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BREAKING THE STALEMATE: THE JUDICIARY'S CONSTITUTIONAL ROLE IN DISPUTES OVER THE WAR POWERS

R. Andrew Smith*

I. INTRODUCTION

Historically, the goal of the three-part American government structure is to separate and balance the power to govern.[1] Separation prevents any branch of the government from straying from its intended purpose and in turn, fosters democratic values as a result.[2] Ideally, this prevents one branch of government from over-exercising its power over the others. However, language in the Constitution gives little guidance on when one branch of the government may be acting outside the sphere of its authority. Constitutional ambiguities and overlapping powers result in struggles between different arms of the government. The purpose of this Article is to explore the role of the judiciary in mediating the power struggles between the legislative and executive branches of government. Justiciability restrictions, such as the political question doctrine, can make the Court's role in such disputes unclear. Recently, the disclosure of President Bush's warrantless electronic surveillance program[3] and subsequent lawsuit challenging the constitutionality of the program[4] have thrown these intra-governmental tensions into sharp relief by questioning the breadth of the executive war power[5] juxtaposed to the legislative war power.[6] In this Article, President Bush's warrantless domestic surveillance program provides a focal point for analysis of separation of powers in general and the problem of overlapping constitutional grants of authority.

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1 THE FEDERALIST NO. 48, at 300-03 (James Madison) (Bantam Classic 2003).

2 THE FEDERALIST NO. 51 (James Madison), *supra* note 1, at 314-17.

3 James Risen & Eric Lichtblau, *Bush Lets U.S. Spy on Callers Without Courts*, N.Y. TIMES, Dec. 16, 2005, at A1, *available at* 2005 WL 20281359.

4 Am. Civil Liberties Union v. Nat'l Sec. Agency, 438 F. Supp. 2d 754 (E.D. Mich. 2006).

5 U.S. CONST. art. II, § 2, cl. 1.

6 *Id*. at art. I, § 8, cls. 1, 11-16.

II. THE STALEMATE PROBLEM

The Constitution reflects James Madison's concept of multifaceted government.[7] However, the powers annunciated in Article II fail to clearly define the powers of the executive branch.[8] The division of power between the three branches, the ambiguous nature of power provided to the president, and the Supreme Court's use of the political question doctrine ultimately create an impasse between the three branches and their constitutionally delegated power.

A. The Separation of Powers

The purpose of separating governmental function is to prevent a tyrannical majority from coming to power.[9] A reasonable construction of the Constitution requires keeping the three branches separate "in all cases in which they were not expressly blended."[10] However, the constitutional text itself blends some governmental activities. These intersections of power between the branches operate to curb the unilateral control of any one branch over the others and supports the notion of "checks and balances," which works in conjunction with the separation of powers.[11] However, the Constitution should not be interpreted to blend the operation of the branches more than its text requires[12] because such an interpretation would allow one branch to usurp the power of another branch subverting the liberty interests that undergird the structure. This structure prevents Congress from removing or including itself in the exercise of another branch's power.[13]

The Supreme Court has used the separation of powers to invalidate legislation that permitted Congress to invade the president's

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7 GORDON S. WOOD, THE CREATION OF THE AMERICAN REPUBLIC 1776-1787, at 58 (1998). Wood articulates that the structure of the government operates to cultivate independent liberty, aiming to minimize government officials' tendencies toward self-interested corruption. *Id.*; *see also* Jeffrey Rudd, *Restructuring America's Government to Create Sustainable Development*, 30 WM. & MARY ENVTL. L. & POL'Y REV. 371, 415 (2006).

8 U.S. CONST. art. II.

9 THE FEDERALIST NO. 51 (James Madison), *supra* note 1.

10 Myers v. United States, 272 U.S. 52, 116 (1926). In *Myers*, the Court considered an act of Congress proscribing the ability of the president to discharge the Postmaster General. *Id.* In invalidating the statute, the Court concluded that Congress cannot annex power attributed to other branches of government unless the Constitution expressly authorizes the mix of governmental power between multiple branches of the government. *See id.* at 163-65.

11 THE FEDERALIST NO. 47 (James Madison), *supra* note 1, at 295.

12 *Id.*

13 *Myers*, 272 U.S. at 159-60.

appointment power,[14] define the extent to which Congress may create rules of procedure for the courts,[15] preserve the finality of judicial determinations,[16] and limit the exercise of judicial power.[17] In many ways, the separation of powers doctrine has been used to preserve the power attributed to the judiciary in the Constitution.[18] However, these examples also illustrate an operational problem within the doctrine.

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[14] *Id.* at 52.

[15] *See* Mistretta v. United States, 488 U.S. 361, 412 (1989) (holding that the federal sentencing guidelines were not a violation of the separation of powers). *But see* United States v. Booker, 543 U.S. 220 (2005). In *Booker*, the Court invalidated the two provisions of the Federal Sentencing Guidelines that required the courts to apply the guidelines in every criminal case. *Id.* Invalidating the mandatory aspects of the guidelines effectively reset the boundary of legislative restrictions on the operation of federal courts. *Id.* at 250-53. This is not entirely inconsistent with existing law. For example, in *United States v. Union Pacific Rail Company*, the Supreme Court considered the extent of Congress's ability to alter definitions of "troops" to take advantage of the Land Grant Acts. 249 U.S. 354 (1919). The Land Grant Acts generally provided that the government could move its property and troops over the roads and rails free of charge or at a reduced cost. *Id.* at 355-56. Ultimately, the Court held that the legislature could not expand the meaning of "troops" to include individuals not rightly classified as members of the military in order to take advantage of the free use provisions of the Land Use Acts. *Id.* at 358-61. Like *Booker*, the *Union Pacific* case prevents Congress from expanding its ability to redefine what constitutes members of the military and reserves the power to determine where costs apply to the Comptroller of the Treasury and the lead administrators of the military, all of whom are agents of the executive branch.

[16] *See* Ala. Dep't of Envtl. Conservation v. Envtl. Prot. Agency, 540 U.S. 461, 512 (2004) (Kennedy, J., dissenting). The Court considered whether the Environmental Protection Agency has the power to block the construction of diesel generators permitted by the Alaskan Department of Environmental Conservation because the product of the construction would violate the Clean Air Act. *Id.* at 468. The majority ultimately determined that the EPA had the ability to issue the order to cease the construction notwithstanding the state permit. *Id.* Justice Kennedy's dissent points out the error in this ruling by noting the fundamental conflict between rulings by executive agencies and the operation of Article III courts. Kennedy specifically stated that the legislative and executive branches may not revise the decisions of Article III courts making the decisions final and binding. *Id.* at 512 (citing Hayburn's Case, 2 U.S. 409, 2 Dallas 409, 410, 1 L. Ed. 436 (1792); Plaut v. Spendthrift Farm, Inc., 514 U.S. 211 (1995)).

[17] There are numerous cases using the separation of powers doctrine to render an issue before the court non-cognizable. *See* Christopher v. Harbury, 536 U.S. 403 (2002). In *Harbury*, the Court considered a challenge to government limitations on information under the auspice of international relations in the murder of a Guatemalan citizen. *Id.* at 405. The Court refused to address the issue, citing separation of powers concerns as part of its reason for finding the plaintiff failed to state a claim upon which relief could be granted. *Id.* at 416.

[18] *See generally In re* Michael, 326 U.S. 224 (1945) (holding that Congress may not execute legislation which limits the power of the courts to issue contempt citations).

