoting *Fiallo v. Bell*, 430 U.S. 787, 792 (1977)).

402. *Id.* at 2408 (quoting 8 U.S.C. § 1182(f) (2012)).

403. *Id.* at 2409 (emphasis omitted) (quoting 8 U.S.C. § 1182(f)).

404. *Id.* at 2400 (citing *Webster v. Doe*, 486 U.S. 592, 600 (1988)).

405. *Id.* at 2400–01 (citing *Sale v. Haitian Ctrs. Council, Inc.*, 509 U.S. 155, 187–88 (1993)).

countries' deficiencies in their entry procedures.<sup>406</sup> The Court noted that "the Government need provide only a statutory citation to explain a visa denial."<sup>407</sup> It also noted that "'when it comes to collecting evidence and drawing inferences' on questions of national security, 'the lack of competence on the part of the courts is marked.'"<sup>408</sup> Faced with a facially broad statute, Plaintiffs were forced to focus on the statutory structure and legislative purpose, both of which were rejected by the Supreme Court in the face of what they perceived as the "clear text of the statute."<sup>409</sup>

*Trump v. Hawaii* stands as yet another reason for why Congress must speak with more clarity where such findings are required. In rejecting claims that the President failed to justify his use of statutory authority, the Court concurrently lays out a roadmap for Congress should it wish for a different result in the future. First, the Court distinguished the broad "detrimental to the interests of the United States" language here from narrower "national emergency" language.<sup>410</sup> The Supreme Court recognized that "[w]hen Congress wishes to condition an exercise of executive authority on the President's finding of an exigency or crisis, it knows how to say just that."<sup>411</sup> Second, the Court noted that the text of this statute "offers no standards that would enable courts to assess, for example, whether the situation in North Korea justifies entry restrictions while the terrorist threat in Yemen does not."<sup>412</sup> Faced with a facially broad statute, Plaintiffs were forced to focus on the statutory structure and legislative purpose, both of which were rejected by the Supreme Court in the face of what they perceived as the "clear text" of the statute.<sup>413</sup>

While not a guarantee that a future Court would be able to see beyond the longstanding precedent that the President is the more appropriate branch than the courts to assess foreign security threats, a statute that used narrower language and provided standards by which courts can assess presidential actions might go a long way. A court may then be more willing to acknowledge that the more appropriate branch is not necessarily the President, but a political branch. Importantly, the politically appointed branches can include either the President, *Congress*,

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406. *Id.* at 2400.

407. *Id.* at 2419 (citing *Kerry v. Din*, 135 S. Ct. 2128, 2141 (2015)).

408. *Id.* (quoting *Holder v. Humanitarian Law Project*, 561 U.S. 1, 34 (2010)).

409. *Id.* at 2410.

410. *Id.* at 2412–13 (quoting 8 U.S.C. § 1182(f) (2012)).

411. *Id.* at 2413.

412. *Id.* at 2415.

413. *Id.* at 2410.

or *both*.<sup>414</sup> Whereas courts may defer to the President over Congress for constitutionally authorized national security actions, courts may be more willing to defer to Congress over the President for statutorily authorized national security actions.

Importantly, in his dissent in *Trump v. Hawaii*, Justice Breyer states that the statute does require that there be “find[ings]” that the grant of visas to foreigners “would be detrimental to the interests of the United States.”<sup>415</sup> The majority found the President’s findings to be sufficient, but the broad text of the statute again suggests that Congress could provide more requirements than merely directing a president to “find.” For instance, Congress could require Presidents to provide “sufficient” or “overwhelming” documentation to support the alleged national security interests, including specific threats. There are a number of ways for courts to handle such sensitive information,<sup>416</sup> but the default should not be for courts to blindly decline to perform the analysis. As just one example, these findings could be confidential and released to the courts for *in camera* review.<sup>417</sup> Without any type of review, there is nothing to provide a check on a rogue executive, a result that few would find palatable. Justice Sotomayor takes a much stronger position in her dissent, noting that the President’s policy “masquerades behind a façade of national-security concerns”<sup>418</sup> and is merely “window dressing” to the President’s discriminatory animus against Islam.<sup>419</sup> She notes that “[d]eference is different from unquestioning acceptance.”<sup>420</sup> In short, Congress is within its power to impose procedural constraints on a president, and where they have, courts can and should enforce them.

