

# The 21st Century National Security Constitution

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## ABSTRACT

*Even as the Biden Administration's foreign policy unfolds, in 21st Century practice, foreign relations law seems to have largely become national security law. Virtually all foreign affairs issues have been reframed into national security terms. And because so much of foreign affairs law seems to have become justification for unilateral exercises of executive power, at times it seems almost like not law at all. This Keynote Address, based on a forthcoming book, describes the synergistic dysfunction among our national security institutions that has fostered these trends, explains why the major academic debates over foreign relations law have missed this most urgent issue, and suggests ways to slow the steady march toward executive unilateralism.*

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## INTRODUCTION

Even as the Biden Administration’s foreign policy unfolds, it has become clear that the world of foreign relations law has taken an overly benign attitude toward its own evolution. Recent academic controversies have revolved around such court-centric sideshows as debates over the status of customary international law as U.S. law and “foreign affairs exceptionalism” versus “normalization.” Yet even while these law review debates have raged, in 21st Century practice, foreign relations law has become national security law. Virtually all foreign affairs issues have been reframed into national security terms. And because so much of foreign affairs law seems to have become justification for unilateral exercises of executive power, at times it seems almost like not law at all.

This Keynote Address describes the synergistic dysfunction among our national security institutions that has fostered these trends, explains why the major academic debates over foreign relations law have missed this most urgent issue, and suggests ways to slow the steady march toward executive unilateralism.

### I. SYNERGISTIC INSTITUTIONAL DYSFUNCTION

Today, more than two decades after September 11, 2001, and nearly two decades into the Roberts Court, the 21st Century National Security Constitution has taken on a strikingly unbalanced cast. More than three decades ago, in *The National Security Constitution*, I made both descriptive and normative claims.<sup>1</sup> As a descriptive matter, I argued that since the beginning of the republic, a package of constitutional and subconstitutional norms has evolved within the United States Constitution to protect the operation of checks and balances in foreign affairs and national security policy.<sup>2</sup> The Constitution’s text and associated norms strongly support a common understanding that powers in national security and foreign affairs are to be divided and shared among the branches.<sup>3</sup>

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<sup>1</sup> See HAROLD HONGJU KOH, *THE NATIONAL SECURITY CONSTITUTION: SHARING POWER AFTER THE IRAN-CONTRA AFFAIR* (1990).

<sup>2</sup> See *id.* at 4.

<sup>3</sup> Although the constitutional allocation of powers in this arena has been the subject of scholarly debate for well over half a century, nearly all scholars agree that the overall conduct of foreign affairs is not committed, by text or historical practice, to the exclusive discretion of any one branch. See, e.g., EDWARD S. CORWIN, *THE PRESIDENT: OFFICE AND POWERS 1787–1957* (1957); Arthur Bestor, *Separation of Powers in the Domain of Foreign Affairs: The Intent of the Constitution Historically Examined*, 5 SETON HALL L. REV. 527 (1974); ABRAHAM SOFAER, *WAR, FOREIGN AFFAIRS, AND*

Yet at the same time, my book identified the recurrent patterns of executive activism, congressional passivity, and judicial tolerance that push Presidents to press the limits of law in foreign affairs. As Vietnam and the Iran-Contra Affair illustrated in the 20th century, our national security decisionmaking process has degenerated into one that forces the President to react to perceived crises, that permits Congress to acquiesce in and avoid accountability for important foreign policy decisions, and that encourages the courts to condone these political decisions, either on the merits or by avoiding judicial review. It is this synergy among institutional incentives, not the motives of any single branch, that best explains the recurring pattern of executive unilateralism in American postwar foreign policy. Because the President reacts, Congress acquiesces, and the courts defer, the resulting process has created *unbalanced institutional participation* in foreign affairs decisionmaking. This continuing dysfunction gives too much freedom to the President, while allowing Congress and the courts too easily to avoid constructive participation in important foreign policy decisions.