Though the purpose of delineating governmental powers aims to preserve the people's liberty interest,[19] the Supreme Court has observed that the perfect operation of this concept is largely theoretical and unattainable in practice.[20] In *Federalist No. 48*, James Madison explicitly stated that a strict practical application of separate powers is pragmatically impossible.[21] Rather, the doctrine should operate in a way that would prevent one branch from invading the powers of another.[22] Madison's own conclusion at the end of *Federalist No. 48* notes that the mere demarcation of government structure on paper is insufficient to guard against government tyranny.[23]

The operation of the judiciary in this scheme is summed up in *Federalist No. 78*, where Alexander Hamilton stated that the separated powers will allow the judiciary to keep the legislature "within the limits assigned to their authority."[24] Somewhere between the theoretical underpinnings of the doctrine and its practical application rests a momentary vacuum of government power. Ideally, the doctrine of the separation of powers operates to prevent this power gap by permitting the judiciary to interpret and define the divisions of power.

But unfortunately, the language of the Constitution is not always clear. The overlapping powers attributed to the president in Article II and to the legislature in Article I exemplify this ambiguity. These mixed responsibilities create problems of constitutional interpretation and blur the operation of the separate powers.

B. The Shared War Power

The War power is a primary example of the conflicts that arise when the Constitution grants dual powers to two branches of government. For instance, the president retains the power to direct the armed forces, but Congress has the ability to restrain the president's power to act as the Commander in Chief. It is important to parse out the distinct powers of each branch before analyzing the tension between them.

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19 *See generally* THE FEDERALIST NO. 48 (James Madison), *supra* note 1; FEDERALIST NO. 51 (James Madison), *supra* note 1.

20 Brush v. Ware, 40 U.S. 93, 99 (1841).

21 THE FEDERALIST NO. 48 (James Madison), *supra* note 1, at 300.

22 *Id*.

23 *Id*. at 303.

24 THE FEDERALIST NO. 78 (Alexander Hamilton), *supra* note 1, at 472.

1. The Executive Branch

The language in the Constitution describing the powers of the executive branch and the legislative branch limit each arm of the government in different ways.[25] The only clear power possessed by the executive is the power to execute federal laws; the structure of the Constitution itself demonstrates this narrow construction of executive power.[26] However, Article II also includes other powers inherent only to the president, indicating that the executive power is greater than just the execution of the law.[27] While the president lacks the fundamental lawmaking power of Congress, this does not prevent the president from affecting citizen's rights.[28] For example, the Supreme Court has interpreted the president's power as Commander in Chief to include his ability to detain citizens and non-citizens to ensure national security.[29] Similarly, current domestic surveillance programs directly implicate the Fourth Amendment[30] by subjecting citizens to searches without warrants.[31] The expansiveness of the language used by the framers also seemingly expands the breadth of executive powers because the power

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25 Gary Lawson & Guy Seidman, *The Jeffersonian Treaty Clause*, 2006 U. ILL. L. REV. 1, 46.

26 *Id.*

27 *Id.* at 46-48.

28 *Id.* at 47-48.

29 *See generally* Hamdi v. Rumsfeld, 542 U.S. 507 (2004) (holding that an American citizen detained as an enemy combatant has a due process right to establish a factual basis for his or her detention but not foreclosing the president's power to detain a citizen in the name of national security as an enemy combatant); Rasul v. Bush, 542 U.S. 466 (2004) (concluding that alien citizens detained as enemy combatants retain a due process right under a writ of habeas corpus and the equal protection clause of the Fifth Amendment). The power here is simply to detain, not detain indefinitely; however, the power to limit individual liberty remains a significant infringement of otherwise constitutionally guaranteed rights.

30 U.S. CONST. amend IV.

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

Id.

31 Risen & Lichtblau, *supra* note 3, at A1. This article first appeared in *The New York Times* on December 16, 2005. The authors discuss the details of a program instituted by President Bush after the September 11, 2001, terrorist attack in New York City. The program, later dubbed the Terrorist Surveillance Program, collected information through telephone wire-taps of United States citizens without providing the protections of search warrants. *See* Am. Civil Liberties Union v. Nat'l Sec. Agency, 438 F. Supp. 2d 754 (E.D. Mich. 2006). This has not been the only time the President has authorized a surveillance program; he has also permitted the CIA and the NSA to collect transaction records for bank transfers between American citizens and suspected Al Qaeda members or supporters. James Risen & Eric Lichtblau, *Bank Data Is Sifted by U.S. in Secret to Block Terror*, N.Y. TIMES, June 23, 2006, at A1.

of the Commander in Chief is not explicitly defined in Article II.[32] By contrast, the Constitution explicitly attributes different powers to the legislative branch.

2. The Legislative Branch

Article I, section eight of the Constitution provides a list of explicit powers conferred upon Congress.[33] Compared to the other provisions of the Constitution, Article II provides Congress with the most expansive power to act.[34] In *Federalist No. 48*, James Madison noted that the legislature retains superiority in the government because its powers are more extensive and less susceptible to limitations placed on the other branches.[35] Moreover, Congress is the only part of the government with specific power to collect money from the public.[36] However, legislative power still has its constitutional limits.

Historically, the Supreme Court has set the boundaries of congressional power under Article I. In *McCulloch v. Maryland*, the Court broadly defined Congress's legislative authority.[37] Under the "Necessary and Proper" clause,[38] the legislature retains the power to create laws that allow the execution of constitutionally prescribed duties.[39] However, these powers are not absolute. The legislature does not enjoy an unfettered ability to dictate policies on foreign affairs.[40]

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32 U.S. CONST. art. II, § 2, cl. 1.

33 *Id*. at art. I, § 8.

34 *See generally id*. art I, § 8 (identifying legislative power); *id*. at art. II, § 2, cls. 1-2 (identifying executive power); *id*. at art. III, § 1, § 3, cl. 2 (identifying judicial power). Article I, section eight provides the Congress with eighteen explicit powers, while Article II, section two, provides the executive with five explicit powers. *id*. at art I, § 8; *id*. at art II, § 2. Article III, section one, states the predominant judiciary's power to judge, but these powers are more narrowly defined by the remainder of Article III, which limits the scope of judicial jurisdiction. *Id*. at art. III.

35 THE FEDERALIST NO. 48 (James Madison), *supra* note 1, at 302.

36 *Id*. The specific language demonstrates that "the legislative department alone has access to the pockets of the people" means Congress is the only branch with the power to lay taxes on the people.

37 17 U.S. (4 Wheat) 316 (1819). The Supreme Court determined the breadth of Congressional power by finding that the necessary and proper clause permitted Congress to create a Bank of the United States under Congress's authority to create currency. *Id.* at 324.

38 U.S. CONST. art. I, § 8, cl. 18.

39 *McCulloch*, 17 U.S. (4 Wheat) at 325.

40 Am. Ins. Ass'n v. Garamendi, 539 U.S. 396, 414 (2003). The Court noted specifically that Congress does not retain total control over foreign affairs by stating that the president has independent authority to act. *Id.* However, this does not prevent Congress from regulating public and private dealings with other countries. *Id.* Interestingly, the Court's decision in *Garamendi* may have significantly limited the ability of Congress to create policy

Similarly, Congress does not retain the ability to legislate beyond the scope of the powers defined within Article I.[41] Congress may not act in ways that would usurp the power of the other branches such as the judiciary.[42] But even with these limits, the Constitution permits the legislature to enact laws that would control the actions of the judiciary and the executive.[43]

While Article II and Article III of the Constitution designate specific powers to the president and judiciary, these provisions also provide Congress with authority to oversee the actions of these branches.[44] This structure leads to situations where the president can act in a manner inconsistent with an act of Congress. One current area of this kind of conflict involves the war powers possessed by the legislative and executive branches.