### B. From Acute to Chronic Threats

This last Section provides additional considerations for a Congress contemplating procedural constraints, namely how the level of procedural

414. See, e.g., *Mathews v. Diaz*, 426 U.S. 67, 81 (1976) (“[R]elations with foreign powers . . . are frequently of a character more appropriate to *either* the Legislative or the Executive . . .” (emphasis added)).

415. *Trump v. Hawaii*, 138 S. Ct. at 2429 (Breyer, J., dissenting) (alteration in original) (quoting 8 U.S.C. § 1182(f)).

416. See, e.g., Kwoka, *supra* note 119, at 108, 144 (arguing against “the exceptional procedures applied to national security secrecy”).

417. See, e.g., 50 U.S.C. § 1702(c) (2012) (“In any judicial review of a determination made under this section, if the determination was based on classified information (as defined in section 1(a) of the Classified Information Procedures Act) such information may be submitted to the reviewing court *ex parte* and *in camera*. This subsection does not confer or imply any right to judicial review.”); “The legislature cannot act effectively if it is at the mercy of the executive for information.” See ACKERMAN, *supra* note 258, at 85. For a more thorough discussion of ways to maintain secrecy in national security litigation, see Shirin Sinnar, *Procedural Experimentation and National Security in the Courts*, 106 CALIF. L. REV. 991 (2018).

418. *Trump v. Hawaii*, 138 S. Ct. at 2433 (Sotomayor, J., dissenting).

419. *Id.* at 2440.

420. *Id.* at 2441 n.6.

requirements could vary depending on the type of national security threat. Not all security threats are created equal, so it would be rational that the levels of procedural constraint are similarly varied. Despite the variety, the key to creating a workable system of constraints would be to ensure that similar levels of procedural constraints apply to similar threats. For this reason, this Section proposes a novel approach to categorizing national security threats as acute or chronic, with a corresponding sliding scale inverse to the exigency of the situation. In other words, for chronic national security threats, Congress might impose a basic demonstration that justifies the existence of an actual security threat, much like that discussed above. For those national security threats that the President deems to be more acute, the President can act liberated from procedural constraints.

The first challenge to implementing such a proposal would be to define what is meant by acute and chronic threats. Acute threats could be those that are discrete, specific incidents capable of identification. An example of an acute threat would be a targeted attack on the transformers on the electric grid in California. Chronic threats could be generalized threats with indistinct beginnings and ends or those that are recognized as being perpetual. An example of a chronic threat would be cybersecurity. In 2015, President Obama used his statutory national security powers under the IEEPA to issue Executive Order 13,694 on cybersecurity.<sup>421</sup> In essence, this Executive Order “created a *permanent* national emergency, given the ubiquity and continued escalation of cyberattacks”,<sup>422</sup> providing a clear example of a chronic national security threat. But we encounter more difficulty with the threat created by the thirteen Russians indicted for meddling in elections.<sup>423</sup> If the acts that threatened national security occurred close in time to the elections, those would surely be acute. But if they were part of the long game, with slow infiltration over many years, these acts may be more appropriately classified as chronic. In reality, many risks are both acute and chronic, and the President is likely to claim that every risk falls in both categories.

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421. Exec. Order No. 13,694, 80 Fed. Reg. 18,077 (Apr. 1, 2015).

422. Brunner, *supra* note 257, at 397. This conception of an acute national security concern comports with governmental interpretations of a national “emergency.” See CRS Report for Congress, *National Emergency Powers* at CRS-5 (Aug. 30, 2007), <https://fas.org/sgp/crs/natsec/98-505.pdf> [<https://perma.cc/C77S-FPRA>] (acknowledging the difficulties of defining national emergencies and suggesting an emergency is “sudden, unforeseen, and of unknown duration”). Similarly, Congress rejected an amendment to the NEA that would have “limit[ed] its use to situations in which war has already been declared or the United States has been attacked, unless an emergency is specifically declared by joint resolution of Congress.” Lobel, *supra* note 120, at 1429 (*citing* 21 CONG. REC. 276456 (Sept. 4, 1975)).