As a normative matter, I argued that the constitutional vision to which foreign relations decisionmaking should aspire is the model of shared power and balanced institutional participation described by Justice Jackson's landmark concurrence in *Youngstown Sheet & Tube Co. v. Sawyer*.<sup>4</sup> As a constitutional matter, Justice Jackson famously wrote, "[p]residential powers are not fixed but fluctuate, depending upon their disjunction or conjunction with those of Congress," while the legality of executive action is reviewable by the courts.<sup>5</sup> As a policy matter, balanced institutional participation in foreign policymaking is not only more faithful to the Constitution's core principles of checks and balances and separation of powers, but better supports democracy,

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CONSTITUTIONAL POWER: THE ORIGINS (1976); LOUIS HENKIN, CONSTITUTIONALISM, DEMOCRACY AND FOREIGN AFFAIRS (1990); THOMAS M. FRANCK, POLITICAL QUESTIONS/JUDICIAL ANSWERS: DOES THE RULE OF LAW APPLY TO FOREIGN AFFAIRS? (1992); LOUIS HENKIN, FOREIGN AFFAIRS AND THE UNITED STATES CONSTITUTION (2d ed. 1996); JOHN HART ELY, ON CONSTITUTIONAL GROUND (1996); PETER M. SHANE, MADISON'S NIGHTMARE: HOW EXECUTIVE POWER THREATENS AMERICAN DEMOCRACY (2009); Martin S. Flaherty, *Restoring Separation of Powers in Foreign Affairs*, 2 ST. JOHN'S J. INT'L & COMP. L. 22 (2012); Laurence H. Tribe, Essay, *Transcending the Youngstown Triptych: A Multidimensional Reappraisal of Separation of Powers Doctrine*, 126 YALE L.J.F. 86 (2016). Even the strongest proponents of executive power in foreign affairs acknowledge the critical role of Congress in shaping foreign relations and national security policy. See, e.g., H. Jefferson Powell, *The President's Authority over Foreign Affairs: An Executive Branch Perspective*, 67 GEO. WASH. L. REV. 527, 549–55 (1999); Saikrishna B. Prakash & Michael D. Ramsey, *The Executive Power over Foreign Affairs*, 111 YALE L.J. 231, 256–61 (2001); John C. Yoo, *War and the Constitutional Text*, 69 U. CHI. L. REV. 1639, 1680–81 (2002).

<sup>4</sup> 343 U.S. 579, 635–55 (1952) (Jackson, J., concurring).

<sup>5</sup> *Id.* at 635.

avoids authoritarian capture, and lowers the risks of catastrophic outcomes and militarism caused by unchecked unilateralism.<sup>6</sup>

But throughout our country's history, this vision of balanced institutional participation has come under constant challenge from the unilateralist constitutional vision of Justice Sutherland's famous 1936 decision in *United States v. Curtiss-Wright Export Corporation*.<sup>7</sup> Justice Sutherland's much-criticized dicta referred to a "plenary and exclusive power of the President as the sole organ of the federal government in the field of international relations—a power which does not require as a basis for its exercise an act of Congress."<sup>8</sup> From the beginning, this was an overbroad assertion that later executive branch lawyers have dubbed, tongue-in-cheek, the "*Curtiss-Wright*, so I'm right, cite."<sup>9</sup> The interactive synergy among institutional incentives described above explains the steady migration from a *Youngstown* toward a *Curtiss-Wright* vision of executive unilateralism in postwar foreign policy.

Even after the Cold War, during the George H.W. Bush Administration, the *Youngstown* vision of checks and balances still held sway, as both a descriptive and normative matter. But today's National Security Constitution looks dramatically different even from its Cold War predecessor. As I elaborate below, 21st Century national security threats give weak and strong Presidents alike institutional incentives to monopolize the foreign policy response; a polarized Congress even greater incentives to acquiesce; and the courts continuing reason to defer or rubberstamp.<sup>10</sup> These trends have fostered an interactive dysfunction that disrupts the constitutional norm that U.S. national security policy-making should be a power shared.

As my new book, *The National Security Constitution in the 21st Century*, chronicles, I have personally witnessed this transformation over five decades. I have watched this dysfunction affect all three branches of the federal government: while working in the federal courts and the Reagan Department of Justice ("DOJ") during the early 1980s, then upon returning to the State Department from 1998 until 2001, again from 2009 until 2013, and most recently in 2021, during the first

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<sup>6</sup> For a fuller defense of this argument, see generally HAROLD HONGJU KOH, *THE NATIONAL SECURITY CONSTITUTION IN THE 21ST CENTURY* (Yale Univ. Press forthcoming 2024).

<sup>7</sup> 299 U.S. 304 (1936).

<sup>8</sup> *Id.* at 320. For a detailed critique of this dicta, see KOH, *supra* note 1, at 93–100.

<sup>9</sup> *Id.* at 94.