3. The Inherent Conflict in the War Powers

The text of Article II states that the president acts as the Commander in Chief of the Army, Navy, and the Militia of the several states.[45]

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in foreign affairs by providing greater latitude to the president in issuing this policy through the State Department. *See* Note, *Foreign Affairs Preemption and State Regulation of Greenhouse Gas Emissions*, 119 HARV. L. REV. 1877, 1898 (2006).

41 *See* United States v. Lopez, 514 U.S. 549 (1995). In *Lopez*, the Court determined that Congress acted outside its ability to regulate interstate commerce by making a law preventing people from carrying guns within a school zone. *Id.* This particular law reached past the breadth of the commerce clause, and affected an area within the control of state law. *Id.* at 561 n.3.

42 *See* United States v. Brown, 381 U.S. 437, 442 (1965). In *Brown*, the Court considered whether an act of the California legislature prohibiting members of the Communist party from serving as elected officials in labor unions violated the constitutional prohibition against bills of attainder. *Id.* In determining that the act violated the constitutional prohibition of bills of attainder, the Court concluded that the prohibition works to implement the separation of powers and prevent a trial by the legislature. *Id.*

43 Examples of these laws for the executive branch are the War Powers Resolution, 50 U.S.C.A. §§ 1541-1548 (West 2003), and the Foreign Intelligence Surveillance Act (FISA), Pub. L. No. 95-11, 92 Stat. 1796 (1978) (codified as amended at 50 U.S.C.A. §§ 1801-1863 (West 2003 & Supp. 2006)), both discussed in more detail later. Examples for the judiciary include the Judiciary Act of 1888 which established the jurisdiction of the federal circuit courts of appeals and regulated the removal of cases from state courts. Act of Aug. 13, 1888, 50 Cong. ch. 866, 25 Stat. 433.

44 U.S. CONST. art. II, § 2, cl. 2 (requiring the Senate give consent by two-thirds majority to ratify any international treaty, and provide advice and consent in matters of executive appointments to governmental offices like ambassadors and appointments to the United States Supreme Court); *id.* at art. III, § 2, cls. 2-3 (providing Congress with the power to create laws setting the jurisdiction of the federal courts, to create lower courts, and determine the punishment for the crime of treason).

45 *Id.* at art. II, § 2, cl. 1.

However, the only provision in the Constitution using the word "war" is in the definition of legislative war power.[46] A reading of the Constitution may generally indicate that the president's war power only activates when Congress issues a declaration of war; however, the president has used military force under both declarations of war and congressional resolutions authorizing military action.[47]

Since World War II, the build-up of a standing army has altered the balance of war power between Congress and the president, abdicating Congress's responsibility and shifting it to the president.[48] However, because of Congress's ability to appropriate funds to support the military, it alone retains the power to determine the number of soldiers that make up the American military forces.[49] Congress may also create laws that regulate the administration of the military.[50]

This places Congress in the unique position of being able to reign in the military activities of the executive by creating laws dictating procedure that the president must follow in exercising his power as Commander and Chief. The War Powers Resolution of 1973 is a prime example of Congress exercising this constitutional power. [51] It served to prevent the president from relying on military appropriations bills as authorizations for the use of military force.[52] The impetus for the resolution was largely Congress's unwillingness to continue to fund military actions in Vietnam.[53] However, the War Powers Resolution is not without its practical flaws; it is possible that the president could circumvent the Resolution by interpreting the exceptions for exigent

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46 *Id.* at art. I, § 8, cl. 11. Congress has the power "[t]o declare War, grant Letters of Marque and Reprisal, and make Rules concerning Captures on Land and Water." *Id.*

47 John Yoo, *The Continuation of Politics by Other Means: The Original Understanding of War Powers*, 84 CAL. L. REV. 167, 176 (1996). John Yoo's article also notes that historically, the legislature has only issued five declarations of war, and has favored issuing other resolutions, or statutory provisions, which provide the president with the power to direct the military into action. *Id.* In some situations, like the Korean War, Congress failed to issue either a declaration of war, or a resolution providing authorization for the use of military force. *Id.*

48 *See also* JOHN HART ELY, WAR AND RESPONSIBILITY 47-67 (Princeton Univ. Press 1993). *See generally* LOUIS FISHER, CONGRESSIONAL ABDICATION ON WAR AND SPENDING (Texas A&M Univ. Press 2000).

49 Note, *Recapturing the War Power*, 119 HARV. L. REV. 1815, 1816 (2006) [hereinafter *War Power*].

50 U.S. CONST. art. I, § 8, cl. 14.

51 *Id.*

52 *War Power*, *supra* note 49, at 1820-21.

53 *Id.*

circumstances to his benefit.[54] One practical alternative to this structure is for Congress to restrict military appropriations by limiting the funding and the duration of these subsidies.[55] Ultimately, the problem comes down to whether the president has the ability to interpret acts of Congress such as the War Powers Resolution and respond with military force when alleged exigent circumstances arise.

Congress retains the power to enact laws restricting the power of the executive as Commander in Chief, while the president retains the power to defend the nation with military force when he deems it appropriate because exigent circumstances require such action. Ideally, in an instance where Congress intends an appropriations bill to subsidize the military in times of peace, the president would be unable to exercise military force absent an authorization by Congress.[56] This does not prevent the president from being able to invoke action in the name of exigent circumstances to exercise military force when slow action by Congress would make an emergency situation worse.[57] The issue then becomes whether legislation restricting executive power such as the War Powers Resolution is an effective exercise of constitutional power. This predicament necessitates the interpretation of the Constitution, and the inherent conflicts in the provisions supplying the president and Congress with their respective war power. In this situation, the Supreme Court retains the authority to interpret the Constitution.[58]

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54 ELY, *supra* note 48, at 123-25.

55 *War Power*, *supra* note 49, at 1832.

56 G. Sidney Buchanan, *A Proposed Model for Determining the Validity of the Use of Force Against Foreign Adversaries Under the United States Constitution*, 29 HOUS. L. REV. 379, 417 (1992). Buchanan argues that the president does not retain the constitutional power to use military force without the express authorization of Congress. *Id.* However, Richard Hartzman argues that the president does retain the power to act as Commander in Chief when participating in United Nations peace keeping operations. *See* Richard Hartzman, *Congressional Control of the Military in a Multilateral Context: A Constitutional Analysis of Congress's Power to Restrict the President's Authority to Place United States Armed Forces Under Foreign Commanders in United Nations Peace Operations*, 162 MIL. L. REV. 50, 66 (1999).

57 The Brig Army Warwick (The Prize Cases), 67 U.S. (2 Black) 635, 692 (1862). This case is referred to as The Prize Cases because it concerned the capture of four merchant ships during a blockade instituted by President Lincoln as part of his strategy to quell the rebellion of the Civil War. *Id.* The public ships of the United States captured the four ships as prizes, giving the case its pseudonym. *Id.* at 635-37. The Court concluded that in the event that the president must respond to an emergency, he may act with his full power as Commander in Chief of the military without the express authorization of Congress. *Id.* at 649.

58 *See generally* Marbury v. Madison, 5 U.S. (1 Cranch) 137, 151-52 (1803).

However, the Court appears reluctant to become involved in disputes between the other two branches and uses the political question doctrine as a means to avoid reaching the merits of the disputes.