423. See Bertrand, *supra* note 90.



Those definitional problems lead to a second, related problem: who is to decide whether threats should be classified as acute or chronic? Although allowing the President to decide is as effective as the fox guarding the hen house, allowing the courts to decide is likely to cause more separation-of-powers concerns. As discussed earlier, attempts to make the distinction between foreign and domestic national security threats<sup>424</sup> and war and nonwartime threats<sup>425</sup> initially suggest that this distinction is bound for failure. Most of them have proved untenable and unworkable as the lines between the distinctions have become increasingly blurred. One way to make the distinction between acute and chronic a bit less fluid would be to tie it to the idea of a *default* presumption that all threats are chronic. In that way, the President alleging an acute national security threat must overcome this default presumption.<sup>426</sup> It is the rare circumstance where the President needs to respond immediately, and where he does, he is likely to be able to justify that the action is acute or alternatively base his actions on constitutional war powers.

A third problem lies in the transitory nature of national security threats. One need only look to the war in Afghanistan to see a threat that moved from acute to chronic.<sup>427</sup> When such threats get “downgraded,” will a president need to perform a reassessment of the measures taken with adherence to the enhanced procedural constraints of a chronic threat?

Although there is no indication that Congress has ever used this distinction between acute and chronic national security threats in a statute, in a few rare instances, Congress has conditioned the President’s use of national security power on the existence of an “imminent” national security threat, a term that may be comparable to the “acute” classification.<sup>428</sup> Congress rarely provides more clarity on the term, but this example suggests that they are intending something other than “generalized” national security as it is understood in the majority of

424. See *supra* note 81 and accompanying text.

425. See *supra* note 80 and accompanying text.

426. Opponents may argue that putting this burden on a president to overcome the default chronic presumption is just as burdensome as a procedural constraint, but in reality, it would not delay any action, but would merely be subject to judicial review after the action had occurred.

427. See generally Mujib Mashal, ‘Time for This War in Afghanistan to End,’ Says Departing U.S. Commander, N.Y. TIMES (Sept. 2, 2018), <https://www.nytimes.com/2018/09/02/world/asia/afghan-commander-us-john-nicholson.html> [<https://perma.cc/D5JL-7JYY>] (discussing the transition of the conflict in Afghanistan from an immediate threat to a persisting issue).

428. See, e.g., 10 U.S.C. § 2538(a), (c) (2012); 12 U.S.C. § 635(b)(12) (2012); 15 U.S.C. § 717z(a)(1) (2012); 42 U.S.C. § 8511(a)(1) (2012); 42 U.S.C. § 9606(a). But see 10 U.S.C. § 161(b)(2) and 42 U.S.C. § 9622(d)(1)(A), for imminent threat exception to notice requirement and consent decrees, respectively.

statutes. Without a publicly available definition of “imminence”, however, it can be difficult for courts to understand and review Executive Branch interpretations of such a constraint.<sup>429</sup>

Courts have sometimes adopted similar language that reflects a degree of urgency similar to that intended by the acute and chronic distinction. The D.C. Circuit has noted that “whatever special powers the Executive may hold in national security situations must be limited to instances of immediate and grave peril to the nation.”<sup>430</sup> The Second Circuit has noted that “[e]xercising the power has always been statutorily limited to ‘particular circumstances such as ‘time of war or when war is imminent,’ the needs of ‘public safety’ or of ‘national security or defense,’ or ‘urgent and impending need.’”<sup>431</sup> Although this limitation is usually applied to agencies in the Executive branch rather than the President himself, at least one court has interpreted a statutory imminency limitation with regards to presidential action.<sup>432</sup>

Secrecy makes the entire project of constraints more complex. As many scholars have noted, the President’s ability to claim executive privilege for information related to national security can complicate any efforts at meaningful judicial review.<sup>433</sup> If the President is not required to disclose the basis for her national security decisions, there is little hope for meaningful judicial review. Without a more transparent process, the public is left with little more than executive self-assurances that they are following the law. It is hard to see whether the Executive is even following the law, beyond their own assurances that they are.

429. See Sudha Setty, *The President’s Private Dictionary: How Secret Definitions Undermine Domestic and Transnational Efforts at Executive Branch Accountability*, 24 IND. J. GLOBAL LEGAL STUD. 513, 532 (2017) (discussing the uncertainty of how the Obama administration interpreted “imminence” when authorizing drone strikes).

430. *Halperin v. Kissinger*, 606 F.2d 1192, 1201 (D.C. Cir. 1979).