<sup>10</sup> For decades, scholars have acknowledged the institutional and political pressures pushing toward greater executive dominance in foreign affairs. See, e.g., ARTHUR M. SCHLESINGER, JR., *THE IMPERIAL PRESIDENCY* (1973); Paul Gewirtz, *Realism in Separation of Powers Thinking*, 30 WM. & MARY L. REV. 343 (1989); JOHN HART ELY, *WAR AND RESPONSIBILITY: CONSTITUTIONAL LESSONS OF VIETNAM AND ITS AFTERMATH* (1993); Michael P. Van Alstine, *Executive Aggrandizement in Foreign Affairs Lawmaking*, 54 UCLA L. REV. 309, 314–15 (2006); Rebecca Ingber, *Congressional Administration of Foreign Affairs*, 106 VA. L. REV. 395, 401–02 (2020).

year of the Biden Administration. On each return stint, I have observed how foreign policy power has shifted further and further away from Congress toward the executive branch as a whole. Even within the executive branch, national security bureaucracies have grown steadily richer, more powerful, and opaque relative to their diplomatic and justice counterparts.

Over the two decades since September 11, 2001, the military and intelligence budgets have swelled as if for years only one arm muscle had been given steroids. Those agencies' resources increasingly dwarf that of the State Department, so that there are now "about as many members of the armed forces marching bands as there are American diplomats."<sup>11</sup> The 9/11 mentality has reshaped the foreign relations bureaucracy, with each agency replicating subunits that mirror and multiply an insistent focus on foreign counterterrorism. The national security bureaucracy has transformed into an unwieldy behemoth that now approaches what Michael Glennon has called "double government": "a bifurcated system . . . in which even the President now exercises little substantive control over the overall direction of U.S. national security policy," evolving "toward greater centralization, less accountability, and emergent autocracy."<sup>12</sup>

The resulting bureaucratic structure too often resists new priorities in favor of combatting more familiar threats. At interagency meetings, military and security interests are regularly double-counted and "kinetic" solutions privileged over diplomatic ones. Throughout 2021—just after an angry domestic mob had attacked the U.S. Capitol seeking to undo a presidential election, and when thousands of Americans were dying from COVID-19 and feeling the ever-greater impact of climate change—countless hours were still being spent contemplating the continued detention of a few dozen aging detainees at Guantánamo and potential terrorist threats originating in distant theaters. This institutional fixation on past threats has resisted the Biden Administration's efforts to turn the page to address newly pressing challenges. So, when new urgent threats mount—such as Hamas's 2023 attack on Israel, Russia's 2022 invasion of Ukraine, China's threat to Taiwan, climate change, and a global health crisis—bureaucratic inertia has tempered the Biden Administration's aspirations to fulfill older promises, such as ending the Forever War, closing Guantánamo, and repealing obsolete 20th century Authorizations for the Use of Military Force ("AUMFs").

While most recent Republican administrations have unabashedly seized power, successive Democratic administrations with slim legislative majorities have seriously undercorrected for past executive

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<sup>11</sup> *The Budget, Diplomacy and Development: Hearing Before H. Comm. on Foreign Affs.*, 115th Cong. 32 (2017) (statement of Hon. William J. Burns, Deputy Secretary, U.S. Dep't of State).

<sup>12</sup> MICHAEL J. GLENNON, NATIONAL SECURITY AND DOUBLE GOVERNMENT 7 (2015).

overreach. Although the Reagan and G.W. Bush Administrations trumpeted executive power as a defining feature of their constitutional vision, the George H.W. Bush, Clinton, Obama, and Biden presidencies—all afflicted by weak legislative support—also resorted to *ad hoc* unilateralism to respond to particular national security crises. Under Donald Trump’s presidency, this interactive institutional dysfunction and executive unilateralism reached crisis levels. Until Trump, those who believed in constitutional government could assume that a President would have *some* internalized limit where a sense of public duty or shame would dictate self-restraint. But Trump displayed no such limit, expressing unique contempt not just for the *Youngstown* vision of the Constitution, but for legal constraints of any kind.<sup>13</sup>

Trump’s unilateralist project fostered disarray within his own branch and fed on the eagerness of the Republican Congress to apologize for and normalize his behavior. He relied on the Supreme Court—on which he filled three seats—to defer to overstated claims of national security necessity. This interactive institutional dysfunction reached new heights, driven by the President’s extreme contempt for the rule of law and determination to discard past policies; Congress’s extreme willingness to cover for Trump’s aberrant behavior; and the Supreme Court’s extreme readiness—exemplified by its decision in *Trump v. Hawaii*<sup>14</sup> upholding Travel Ban 3.0—to defer to fabricated presidential motives when taking actions based on claimed national security necessity. That pattern predictably spawned new claims by Trump of national security emergency as a basis for unilateral executive action in such traditional areas of congressional authority as immigration,<sup>15</sup> declaring war,<sup>16</sup>