C. The Political Question Doctrine

Generally speaking, the Court invokes the political question doctrine when it deems a question of law inappropriate for judicial review because it should be resolved by the political process.[59] In these situations, interpretation of the Constitution is left to the politically accountable branches of government.[60] The *Marbury v. Madison* decision is the genesis of the doctrine.[61] There, the Court declined to adjudicate whether they could award a writ of mandamus to James Madison because the appointment power is inherent to the executive power, and was not subject to judicial intervention under separation of powers concerns.[62] In addition, the Supreme Court has used the political question doctrine when parties contest the validity of elections.

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[59] ERWIN CHEMERINSKY, CONSTITUTIONAL LAW PRINCIPLES AND POLICIES § 2.8.1, at 117 (Aspen 1997).

[60] *Id.*

[61] *Id.*

[62] *Id.* § 2.9, at 151-52. While the Court fails to outright cite the doctrine of the separation of powers as part of the basis of their opinion, language used by the majority and the Court's reliance on *Federalist Nos. 78* and *79* demonstrate that the ability of the branches to operate independently of one another based on their enumerated powers is of paramount concern juxtaposed against the balance of powers. *Id.* § 2.9, at 151. For example, the Court states:

> The appointment of such an officer is complete when the President has nominated him to the senate, and the senate have advised and consented, and the President has signed the commission and delivered it to the secretary to be sealed. The President has then done with it; it becomes irrevocable. An appointment of a judge once completed, is made forever. He holds under the constitution. The requisites to be performed by the secretary are ministerial, ascertained by law, and he has no discretion, but must perform them; there is no dispensing power. In contemplation of law they are as if done.

Id. (citing Marbury v. Madison, 5 U.S. (1 Cranch) 137, 151 (1803)). It is interesting that the Court points to *Federalist Nos. 78* and *79* in its reasoning. *Federalist 78* focuses largely on the role of the judiciary in the balance of power, and at one point Hamilton explicitly states that the judiciary is an excellent prophylactic measure against despotism under a monarchy. THE FEDERALIST NO. 78 (Alexander Hamilton), *supra* note 1, at 472. Hamilton also noted that the judiciary is, under the separation of the powers, the least dangerous branch of the proposed government. *Id.*

Claims brought under the Guarantee Clause[63] are consistently held nonjusticiable under the political question doctrine[64] because they typically involve challenges to the operation of republican government or the electoral process. In *Luther v. Borden,*[65] the Court refused to address the merits of the dispute because it would require review of a political question.[66] Similarly, the Court refused to determine the outcome of the Kentucky gubernatorial race in 1900.[67] However, the evolution of the doctrine demonstrates the Court has not applied it when mediating disputes between the other branches of government.

In *Baker v. Carr*,[68] the Court further defined the boundaries of the political question doctrine.[69] Specifically, the Court concluded that the relevant considerations in determining if the doctrine applies are whether the dispute deals with the finality of judgments by other political branches and whether the dispute lacks sufficient criteria for judicial determination.[70] The doctrine is typically relevant in situations where foreign relations,[71] the duration of military action,[72] the validity of the legislative process,[73] or the status of Indian tribes[74] is at issue. In these situations, the doctrine exists to preserve political order by permitting sufficient respect for the role of the other arms of the

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63 U.S. CONST. art. IV, § 4. The Guarantee Clause states that "The United States shall guarantee to every State in this Union a Republican Form of Government, and shall protect each of them against Invasion; and on Application of the Legislature, or of the Executive (when the Legislature cannot be convened) against domestic Violence." *Id.*

64 CHEMERINSKY, *supra* note 59, § 2.8, at 122.

65 48 U.S. 1 (1949).

66 In *Luther v. Borden*, the Court considered whether the actions of police officials in Rhode Island in 1840 violated the Guarantee Clause by declaring elections under a new state constitution illegal. *Id.* The Court refused to deal with the issue under the political question doctrine because it would require the Court to declare the entire state government unconstitutional, thereby creating chaos. *Id.* at 42-44. Specifically, the Court stated that it was the duty of the legislature to determine what kind of government existed prior to the Court reviewing whether the existing government violated the Guarantee Clause. *Id.* Creating the state government was a duty allocated to elected state officials and not an area subject to judicial review prior to its outset. *Id.* at 45.

67 Taylor v. Beckham, 178 U.S. 548 (1900).

68 369 U.S. 186 (1962).

69 *See generally id.*

70 *Id.* at 210; *see also* Coleman v. Miller, 307 U.S. 433, 454-55 (1939).

71 Oetjen v. Cent. Leather Co., 246 U.S. 297, 311 (1918).

72 Commercial Trust Co. v. Miller, 262 U.S. 51, 57 (1923) (noting the specific power of declaration attributed to the Executive and Legislative branches); *see also* Hamilton v. Ky. Distilleries & Warehouse Co., 251 U.S. 146, 161 (1919) (explaining the breadth of the war power as including the remedies associated with military action and emergency situations).

73 Marshall Field & Co. v. Clark, 143 U.S. 649, 672, 676-77 (1892).

74 United States v. Holliday, 70 U.S. (3 Wall.) 407, 419 (1865).

government.[75] Ultimately, the doctrine is limited to cases where a government act is textually attributed to a political arm of the government, where the judiciary lacks a manageable method of resolving the issue, or when it is impossible for the Court to review the issue because another branch has not made a necessary policy decision that would give rise to a justiciable issue.[76]

Baker v. Carr demonstrates that the purpose of the political question doctrine is to avoid conflicts between the power attributed to other branches and the judiciary, which it accomplishes by limiting the scope of judicial review. However, in the context of the war powers, conflicts erupt between the legislative and executive branches because of their concurrent constitutional power. The Court has rarely commented on the constitutionality of the president's exercise of military force.[77] *The Brig Army Warwick*, or the Prize Cases, is the primary authority in this area.[78] The primary issue before the Court turned on whether President Lincoln was acting within his prescribed power when he authorized a naval blockade of southern states that resulted in the capture of several merchant vessels.[79] In determining the distinction between the war power of Congress and the president, the Prize Cases Court noted that a state of war can exist without a formal congressional declaration.[80] In addition, the Court determined that the president must act during a state of war notwithstanding the absence of a formal declaration of war from

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75 Baker v. Carr, 369 U.S. 186, 215 (1962).

76 *Id.* at 217. This definition of the doctrine comes from the oft-cited passage outlining the purpose and application of the political question doctrine, which states:

> It is apparent that several formulations which vary slightly according to the settings in which the questions arise may describe a political question, although each has one or more elements which identify it as essentially a function of the separation of powers. Prominent on the surface of any case held to involve a political question is found a textually demonstrable constitutional commitment of the issue to a coordinate political department; or a lack of judicially discoverable and manageable standards for resolving it; or the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion; or the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government; or an unusual need for unquestioning adherence to a political decision already made; or the potentiality of embarrassment from multifarious pronouncements by various departments on one question.

Id.

77 CHEMERINSKY, *supra* note 59, § 4.6.3, at 275.

78 The Brig Army Warwick (The Prize Cases), 67 U.S. 635 (1862).

79 *Id.* at 641-42.

80 *Id.* at 653-54.

Congress or the lack of legislative restrictions on the president's exercise of military might.[81] However, a law retroactively subsidizing military action and validating the president's actions is inconsistent with the structure of the Constitution because only Congress can determine when a state of war exists.[82]

Essentially, the Prize Cases articulate two circumstances where the president retains his power to wage war as Commander in Chief: when Congress declares war, and when a state of war results from exigent circumstances.[83] In determining whether the presidential powers of war activated under a legislative proclamation, the Court considered the context of the conflict including the way the president himself referred to the acts of the ceding states.[84] Ultimately, the Court found that a state of war, by an international definition, did not exist rendering the seizure of the ships an invalid act under the Constitution.[85] More specifically, the Constitution provides for definitions of war in the legal context, stating that only Congress may activate special presidential war powers because only congress may determine that a legal state of war exists.[86]

This constitutional dichotomy, then, creates the kind of conflict *Baker v. Carr* aims to prevent the courts from hearing. If Congress retains the sole authority to create laws granting the president the ability to use executive war powers, a presidential act inconsistent with an act of Congress falls squarely within the political arena. But even with the Court's reluctance to involve itself with conflicts arising from the political process, judicial attempts to refrain from becoming involved in conflicts over the war powers will likely become impossible when exercise of that power conflicts with civil liberties reserved by the Bill of Rights. Current tensions regarding President Bush's electronic surveillance program throw this problem into sharp relief.