431. *Bandes v. Harlow & Jones, Inc.*, 852 F.2d 661, 670 (2d Cir. 1988) (quoting *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 598 (1952) (Frankfurter, J., concurring)).

432. See *Crockett v. Reagan*, 558 F. Supp. 893, 899–901 (D.D.C. 1982) (providing, in dicta, an interpretation of a federal statute’s presidential reporting requirement when the President determines American soldiers face “imminent” hostility, although finding issue regarding presidential action as a non-justiciable political question); *United States v. Reilly Tar & Chem. Corp.*, 546 F. Supp. 1100, 1109–14 (D. Minn. 1982) (relying upon legislative history of federal environmental statutes to determine the meaning of “imminent and substantial endangerment” in upholding presidential action).

433. See, e.g., Mark J. Rozell, *Executive Privilege Revived?: Secrecy and Conflict During the Bush Presidency*, 52 DUKE L.J. 403, 403–04 (2002); Heidi Kitrosser, *Secrecy and Separated Powers: Executive Privilege Revisited*, 92 IOWA L. REV. 489, 491 (2007); Robert M. Chesney, *State Secrets and the Limits of National Security Litigation*, 75 GEO. WASH. L. REV. 1249 (2007); David E. Pozen, *Deep Secrecy*, 62 STAN. L. REV. 257 (2010). See generally SUDHA SETTY, NATIONAL SECURITY SECRECY: COMPARATIVE EFFECTS ON DEMOCRACY AND THE RULE OF LAW (2017).

In short, Congress should more closely evaluate its delegations of national security power to the President, considering whether the same effect can be achieved with the imposition of procedural constraints. They may consider better defining “national security” and demand heightened procedural hurdles where a national security threat is chronic as opposed to acute. Similarly, courts should continue to recognize these statutory limits on the President and not automatically switch to extreme deference mode at the mere mention of national security.

### CONCLUSION

It is extremely difficult to strike the right balance between the branches in regard to national security. In addition to deference, political constraints, and constitutional constraints, all of which receive significant scholarly attention, this Article fights to give procedural constraints a seat at the scholarly table. It does so by acknowledging their limitations, but also by demonstrating their current and future viability for enhancing accountability and transparency in the President’s use of statutory national security powers. It addresses concerns about binding a president’s hands with bureaucratic procedures by tailoring the constraints according to whether the national security threats are chronic or acute. Although these constraints are not perfect, they are worthy of consideration in an effort to reach a more balanced exercise of statutory national security power. Without congressional constraints on a president’s exercise of these statutory national security powers, courts may be left to flounder. A lack of internal constraints runs the risk of conflating the treatment of constitutional and statutory authority and failing to realize the separation of powers. As Justice Jackson has remarked, “[w]e may say that power to legislate for emergencies belongs in the hands of Congress, but only Congress itself can prevent power from slipping through its fingers.”<sup>434</sup> Justice Jackson noted that the examples of foreign experience with emergency powers suggests that “emergency powers are consistent with free government only when their control is lodged elsewhere than in the Executive who exercises them.”<sup>435</sup>

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434. *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 654 (1952) (Jackson, J., concurring).

435. *Id.* at 652.

## APPENDIX A

Year	Executive Orders in the Name of National Security or with Consideration of National Security	Authority Cited
2018	Exec. Order No. 13,823, 83 Fed. Reg. 4831 (Protecting America Through Lawful Detention of Terrorists)	By the authority vested in me as President by the Constitution and the laws of the United States of America
	Exec. Order No. 13,840, 83 Fed. Reg. 29,431 (Ocean Policy to Advance the Economic, Security, and Environmental Interests of the United States)	By the authority vested in me as President by the Constitution and the laws of the United States of America
2017	Exec. Order No. 13,757, 82 Fed. Reg. 1 (Malicious Cyber Activities)	By the authority vested in me as President by the Constitution and the laws of the United States of America, including the International Emergency Economic Powers Act ( <u>50 U.S.C. 1701 et seq.</u> ) (IEEPA), the National Emergencies Act ( <u>50 U.S.C. 1601 et seq.</u> ) (NEA), and section 301 of title 3, United States Code
	Exec. Order No. 13,767, 82 Fed. Reg. 8793 (Immigration Enforcement Improvements)	By the authority vested in me as President by the Constitution and the laws of the United States of America, including the Immigration and Nationality Act ( <u>8 U.S.C. 1101 et seq.</u> ) (INA), the Secure Fence Act of 2006 ( <u>Public Law 109-</u>