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<sup>13</sup> Michael Brice-Saddler, *While Bemoaning Mueller Probe, Trump Falsely Says the Constitution Gives Him ‘the Right to Do Whatever I Want,’* WASH. POST (July 23, 2019, 9:46 AM), <https://www.washingtonpost.com/politics/2019/07/23/trump-falsely-tells-auditorium-full-teens-constitution-gives-him-right-do-whatever-i-want/> [<https://perma.cc/UVQ5-98A4>] (statement of Donald Trump) (“I have an Article II, where I have to [sic] the right to do whatever I want as president.”). Even after declaring his candidacy to again take the oath to “support, protect, and defend, the Constitution,” Trump wrote on social media that his prior defeat constituted a “Massive Fraud of [a] type and magnitude [that] allows for the termination of all rules, regulations, and articles, even those found in the Constitution.” Donald J. Trump (@realDonaldTrump), TRUTHSOCIAL (Dec. 3, 2022, 7:44 AM), <https://truthsocial.com/@realDonaldTrump/posts/109449803240069864> [<https://perma.cc/6NET-2GMJ>].

<sup>14</sup> 138 S. Ct. 2392, 2423 (2018) (narrowly upholding Trump’s third travel ban based on tenuous claims of national security necessity).

<sup>15</sup> See, e.g., Dara Lind, *The Trump Administration’s Separation of Families at the Border, Explained*, VOX (Aug. 14, 2018, 1:29 PM), [https://www.vox.com/2018/6/11/17443198/children-immigrant-families-separated-parents\\_](https://www.vox.com/2018/6/11/17443198/children-immigrant-families-separated-parents_) [<https://perma.cc/6745-XKV4>] (separating parents who enter the country illegally from their children in the name of national security).

<sup>16</sup> Harold Hongju Koh, *Is Preemptive Assassination the New Trump Doctrine?*, FOREIGN POL’Y (Jan. 9, 2020, 7:01 PM), <https://foreignpolicy.com/2020/01/09/preemptive-assassination-suleimani-new-trump-doctrine-legal/> [<https://perma.cc/74XN-XLD3>].

international trade,<sup>17</sup> international agreements,<sup>18</sup> regulation of cross-border investments,<sup>19</sup> and the power of the purse.<sup>20</sup>

In foreign affairs, the President now operates almost entirely by executive order or national security directive and rarely proposes national security legislation unless it involves appropriations. The White House has virtually given up on congressional-executive agreements or supermajority ratification of Article II treaties as ways of concluding international agreements.<sup>21</sup> Yet during the Trump era and before, Presidents have claimed the power to terminate even longstanding international arrangements at will, without even paying lip service to interbranch consultation.<sup>22</sup> The President now regularly imposes crushing trade and economic sanctions based on previously delegated statutory authorities.<sup>23</sup> He wields broad diplomatic tools based on expansive readings of the recognition and foreign affairs powers. Trump in particular usurped Congress's power of the purse by invoking emergency powers to build a border wall using funds that Congress had expressly withheld.<sup>24</sup> By weaponizing artificial intelligence,

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<sup>17</sup> See Harold Hongju Koh, *Trump Change: Unilateralism and the "Disruption Myth" in International Trade*, 44 *YALE J. INT'L L. ONLINE* 96, 96–101 (2019).

<sup>18</sup> See Harold Hongju Koh, *Could the President Unilaterally Terminate All International Agreements: Questioning Section 313*, in *THE RESTATEMENT AND BEYOND: THE PAST, PRESENT, AND FUTURE OF U.S. FOREIGN RELATIONS LAW* 67–68 (Paul B. Stephan & Sarah H. Cleveland eds., 2020) [hereinafter *RESTATEMENT AND BEYOND*].

<sup>19</sup> See Kristen E. Eichensehr & Cathy Hwang, *National Security Creep in Corporate Transactions*, 123 *COLUM. L. REV.* 549, 551 (2023) (describing "'national security creep': the recent expansion of national security-related review and regulation of cross-border investments to allow government intervention in more transactions than ever before").

<sup>20</sup> Perhaps Trump's most graphic incursion into plenary congressional power was his invocation of a "national emergency," because he wanted to spend more public funds on a border wall than Congress had been willing to appropriate for it. See *infra* note 24.