III. WARRANTLESS ELECTRONIC SURVEILLANCE: THE CURRENT PROBLEM

In December 2005, *The New York Times* published a story detailing an initiative by President Bush permitting the National Security Agency ("NSA") to eavesdrop on international telephone calls and e-mails of

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81 *Id.* at 661-63.
82 *Id.* at 649-50.
83 *Id.* at 649.
84 *Id.* at 642-43.
85 *Id.* at 664.
86 *Id.* at 649.

United States citizens.[87] The purpose of gathering this intelligence[88] is to attempt to recover information that might aid in preventing a terrorist attack.[89] Regardless of its impetus, the program has raised constitutional questions and sparked litigation by the American Civil Liberties Union challenging the validity of the NSA's program.[90]

In 1972, in *Keith*,[91] the United States Supreme Court invalidated the federal government's approach to collecting intelligence under the Omnibus Crime Control and Safe Streets Act,[92] which allowed the president to collect intelligence for national security purposes without a warrant.[93] Congress responded by drafting the Foreign Intelligence Surveillance Act ("FISA") in 1978.[94] FISA creates a system of classified courts that grant warrants allowing government surveillance activities for the purposes of national security.[95] These warrants are actually orders obtained through ex parte application proceedings.[96] However,

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87 Risen & Lichtblau, *supra* note 3, at A1.

> Under a presidential order signed in 2002, the intelligence agency has monitored the international telephone calls and international e-mail messages of hundreds, perhaps thousands, of people inside the United States without warrants over the past three years in an effort to track possible "dirty numbers" linked to Al Qaeda, the officials said. The agency, they said, still seeks warrants to monitor entirely domestic communications.

Id.

88 "Intelligence" is defined by the DEPARTMENT OF DEFENSE DICTIONARY OF MILITARY AND ASSOCIATED TERMS, JOINT PUBLICATION 1-02 (Apr. 12, 2001), *available at* http://www.dtic.mil/doctrine/jel/doddict/, as amended from Aug. 15, 2005, in relevant part as follows: "1. The product resulting from the collection, processing, integration, analysis, evaluation, and interpretation of available information concerning foreign countries or areas. 2. Information and knowledge about an adversary obtained through observation, investigation, analysis, or understanding." *Id.* at 264.

89 Risen & Lichtblau, *supra* note 3, at A1.

> The Bush administration views the operation as necessary so that the agency can move quickly to monitor communications that may disclose threats to the United States, the officials said. Defenders of the program say it has been a critical tool in helping disrupt terrorist plots and prevent attacks inside the United States.

Id.

90 Am. Civil Liberties Union v. Nat'l Sec. Agency, 438 F. Supp. 2d 754 (E. D. Mich. 2006).

91 United States v. United States Dist. Court (*Keith*), 407 U.S. 297 (1972).

92 Omnibus Crime Control and Safe Streets Act of 1968, 42 U.S.C.A. §§ 3711-3797y-4 (West 2003 & Supp. 2006).

93 *Keith*, 407 U.S. 297.

94 Foreign Intelligence Surveillance Act of 1978 (FISA), Pub. L. No. 95-511, 92 Stat. 1796 (codified as amended at 50 U.S.C.A. §§ 1801-1863 (West 2003 & Supp. 2006)).

95 Douglas C. McNabb & Matthew R. McNabb, *Of Bugs, the President, and the NSA: National Security Agency Intercepts Within the United States*, CHAMPION, Mar. 2006, at 10-11.

96 50 U.S.C.A. §§ 1802, 1805 (West 2003 & Supp. 2006).

these warrant restrictions are not applicable in all cases because FISA permits a grace period of fifteen days when the president instigates foreign surveillance pursuant to a congressional declaration of war.[97]

As a result, the constitutional question raised by the NSA program concerns its permissibility under the Fourth Amendment and the president's war power. In general, the Fourth Amendment protects citizens from government intrusion by preventing unreasonable search and seizure. [98] The warrant requirement provides the pragmatic protection of this right by rendering searches presumptively invalid without a proper warrant.[99] Prior to the existence of FISA, the foreign intelligence exception to the Fourth Amendment allowed the government to avoid the warrant requirement.[100] However, FISA changed this exception by legislatively requiring judicial review of searches in the name of foreign intelligence.[101] Additionally, the *Keith* case had indicated that restrictions on foreign intelligence gathering are not as strict as those applied to domestic surveillance.[102]

Currently, the president asserts that FISA does not apply to the NSA program because the Authorization for Use of Military Force ("AUMF")[103] provides an exception to the application of FISA giving the president inherent authority to use all necessary force to pursue terrorists.[104] President Bush also argues that FISA hinders the ability of the executive to wage the "War on Terror."[105] But his two reasons for ignoring FISA create a constitutional conflict. The first reason questions the power of Congress to regulate the operation of the military within

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97 *Id*. § 1811.

98 U.S. CONST. amend. IV; *see supra* note 30 (providing text of the Fourth Amendment).

99 Katz v. United States, 389 U.S. 347, 361 (1967) (Harlan, J., concurring); *see also* Johnson v. United States, 333 U.S. 10, 14-15 (1948).

100 Jones v. United States, 357 U.S. 493, 499 (1958); *see also* Arthur S. Lowry, *Who's Listening: Proposals for Amending the Foreign Intelligence Surveillance Act*, 70 VA. L. REV. 297, 299 (1984).

101 *In re* Sealed Case No. 02-001, 310 F.3d 717, 738 (FISA Ct. Rev. 2002); *see also* United States v. United States Dist. Court (*Keith*), 407 U.S. 297 (1972).

102 *Keith*, 407 U.S. at 323.

103 Authorization for Use of Military Force of September 18, 2001 (AUMF), Pub. L. No. 107-40, 115 Stat. 224 (2001).

104 Letter from William E. Moschella, Assistant Attorney General, to Pat Roberts, Chairman Senate Select Comm. on Intelligence, John D. Rockefeller, IV, Vice Chairman Senate Select Comm. on Intelligence, Peter Hoekstra, Chairman Permanent Select Comm. on Intelligence, and Jane Harman, Ranking Minority Member Permanent Select Comm. on Intelligence (Dec. 22, 2005) (on file with author) [hereinafter Moschella Letter], *available at* http://www.nationalreview.com/pdf/12%2022%2005%20NSA%20letter.pdf.

105 Milton Hirsch, *A Letter to Congress*, CHAMPION, Apr. 2006, at 50, 52-53.

the structural balance of power, while the second implicates the Fourth Amendment and existing limitations on the foreign intelligence exception to the warrant requirement.

But the current dispute between the legislature and the president over the FISA structure focuses on whether the NSA domestic surveillance program is within the ambit of the FISA exceptions.[106] The Department of Justice asserts that the AUMF constitutes an exception to the FISA requirements because it provides the president with unlimited authority to wage the "War on Terror."[107] If the AUMF does not supercede FISA, then the NSA program is governed by section 1811 of FISA and requires a declaration of war by Congress to validate the president's actions if they exceed FISA's fifteen-day grace period for wiretaps.