		367) (Secure Fence Act), and the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 ( <u>Public Law 104-208 Div. C</u> ) (IIRIRA)
	Exec. Order No. 13,768, 82 Fed. Reg. 8799 (Public Safety in the Interior)	By the authority vested in me as President by the Constitution and the laws of the United States of America, including the Immigration and Nationality Act (INA) ( <u>8 U.S.C. 1101 et seq.</u> )
	Exec. Order No. 13,769, 82 Fed. Reg. 8977 (Foreign Terrorist Entry)	By the authority vested in me as President by the Constitution and laws of the United States of America, including the Immigration and Nationality Act (INA), <u>8 U.S.C. 1101 et seq.</u> , and section 301 of title 3, United States Code
	Exec. Order No. 13,773, 82 Fed. Reg. 10,691 (Preventing International Trafficking)	By the authority vested in me as President by the Constitution and the laws of the United States of America
	Exec. Order No. 13,780, 82 Fed. Reg. 13,209 (Second Foreign Terrorist Entry)	By the authority vested in me as President by the Constitution and laws of the United States of America, including the Immigration and Nationality Act (INA), <u>8 U.S.C. 1101 et seq.</u> , and section 301 of title 3, United States Code

	Exec. Order No. 13,783, 82 Fed. Reg. 16,093 (Promoting Energy Independence”)	By the authority vested in me as President by the Constitution and the laws of the United States of America
	Exec. Order No. 13,788, 82 Fed. Reg. 18,837 (Buy American and Hire American)	By the authority vested in me as President by the Constitution and the laws of the United States of America, and to ensure the faithful execution of the laws
	Exec. Order No. 13,795, 82 Fed. Reg. 20,815 (America-First Offshore Energy Strategy)	By the authority vested in me as President by the Constitution and the laws of the United States of America, including the Outer Continental Shelf Lands Act, <u>43 U.S.C. 1331 et seq.</u> ,
	Exec. Order No. 13,800, 82 Fed. Reg. 22,391 (Strengthening Cybersecurity)	By the authority vested in me as President by the Constitution and the laws of the United States of America
	Exec. Order No. 13,803, 82 Fed. Reg. 31,429 (National Space Council)	By the authority vested in me as President by the Constitution and the laws of the United States of America
	Exec. Order. No. 13,810, 82 Fed. Reg. 44,705 (Imposing Additional Sanctions With Respect to North Korea)	By the authority vested in me as President by the Constitution and the laws of the United States of America, including the International Emergency Economic Powers Act ( <u>50 U.S.C. 1701 et seq.</u> )

		<p>(IEEPA), the National Emergencies Act (<u>50 U.S.C. 1601 et seq.</u>), the United Nations Participation Act of 1945 (<u>22 U.S.C. 287c</u>) (UNPA), section 1 of title II of Public Law 65-24, ch. 30, June 15, 1917, as amended (<u>50 U.S.C. 191</u>), sections 212(f) and 215(a) of the Immigration and Nationality Act of 1952 (<u>8 U.S.C. 1182(f)</u> and <u>1185(a)</u>), and section 301 of title 3, United States Code; and in view of United Nations Security Council Resolution (UNSCR) 2321 of November 30, 2016, UNSCR 2356 of June 2, 2017, UNSCR 2371 of August 5, 2017, and UNSCR 2375 of September 11, 2017</p>
	<p>Exec. Order No. 13,817, 82 Fed. Reg. 60835, (Ensure Secure and Reliable Supplies of Critical Minerals)</p>	<p>By the authority vested in me as President by the Constitution and the laws of the United States of America</p>
	<p>Exec. Order No. 13,818, 82 Fed. Reg. 60,839 (Blocking the Property of Persons Involved in Human Rights Abuse or Corruption)</p>	<p>By the authority vested in me as President by the Constitution and the laws of the United States of America, including the International Emergency Economic Powers Act (<u>50 U.S.C. 1701 et seq.</u>) (IEEPA), the National Emergencies Act (<u>50</u></p>