<sup>21</sup> See Harold Hongju Koh, *Triptych's End: A Better Framework to Evaluate 21st Century International Lawmaking*, 126 *YALE L.J.F.* 338, 339–41 (2017).

<sup>22</sup> See Harold Hongju Koh, *Presidential Power to Terminate International Agreements*, 128 *YALE L.J.F.* 432, 433, 447 (2018).

<sup>23</sup> The Biden Administration has demonstrated its sanctioning capability almost weekly since Russia invaded Ukraine in February of 2022. The Administration has imposed bans on provision of technology for oil and gas exploration and of credits to Russian oil companies and state banks, and travel restrictions and asset freezes on Russian oligarchs close to President Putin, especially those connected to the 2014 annexation of Crimea. See *Russia—Country Commercial Guide: Sanctions Framework*, INT'L TRADE ADMIN. (July 21, 2022), <https://www.trade.gov/country-commercial-guides/russia-sanctions-framework> [<https://perma.cc/C8AZ-K6KJ>] (listing sanctions imposed).

<sup>24</sup> See Todd Ruger, *Supreme Court Ends Legal Clash Over Border Wall Spending*, ROLL CALL (Oct. 12, 2021, 12:20 PM), <https://rollcall.com/2021/10/12/supreme-court-ends-legal-clash-over-border-wall-spending/> [<https://perma.cc/BLZ2-RS5P>]. When Congress appropriated only \$1.375 billion to fund a border wall, Trump declared that he would take up to \$8.1 billion from other funds to pay for the wall. *Id.* The Democratic-led House sued, arguing that the move violated Congress's powers under the Appropriations Clause, but after a D.C. Circuit panel ruled in 2020 that the House had the right to sue, the Supreme Court vacated that ruling as moot when President

cyberconflict, and special forces, executive war making has proceeded based on classified policy memoranda, with minimal congressional oversight, under broad readings of Article II and twenty-year-old legislative authorizations for the use of military force.<sup>25</sup>

Congress's general response to these presidential initiatives has been institutional passivity and focus on extraneous issues. The congressional process for international lawmaking has virtually broken down. As one long-serving Congressman put it a decade ago, "Taxpayers are hiring mediocre talent, candidates who think their job is to ignore policy in order to get elected and reelected."<sup>26</sup> Foreign policy compromise has become a dirty word, as once-bipartisan issues have become deeply politicized. On the House side, starting in 1995, Newt Gingrich centralized power in a politicized office of the Speaker of the House, which he merged with the majority leader's and whip's offices, effectively gutting

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Biden halted the plan (although he later resumed it). *Id.*; *Yellen v. U.S. House of Representatives*, 142 S. Ct. 332 (2021).

<sup>25</sup> See Brianna Rosen, *Ending Perpetual War*, JUST SEC. (Oct. 25, 2022), <https://www.justsecurity.org/83749/ending-perpetual-war/> [<https://perma.cc/7GDS-GRYZ>]; see also Harold Hongju Koh, *Finally Ending America's Forever War, Part I: Diagnosis*, JUST SEC. (Sept. 11, 2023) [hereinafter Koh, *Finally Ending Part I*], <https://www.justsecurity.org/88131/finally-ending-americas-forever-war-part-i-diagnosis/> [<https://perma.cc/7HRG-NMKC>]; Harold Hongju Koh, *Finally Ending America's Forever War, Part II: Prescription*, JUST SEC. (Sept. 12, 2023) [hereinafter Koh, *Finally Ending Part II*], <https://www.justsecurity.org/88164/finally-ending-americas-forever-war-part-ii-prescription/> [<https://perma.cc/BP34-JL4B>] (excerpted from chapter in *Perpetual War and International Law: Legacies of the War on Terror* (Brianna Rosen ed., Oxford University Press forthcoming 2024)). Some have criticized opinions that I drafted at the State Department for spurring this unilateralist trend, particularly regarding the use of drones and the 2011 intervention in Libya. See, e.g., CHARLIE SAVAGE, *POWER WARS* 239–45 (2015); Dawn E. Johnsen, *When Responsibilities Collide: Humanitarian Intervention, Shared War Powers, and the Rule of Law*, 53 HOUS. L. REV. 1065, 1093–96 (2016). But I have offered detailed defenses and read no persuasive rebuttals of those opinions, which I believe to be correct. See, e.g., Harold Hongju Koh, *Ending the Forever War: A Progress Report*, JUST SEC. (Oct. 28, 2013), <https://www.justsecurity.org/2634/ending-war-progress-report/> [<https://perma.cc/Y9JF-J8RQ>]; *Authorization for Use of Military Force After Iraq and Afghanistan: Hearing Before the S. Comm. on Foreign Rels.*, 113th Cong. 40–51 (2014) (statement of Hon. Harold Hongju Koh, Sterling Professor of International Law, Yale Law School); Harold Hongju Koh, *The War Powers and Humanitarian Intervention*, 53 HOUS. L. REV. 971, 1603 (2016). As I explain elsewhere, I see no hypocrisy in defending—in my role as government lawyer—the legality of my clients' positions on these matters, while still questioning—in my role as a scholar—whether such *ad hoc* reactive unilateralism may have continued the migration of U.S. foreign policy in an unfortunate direction. See generally KOH, *supra* note 6, at 337–39; Harold Hongju Koh, *Academic Lawyers in the U.S. Government: Walter's Wisdom*, 102 N.C. L. REV. (forthcoming 2024) (Symposium on Walter Dellinger and the Path of Constitutional Law).