This illustrates that, on one hand, Congress has issued a statute creating a structure of oversight dedicated to preventing the president from abusing his war power and protecting citizens' Fourth Amendment rights. On the other, the president continues to place wiretaps on American citizens under the auspices of national security. Without judicial intervention, the legislative and executive branches will remain at an impasse. To solve this dispute, the judiciary should decide the extent of legislative and executive power regardless of the political question doctrine.

IV. THE JUDICIARY SHOULD MEDIATE THE DISPUTE OVER THE WAR POWER

The judiciary has the responsibility to interpret the language and structure of the Constitution to determine when government action is in violation of its various attributed powers.[108] In a situation like the one presented with President Bush's NSA electronic surveillance program, the judiciary must determine whether the executive has exceeded its constitutional authority. Even though the Supreme Court has refused to address the scope of presidential power during times of war under the political question doctrine,[109] the Court should review this situation

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[106] Section 1802 of FISA prefaces its application to "[n]otwithstanding any other law." 50 U.S.C.A. § 1802(a)(1) (West 2003 & Supp. 2006). Section 1811 of FISA states that the president is not obligated to obtain a FISA court order for fifteen days after the issuance of a declaration of war by Congress. *Id.*

[107] Moschella Letter, *supra* note 104.

[108] *See generally* Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177 (1803); CHEMERINSKY, *supra* note 59, at 36-37.

[109] *See* Chi. & S. Air Lines, Inc. v. Waterman S.S. Corp., 333 U.S. 103, 111 (1948); Oetjen v. Cent. Leather Co., 246 U.S. 297, 302 (1918).

because its existing precedent demonstrates that the Court should mediate the dispute. In addition, the Court's constitutionally-mandated role in the operation of separate powers requires the Court's involvement.

A. The Legal Basis for Involving the Courts

While the Supreme Court has generally taken a hands-off approach to decisions made in a time of war,[110] the Court's precedent demonstrates its willingness to limit the actions of the other branches under the doctrine of separate powers to preserve the liberty rights of the citizenry.

First, the Court's decision in the Prize Cases shows that it should mediate the dispute surrounding the NSA surveillance program. The Court established that when the president exercises his authority to use military force and Congress does not act to rein in the exercise of that power, the federal courts should not involve themselves with subsequent disputes about the presidential exercise.[111] While superficially this appears to resolve the point of justiciability under the political question doctrine and the separation of powers, the conflict presented with the NSA program fundamentally differs from the situation presented in the Prize Cases. Specifically, the Prize Cases demonstrate that the president only retains the power to use military force where Congress has failed to restrict his ability to act. FISA and the War Powers Resolution operate to fill the void created by the Prize Cases: since their adoption, the president no longer retains unilateral discretion to commit the military to action. As a result, the Prize Cases, FISA, and the War Powers Resolution work in concert to limit the executive war power.

In particular, FISA and the War Powers Resolution restrict the exercise of the president's power in several ways. The purpose of the War Powers Resolution[112] is to insure that full consideration by both Congress and the president contributes to any decision that would put American military forces into action.[113] The Resolution places specific

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110 *See Waterman S.S. Corp.*, 333 U.S. at 111; *Oetjen*, 246 U.S. at 302.

111 The Brig Army Warwick (The Prize Cases), 67 U.S. (2 Black) 635, 649 (1862).

112 50 U.S.C.A. §§ 1541-1548 (West 2003).

113 *Id.* § 1541(a). Section 1541 articulates the purpose of the War Powers Resolution indicating that it operates to

> fulfill the intent of the framers of the Constitution of the United States and insure that the collective judgment of both the Congress and the President will apply to the introduction of United States Armed Forces into hostilities, or into situations where imminent involvement in

limitations on the president's power to act as Commander in Chief[114] and requires that the president involve Congress in decisions regarding on-going military activity.[115] Similarly, FISA restricts the president's ability to collect information from citizens by requiring that wire taps satisfy the Fourth Amendment.[116] Under these statutes, Congress has taken explicit steps to control the boundaries of the president's war power. In the Prize Cases, the Court determined that it lacks the power to render a decision in cases where the president exercises his war power when Congress has failed to restrict his power, demonstrating that the Supreme Court should mediate disputes in the area of the war power when called upon to do so.[117] However, the Court's decision in the *Steel Seizure* case demonstrates that justiciability in a dispute between the legislative and executive branches requires more than an act of Congress restricting the president's power.[118]

In the *Steel Seizure* case, the Supreme Court determined that the president lacked constitutional authority to seize control of the nation's steel mills to ensure continued steel production during World War II.[119] In analyzing the breadth of presidential authority under the war power, the Court determined that any exercise of this authority must stem either from an act of Congress or the Constitution.[120] Justice Jackson's concurrence elaborated on this analysis by stating three classifications for determining presidential authority.[121] The first classification provides the president with the most authority because he acts with the permission of Congress, buttressing the president's own constitutional powers with all the authority Congress can delegate.[122] The second classification contemplates situations where the legislative and executive branches share power, but Congress has failed to act.[123] In this

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> hostilities is clearly indicated by the circumstances, and to the continued use of such forces in hostilities or in such situations.

Id.

114 *Id.* § 1541(c). In this subsection, congress relegates the president's power to act as Commander in Chief to only exist where there is "(1) a declaration of war, (2) specific statutory authorization, or (3) a national emergency created by attack upon the United States, its territories or possessions, or its armed forces." *Id.*

115 *Id.* § 1542.

116 50 U.S.C. §§ 1801-1863 (West 2003 & Supp. 2006).

117 The Brig Army Warwick (The Prize Cases), 67 U.S. (2 Black) 635, 649 (1862).

118 *See generally* Youngstown Sheet & Tube Co. v. Sawyer (*Steel Seizure*), 343 U.S. 579 (1952).

119 *Id.* at 588.

120 *Id.* at 586.

121 *Id.* at 636-39.

122 *Id.* at 636-37.

123 *Id.* at 637.

classification, the president has independent authority.[124] The final classification illustrates that the president's power is at its lowest when he acts contrary to an act of Congress.[125]

Justice Jackson's concurrence takes into account the division of power articulated in the Constitution. With regards to the war powers, the Court has concluded that only Congress can determine when a state of war exists and thereby activate the full breadth of the president's power to act as Commander in Chief.[126] In the current conflict over the "War on Terror," acts of Congress like FISA, the War Powers Resolution,[127] and the AUMF[128] arguably activate President Bush's ability to act as Commander in Chief. If this is the case, the *Steel Seizure* decision would require the courts to defer their judgments in favor of the president.[129] Conversely, if FISA, the War Powers Resolution, and the AUMF serve to restrict executive military abilities, then presidential power is at its lowest because programs like the NSA electronic surveillance program operate contrary to acts of Congress.[130]

The president would likely argue that the NSA electronic surveillance program falls within the first classification because the executive receives the most deference from the judiciary.[131] Under this analysis, the president would retain the power to authorize the NSA surveillance program and could wage the war on terror in any manner consistent with the congressional grant of power. Alternatively, the program could fall into the third classification, which is the least deferential to presidential action.[132] If the NSA program falls within the ambit of FISA, then the Court must determine in which classification the

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124 *Id.*

125 *Id.* at 637-38.

126 *See* The Brig Army Warwick (The Prize Cases), 67 U.S. (2 Black) 635, 664 (1862).