		U.S.C. 1601 <i>et seq.</i> ) (NEA), the Global Magnitsky Human Rights Accountability Act ( <u>Public Law 114-328</u> ) (the “Act”), section 212(f) of the Immigration and Nationality Act of 1952 ( <u>8 U.S.C. 1182(f)</u> ) (INA), and section 301 of title 3, United States Code
2016	Exec. Order No. 13,717, 81 Fed. Reg. 6407 (Earthquake Risk Management Standard)	By the authority vested in me as President by the Constitution and the laws of the United States of America, including the Earthquake Hazards Reduction Act of 1977, as amended, and section 121(a) of title 40, United States Code
	Exec. Order No. 13,718, 81 Fed. Reg. 7441 (Enhancing National Cybersecurity)	By the authority vested in me as President by the Constitution and the laws of the United States of America
	Exec. Order No. 13,721, 81 Fed. Reg. 14,685 (Counterterrorism)	By the authority vested in me as President by the Constitution and the laws of the United States of America, including section 2656 of title 22, United States Code, and section 3161 of title 5, United States Code
	Exec. Order No. 13,726, 81 Fed. Reg. 23,559 (Suspending Entry to Persons Contributing to Situation in Lybia)	By the authority vested in me as President by the Constitution and the laws of the United States of



		America, including the International Emergency Economic Powers Act ( <u>50 U.S.C. 1701 et seq.</u> ) (IEEPA), the National Emergencies Act ( <u>50 U.S.C. 1601 et seq.</u> ), section 212(f) of the Immigration and Nationality Act of 1952 ( <u>8 U.S.C. 1182(f)</u> ), and section 301 of title 3, United States Code
	Exec. Order No. 13,729, 81 Fed. Reg. 32,611 (Mass Atrocity Prevention and Response)	By the authority vested in me as President by the Constitution and the laws of the United States of America
	Exec. Order No. 13,732, 81 Fed. Reg. 44,485 (Civilian Casualties in U.S. Operations)	By the authority vested in me as President by the Constitution and the laws of the United States of America
	Exec. Order No. 13,741, 81 Fed. Reg. 68,289 (Role of National Background Investigations Bureau)	By the authority vested in me as President by the Constitution and the laws of the United States of America
2015	Exec. Order 13,687, 80 Fed. Reg. 819 (Sanctions on North Korea)	By the authority vested in me as President by the Constitution and the laws of the United States of America, including the International Emergency Economic Powers Act ( <u>50 U.S.C. 1701 et seq.</u> ) (IEEPA), the National Emergencies Act ( <u>50 U.S.C. 1601 et seq.</u> ), section 212(f) of the Immigration and

		Nationality Act of 1952 (8 U.S.C. 1182(f)), and section 301 of title 3, United States Code
	Exec. Order No. 13,689, 80 Fed. Reg. 4191 (National Efforts in the Arctic)	By the authority vested in me as President by the Constitution and the laws of the United States of America
	Exec. Order No. 13,690, 80 Fed. Reg. 6425 (Flood Risk Management Standard)	By the authority vested in me as President by the Constitution and the laws of the United States of America
	Exec. Order No. 13,691 (Cybersecurity Information Sharing)	By the authority vested in me as President by the Constitution and the laws of the United States of America
	Exec. Order No. 13,694 (Blocking Property of Persons Engaged in Malicious Cyber-Enabled Activities)	By the authority vested in me as President by the Constitution and the laws of the United States of America, including the International Emergency Economic Powers Act (50 U.S.C. 1701 <i>et seq.</i> ) (IEEPA), the National Emergencies Act (50 U.S.C. 1601 <i>et seq.</i> ), section 212(f) of the Immigration and Nationality Act of 1952 (8 U.S.C. 1182(f)), and section 301 of title 3, United States Code
	Exec. Order No. 13,698 (Hostage Recovery Activities)	By the authority vested in me as President by the Constitution and the laws

		of the United States of America
	Exec. Order No. 13,712 (Blocking Property of Persons Contributing to Burundi Situation)	By the authority vested in me as President by the Constitution and the laws of the United States of America, including the International Emergency Economic Powers Act ( <u>50 U.S.C. 1701 et seq.</u> ) (IEEPA), the National Emergencies Act ( <u>50 U.S.C. 1601 et seq.</u> ), section 212(f) of the Immigration and Nationality Act of 1952 ( <u>8 U.S.C. 1182(f)</u> ), and section 301 of title 3, United States Code