<sup>26</sup> Jim Cooper, *Fixing Congress*, BOS. REV. (May 2, 2011), <https://bostonreview.net/forum/cooper-fixing-congress/> [<https://perma.cc/AUG2-3WFL>].



the role of committee chairs.<sup>27</sup> Opposition legislators began to see their role not as making bipartisan foreign policy, but as waging total war against the other party's President, even shutting down the government when expedient to score political points. As a departing Member described it,

Objective information sources such as the Democratic Study Group were banned. Leadership told members how to vote on most issues and force-fed talking points so that everyone could stay “on message.” . . . All major floor votes became partisan steamrollers with one big “yes” or “no” vote at the end of debate[, with n]o coherent alternatives . . . allowed to be considered, only approval of party doctrine. Instead of limited legislative freedom, a member's only choice was between being a teammate or a traitor.<sup>28</sup>

The Senate divide has become even more polarized, paralyzed, and zero sum. Senate electoral outcomes now closely track presidential outcomes, creating greater pressure for senators to vote with their party's President and less incentive to make deals across party lines.<sup>29</sup> Each party has been able to assemble a strong Senate majority only once in the last twenty years.<sup>30</sup> Yet because the minority can always envision gaining legislative control in the next election, minority senators have become far less inclined to give bipartisan approaches any perceived victories. With a few exceptions,<sup>31</sup> votes across the aisle have largely given way to lockstep minority opposition, hamstringing the

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<sup>27</sup> *Id.*; see also John Bresnahan, *The Demise of One of the Best Gigs in Congress*, POLITICO (Jan. 30, 2018, 6:15 PM), <https://www.politico.com/story/2018/01/30/congress-republican-committee-chairs-377078> [<https://perma.cc/K5CK-89CB>]; JULIET EILPERIN, FIGHT CLUB POLITICS: HOW PARTISANSHIP IS POISONING THE U.S. HOUSE OF REPRESENTATIVES 32 (2007).

<sup>28</sup> Cooper, *supra* note 26.

<sup>29</sup> Ronald Brownstein, *Why the Senate Doesn't Work Anymore*, CNN (Oct. 5, 2021, 2:52 PM), <https://www.cnn.com/2021/10/05/politics/senate-broken-biden-agenda/index.html> [<https://perma.cc/S2CH-BWFY>].

<sup>30</sup> *Id.*

<sup>31</sup> 2022 witnessed a few prominent foreign policy exceptions: the climate change bill, enacted on a party line basis based on negotiations between Majority Leader Chuck Schumer and holdout Senator Joe Manchin, H.R. 5376, 117th Cong. (2022); and the bipartisan votes on a bill to boost U.S. competitiveness with China, H.R. 4346, 117th Cong. (2022); and the resolution supporting Finland and Sweden's admission to NATO, S. Res. 646, 117th Cong. (2022). Kevin Liptak, Manu Raju, Ella Nilsen & Alex Rogers, *How Secret Negotiations Revived Joe Biden's Agenda and Shocked Washington*, CNN (July 28, 2022, 7:27 PM), <https://www.cnn.com/2022/07/28/politics/manchin-schumer-biden-deal/index.html> [<https://perma.cc/L3MJ-WDM8>]; Kevin Breuninger, *House Passes Bill to Boost U.S. Chip Production and China Competition, Sending It to Biden*, CNBC (July 28, 2022, 3:03 PM), <https://www.cnbc.com/2022/07/28/china-competitiveness-and-chip-bill-passes-house-goes-to-biden.html> [<https://perma.cc/NF2Q-VVHA>]; Mychael Schnell, *House Approves Resolution Supporting Finland, Sweden Joining NATO; 18 Republicans Vote 'No.'* THE HILL (July 18, 2022, 8:47 PM), <https://thehill.com/homenews/>