127 Foreign Intelligence Surveillance Act of 1978 (FISA), Pub. L. No. 95-511, 92 Stat. 1796 (1978) (codified as amended at 50 U.S.C.A. §§ 1801-1863 (West 2003 & Supp. 2006)); *see also supra* text accompanying notes 51-55. It is important to point out that statutes like the War Powers Resolution and FISA originally intended to limit the ability of the president to utilize all the tools available at his disposal without congressional or administrative oversight.

128 *See supra* note 103. The AUMF, on the other hand, operates as an express grant of power to pursue the war on terror. When the president exercises his military power under the AUMF in opposition to the restrictions imposed by FISA and the War Powers Resolution a conflict arises between these three laws. The resulting dispute can only be resolved by applying the standards espoused in the *Steel Seizure* case and the Prize Cases.

129 *Steel Seizure,* 343 U.S. at 636-37.

130 *Id.* at 637-38.

131 *See id*. at 636-37.

132 *Id.* at 637-38.

program belongs and the degree of deference that the Court must show to the president's actions. Based on the Prize Cases and the *Steel Seizure* decisions, determining the justiciability of a dispute between Congress and the president requires determining the degree to which each branch has exerted its constitutional authority. Determining which classification applies should assist in deciding whether the political question doctrine applies.

More specifically, if the first classification applies then the Court should not get involved because the president is acting with the full extent of his constitutional power. However, if the Court determines that the president's action falls into the third classification, then his action receives the least amount of judicial deference. In such a situation, the Court should not be bound by the political question doctrine because the issue would be the constitutionality of the president's actions where Congress retains the sole authority to act. The operation of the separate powers requires the Court to keep the president and Congress within the ambit of their constitutional powers. However, it is possible that the political question doctrine supercedes the concerns raised by the Prize Cases and *Steel Seizure*. Even so, the Court should still consider the merits of a dispute over the war power because it implicates a fundamental liberty interest protected by the Bill of Rights.

B. The Court Should Review the NSA Program Because It Implicates a Fundamental Liberty Interest

In *United States v. Nixon,*[133] the Court considered whether President Nixon's tape-recorded conversations in the oval office during the Watergate scandal were subject to an executive privilege.[134] However, before the Court could reach the merits of the case, it had to determine whether the issue was a nonjusticiable political question. In concluding that the Court could decide the dispute, it noted that determining justiciability is an inquiry that goes beyond the status of the parties; the Court must look to the underlying issue in order to determine whether the case is cognizable.[135] The Court found that the issue typically arises in the regular course of criminal prosecution, which is within the traditional scope of judicial review.[136] After making a determination of justiciability, the Court found that the executive office lacked a discernable privilege under the responsibilities enumerated in Article II

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133 418 U.S. 683 (1974).
134 *Id.*
135 *Id.* at 693.
136 *Id.* at 697.

of the Constitution because the existence of an absolute executive privilege requires more than support from the doctrine of separate powers and the need for confidentiality in communications at high levels.[137] Absent a need to protect military, diplomatic, or sensitive national security secrets, the Court declined to find a sufficient confidentiality interest to support the executive privilege asserted by Nixon in the Watergate investigation.[138]

Nixon demonstrates the role of the separation of powers in the political question doctrine, but the opinion also highlights that the norm of separation of powers has priority over the political question doctrine.[139] Separation of powers requires the Court to interpret the enumerated powers in a way that demonstrates their separation but also their balance.[140] In *Nixon*, it was the Court's concern for preserving the constitutional balance that operates to preserve a workable government structure.[141]

In addition, the Court has reviewed other cases on a very limited basis when a superceding policy is at issue. In particular, the Court has exercised its judicial power of review over political questions in cases that typically incorporate constitutional principles that transcend the operation of the political scheme. In *United States v. Nixon*, the Court acted to prevent the crippling effect on the exercise of judicial power that would follow from the creation of an executive privilege.[142]

Similarly, the Court has acted to protect individual liberties notwithstanding the political question doctrine in *Nixon v. Herndon*.[143] The Court in *Herndon* considered a racial discrimination policy regarding voting in the Texas Democratic primary.[144] The political question doctrine did not protect the actions of the Texas legislature from judicial

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137 *Id.* at 705-06.

138 *Id.* at 706.

139 *Id.* at 706-07.

140 *Id.* at 707; *see also* Youngstown Sheet & Tube Co. v. Sawyer (*Steel Seizure*), 343 U.S. 579 (1952) (Jackson, J., concurring).

141 *Steel Seizure*, 343 U.S. at 635. The majority's opinion in *Nixon* and Justice Jackson's concurrence in *Steel Seizure* are consistent with James Madison's position in *Federalist No. 48* when he noted the impracticability of strict adherence to the separation of powers. THE FEDERALIST NO. 48 (James Madison), *supra* note 1, at 300. *United States v. Nixon* points out an interesting example, noting the ineffectiveness of judicial determinations in a situation where the president may assert a privilege that would prevent the Court from performing its constitutional duty. 418 U.S. 683, 707 (1974).

142 *Nixon*, 418 U.S. at 707.

143 273 U.S. 536 (1927).

144 *Id.* at 539.

review because the legislation refused a citizen the right to vote.[145] The Court determined that this refusal created a private right of action for the plaintiff, and that relegating the claim nonjusticiable pursuant to the political question doctrine would be a mere play on words because the action itself involved the exercise of the political process.[146]

More recently, the Court used similar considerations on facts that specifically operated within the political sphere. In *Bush v. Gore*,[147] the plurality used the fundamental constitutional interest in voting rights to avoid the conflict posed by the political question doctrine.[148] Interestingly, the Court justified rendering a decision based on having the "responsibility to resolve the federal and constitutional issues the judicial system has been forced to confront."[149] In its reasoning, the Court purposely subordinated political question concerns.[150] Similarly, in *Hamdi v. Rumsfeld*, the Court acted under the guise of due process rights to justify its involvement and subsequently limitation of the president's power to wage war.[151]

In the dispute between Congress and President Bush over the NSA domestic surveillance program, the political question doctrine is a viable option that would allow the Court to avoid determining who retains constitutional authority. But, the Court should not use the political question doctrine to avoid rendering a decision if the case is brought before the federal courts. Prior Supreme Court decisions, such as *Nixon*

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145 *Id.* at 540.

146 *Id.* The Court has reaffirmed this position. *See generally* Nixon v. Condon, 286 U.S. 73 (1932).

147 531 U.S. 98 (2000).

148 *Id.* at 98-112. Practically, the Court's decision leveled the playing field of voter rights by making the value of each vote equal in general elections. The Court rendered its decision over the objections of other members of the Court under the political question doctrine. *Id.* at 142-43. Per *Nixon v. Herndon*, though, it is clear that the political question doctrine does not apply to situations where voting rights are involved. 273 U.S. 536 (1927). The per curiam decision was built largely on the foundation of one-person, one-vote. *Gore*, 531 U.S. at 108.

149 *Gore*, 531 U.S. at 111. However, some commentators posit that the situation was not cognizable by the Court on grounds of justiciability. Erwin Chemerinsky, Bush v. Gore *was not Justiciable*, 76 NOTRE DAME L. REV. 1093 (2001). Professor Chemerinsky argues that the political question doctrine would have solved the problem by leaving the election to the operation of the political process. *Id.*

150 Rachel E. Barkow, *More Supreme than Court? The Fall of the Political Question Doctrine and the Rise of Judicial Supremacy*, 102 COLUM. L. REV. 237, 242-43 (2002).

151 Hamdi v. Rumsfeld, 542 U.S. 507, 516, 536-40 (2004); Rasul v. Bush, 542 U.S. 466, 475-85 (2004). Parts of these decisions operate to limit presidential power by invalidating President Bush's attempt to indefinitely detain prisoners because only Congress retains the ability to suspend the process of habeas corpus. *See also* U.S. CONST. art. I, § 9, cl. 2.

v. Herndon,[152] *Bush v. Gore*,[153] *Hamdi v. Rumsfeld*,[154] and *Hamdan v. Rumsfeld*,[155] demonstrate that if a sufficient liberty interest or a constitutional right is at risk, the Court might become involved and resolve the dispute. The war power and the NSA program raise Fourth Amendment concerns because NSA wiretaps constitute a search under the Fourth Amendment. This interest is sufficiently important for the Court to approach the merits of the dispute between the legislative and executive offices. Currently, President Bush's position states that the NSA program is within the confines of the FISA structure because Congress authorized the use of force to pursue the "War on Terror."[156] FISA contemplates restricting the operation of government wiretaps on international communications[157] that involve communications by non-citizens.[158] However, this implicates the right of individuals to be free from unreasonable search and seizure.

In particular, the NSA program necessarily captures communications where an American citizen is involved because it targets international telephone and electronic mail communications originating in the United States.[159] This places the NSA program completely outside the purview of FISA and squarely within the realm of the Fourth Amendment. Absent a national security or foreign intelligence exception to the warrant requirement, the president would have to obtain warrants for every domestic wiretap.[160] But the Supreme

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152 273 U.S. 536 (1927).

153 531 U.S. 98 (2000).

154 542 U.S. 507 (2004).

155 126 S. Ct. 2749 (2006). The Court refused to permit President Bush's plan for trying suspected terrorists in the detention facility at Guantanamo Bay, Cuba, because the plan violated the Uniform Code of Military Justice and the Geneva Convention. *Id.* at 2786-93, 2795.

156 AUMF, Pub. L. No. 107-40, 115 Stat. 224 (2001). Congress instructed the president "to prevent any future acts of international terrorism against the United States . . . ." *Id.* Congress's grant of "all necessary and appropriate force" to pursue this task precedes this language in the statute. *Id.* To determine whether the president acted within his constitutional authority, the Court must confront whether this authorization supercedes FISA though it explicitly states it does not supercede any part of the War Powers Resolution.

157 50 U.S.C.A. § 1802(a)(1)(A) (West 2003 & Supp. 2006).

158 *Id.* § 1802(a)(1)(B).

159 Risen & Lichtblau, *supra* note 3, at 1; *see also* Am. Civil Liberties Union v. Nat'l Sec. Agency, 438 F. Supp. 2d 754, 758 (E.D. Mich. 2006).

160 United States v. United States Dist. Court (*Keith*), 407 U.S. 297 (1972). *Keith* established that, regardless of its impetus, domestic surveillance requires satisfaction of the warrant requirement by a neutral magistrate under the Fourth Amendment. *Id.* at 316-17. This case fundamentally denies the existence of an exception to the warrant requirement where the targets of government surveillance are United States citizens.

Court foreclosed the existence of a national security exception to the warrant requirement in the *Keith* case.[161] As a result, the NSA program causes an inherent conflict between all three branches because the Fourth Amendment requires a neutral fact-finder to issue search warrants.[162] The doctrine of separation of powers dictates that the courts fill the role of neutral arbiter in the criminal process where the Executive branch is not neutral and disinterested when, through the Attorney General, it acts as investigator and prosecutor.[163] These actions fundamentally erode the validity of the criminal process. Similarly, FISA represents the bare minimum of judicial protection under the Fourth Amendment.[164] President Bush's refusal to cooperate with the restrictions set in place by FISA adds to the conflict because the president ignores laws created pursuant to the constitutional authority retained by Congress.

If cases like *ACLU v. NSA* reach the Supreme Court, the Court must act to prevent the negative impact on liberty caused by programs with presidential authorization like the one operated by the NSA. In his dissent in *Olmstead v. United States*,[165] Justice Brandeis explained that "[t]he greatest dangers to liberty lurk in insidious encroachment by men of zeal."[166] Moreover, Brandeis explained that the government breeds contempt for the law by breaking it, thereby inviting anarchy.[167] The NSA program stands to create anarchy if it continues to collect data without adhering to the warrant requirement of the Fourth Amendment. When the government breaks the law, citizens lose trust in its operation and refuse to adhere to it.[168] The Fourth Amendment protects a person's right to a reasonable expectation of privacy.[169] Additionally, the Court

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161 *Id.* The Court pointed out specifically, "These Fourth Amendment freedoms cannot properly be guaranteed if domestic security surveillances may be conducted solely within the discretion of the Executive Branch." *Id.* at 316-17.

162 Katz v. United States, 389 U.S. 347 (1967).

163 Barbara E. Bergman, *When the Government Breaks the Law*, CHAMPION, Jan.-Feb. 2006, at 45.

164 *Id.*

165 277 U.S. 438 (1928).

166 *Id.* at 479. The Court found that the Fourth Amendment did not prevent the use of information gained through telephone wiretaps without a warrant. *Id.* at 467-69. This case was subsequently overruled in part by *Katz*, 389 U.S. 347, and *Berger v. New York*, 388 U.S. 41 (1967). Justice Brandeis's dissent articulates the dangers in permitting violations of the Fourth Amendment, noting the importance of the privacy protected by the warrant requirement, and the damaging effect on liberty resulting from diminished restrictions on the ability of the government to intrude in the lives of the citizenry. *Olmstead*, 277 U.S. at 474-76.

167 *Olmstead*, 277 U.S. at 478.

168 *Id.*

169 *Katz*, 389 U.S. at 360 (Harlan, J., concurring).

has stated that the security of one's privacy against arbitrary intrusion by the police is the core of the Fourth Amendment and basic to a free society.[170] This concept is implicit in ordered liberty.[171] Permitting President Bush's surveillance program to avoid the prohibitions of the Fourth Amendment would allow the arbitrary invasion of privacy, weakening the value of liberty in the Constitution as a result.

The evolution of the law surrounding the political question doctrine demonstrates that the Supreme Court has found cases justiciable when government action, either executive or legislative, implicates a fundamental liberty interest. The NSA program violates the Fourth Amendment, implicating a fundamental right protecting American citizens from the abuse of government power. The Court must step in to establish the boundaries of legislative and executive power to protect this right.

V. CONCLUSION

The constitutional division of the war power between the executive and legislative branches can cause an inherent conflict when one branch exercises its power in opposition of the other. While the Supreme Court would typically find such a conflict nonjusticiable under the political question doctrine, the Court should find these disputes cognizable if the president oversteps the breadth of his constitutional authority impeding upon the power attributed to another branch, or if it implicates a fundamental liberty interest retained by American citizens.

President Bush's domestic surveillance program, conflicts with acts of Congress such as FISA and the War Powers Resolution. These acts aim to rein in the president's power to wage war, but the NSA program seemingly disregards these restrictions. The program contradicts the power of Congress. As a result, the Supreme Court must mediate the dispute between Congress and the president because the executive has invaded the constitutional authority retained by Congress.

Moreover, the NSA program collects the personal information of the citizenry without a warrant, and the Fourth Amendment requires the government to obtain a warrant in order to collect this information. Because the Supreme Court has failed to recognize a national security exception to the warrant requirement, the NSA program violates the fundamental liberty interest protected by the Fourth Amendment. In

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170 Wolf v. Colorado, 338 U.S. 25, 27 (1949).

171 *Id.*

order to prevent the harm to liberty that could lead towards anarchy, the Supreme Court must determine the breadth of the president's constitutional power to exercise military force under the auspice of national security.