majority from winning any opposition votes for any key initiatives by the other party's President.<sup>32</sup> The majority can therefore legislate only with near-total unity within their own party. This gives a tiny number of "swing senators" disproportionate leverage to block or dampen their own party's legislative ambitions, but not enough leverage to ensure that the opposition party will join their initiatives.<sup>33</sup> But there are not enough of those swing senators to build regular or reliable bipartisan coalitions that can overcome the sixty-vote threshold to end a filibuster.<sup>34</sup> Finally, as America's population concentrates in the largest states, states representing a shrinking percentage of the national population have become even more overrepresented in the Senate, so that smaller segments of the electorate control more Senate seats.<sup>35</sup> This has led to what one experienced congressional observer called "a distortion that is so great it puts into question the entire legitimacy of the Senate as a governing body."<sup>36</sup> The overall result is far less foreign policy legislation, and even less that truly represents the will of the people.

As important, public perception has come to treat this reality as the new normal. In most foreign policy situations, everyone now *expects* Congress to do nothing. Members never want to vote on war when such visible votes are among the only acts sufficient to get legislators ousted at the polls. In our sharply polarized polity, the legislature has become so narrowly divided that it has become nearly impossible to quickly compose legislative majorities capable of overcoming a filibuster, much less confirm executive officials for key Senate-confirmed foreign policy posts.<sup>37</sup> Individual senators and individual staffers have been afforded extraordinary power to hold up nominees for no good reason.<sup>38</sup> So when

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house/3564989-house-approves-resolution-supporting-finland-sweden-joining-nato-18-republicans-vote-no/ [https://perma.cc/L27R-UJK7].

<sup>32</sup> See Philip Bump, *Republicans in Congress Are More Likely to Go Sideways on Their Caucus*, WASH. POST (Dec. 1, 2022, 12:50 PM), <https://www.washingtonpost.com/politics/2022/12/01/republicans-congress-party-conformity/> [https://perma.cc/Q933-K8MM] (finding both parties vote along party lines well over ninety percent of the time).

<sup>33</sup> Recall, for instance, the roles of "swing" Democratic Senators Joe Manchin and Kyrsten Sinema in paring back Biden's 2022 climate and tax legislation. See Emily Cochrane, Jim Tankersley & Lisa Friedman, *Manchin, in Reversal, Agrees to Quick Action on Climate and Tax Plan*, N.Y. TIMES (July 27, 2022), <https://www.nytimes.com/2022/07/27/us/politics/manchin-climate-tax-bill.html> [https://perma.cc/R9WZ-ULA7]; Emily Cochrane, *Sinema Agrees to Climate and Tax Deal, Clearing Way for Votes*, N.Y. TIMES (Aug. 4, 2022), <https://www.nytimes.com/2022/08/04/us/politics/sinema-inflation-reduction-act.html> [https://perma.cc/SL7V-996Y].

<sup>34</sup> See Brownstein, *supra* note 29.

<sup>35</sup> *Id.*

<sup>36</sup> *Id.* (quoting Thomas E. Mann).

<sup>37</sup> *Id.*

<sup>38</sup> See Koh, *supra* note 21, at 340 ("Under the political deadlock between the President and Congress during the Obama Administration, the number of Senators needed to block consideration of [an agreement or nomination] has declined over time from fifty-one (a majority of the Senators), to forty-one (the number needed to sustain a filibuster), to ten (the number usually

a crisis arises in the world, the public, the Congress, the allies, and the media all now demand *executive* action. This universal expectation has only furthered centralization of foreign policy power and initiative in the White House and the National Security Council. At the same time, it has dampened the incentives for political appointees to consult with a Congress to whom they do not owe confirmation, or by whom their confirmation was unconscionably delayed. Even executive branch officials with instincts to consult or cooperate more with legislators increasingly find themselves facing a binary choice between unilateral action or no action. Because the Executive is punished politically for passivity, not surprisingly, it usually opts for the former.

The judiciary has only modestly moderated these trends. As the Executive has populated the courts, with a few visible exceptions,<sup>39</sup> judges of both parties have with striking frequency either rubber-stamped executive actions or dismissed individual challenges to them on preliminary grounds. To be sure, the Supreme Court responded to the excesses of the George W. Bush Administration by holding against the executive branch in a famous string of Guantánamo cases.<sup>40</sup> But inside the government, these cases have had surprisingly little real impact in checking the steady migration toward executive unilateralism.<sup>41</sup> After *Boumediene v. Bush*,<sup>42</sup> the Supreme Court has not taken another Guantánamo case,

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needed to prevent [the agreement or nomination] from being voted out of the relevant committee), to one (a single Senator or staffer preventing an otherwise uncontroversial [nomination or agreement] from getting unanimous consent).”).

<sup>39</sup> The most glaring exceptions have come in the field of immigration, where Democratic-appointed lower-court judges generally resisted Trump’s most extreme immigration actions, until the cases reached the Supreme Court. Since Biden took office, this pattern has continued, as judges across the political spectrum have declined to defer to Biden Administration immigration policies. Several courts have declared unlawful the Administration’s continuing use of Title 42 public health authorities to expel asylum seekers without adequate asylum hearings. *See, e.g.,* *Huisha-Huisha v. Mayorkas*, 27 F.4th 718, 734–35 (D.C. Cir. 2022) (finding plaintiffs likely to succeed on the merits of their statutory claim that the Executive cannot expel them to places where they face persecution or torture); *Huisha-Huisha v. Mayorkas*, 642 F. Supp. 3d 1, 19 (D.D.C. 2022) (granting partial summary judgment against Title 42 policy as arbitrary and capricious and permanently enjoining the U.S. government from applying it to plaintiff class members). *But see* *Louisiana v. CDC*, 603 F. Supp. 3d 406, 439–41 (W.D. La. 2022) (enjoining CDC’s nationwide termination of Title 42 on the ground that the order was done without sufficient notice-and-comment). But even here, the Roberts Court recently accepted the Biden Administration’s effort to repeal Trump’s “Remain in Mexico” policy. *See* *Biden v. Texas*, 142 S. Ct. 2528, 2548 (2022).

<sup>40</sup> *See* *Rasul v. Bush*, 542 U.S. 466, 485 (2004); *Hamdi v. Rumsfeld*, 542 U.S. 507, 509 (2004); *Hamdan v. Rumsfeld*, 548 U.S. 557, 635 (2006); *Boumediene v. Bush*, 553 U.S. 723, 732 (2008).

<sup>41</sup> *See* MARTIN S. FLAHERTY, *RESTORING THE GLOBAL JUDICIARY: WHY THE SUPREME COURT SHOULD RULE IN U.S. FOREIGN AFFAIRS* 204–19 (2019) (arguing that *Hamdi*, *Hamdan*, *Rasul*, and *Boumediene* should have been read together to reduce judicial deference to government national security arguments).

<sup>42</sup> 553 U.S. 723 (2008).

even though the D.C. Circuit visibly diluted the reach of *Boumediene* in subsequent Guantánamo habeas litigation.<sup>43</sup>

Academic commentators have read great meaning into such cases as *Zivotofsky v. Clinton* (“*Zivotofsky I*”),<sup>44</sup> where the Supreme Court declined to apply the political question doctrine to bar review of the President’s actions in the face of a contrary congressional statute,<sup>45</sup> and *Bond v. United States* (“*Bond I*”),<sup>46</sup> which found that a criminal defendant had civil standing to challenge, on Tenth Amendment grounds, a statute that implemented a major multinational treaty.<sup>47</sup> But these decisions notwithstanding, the courts of appeals have generally continued to rely on expansive understandings of justiciability doctrines, procedural obstacles, or immunity defenses to avoid reaching the merits of any civil dispute that arguably touches on national security.<sup>48</sup> In military contractor cases, for example, lower courts have continued to invoke the

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<sup>43</sup> See Stephen I. Vladeck, *The D.C. Circuit After Boumediene*, 41 SETON HALL L. REV. 1451, 1453–54 (2011). After *Boumediene*, the Supreme Court has consistently denied certiorari to petitions from Guantánamo Bay detainees and in other national security and terrorism-related cases, avoiding opportunities to clarify the detainees’ due process and habeas rights. *Id.* at 1454; see also Charlie Savage & Carol Rosenberg, *Appeals Court Punts on Due Process Rights for Guantánamo Detainees*, N.Y. TIMES (April 4, 2023), <https://www.nytimes.com/2023/04/04/us/politics/guantanamo-appeals-court-due-process.html> [https://perma.cc/9AVG-CVD3] (discussing D.C. Circuit’s one-paragraph en banc per curiam order in *Al Hela v. Biden*, again dodging the due process issue). In *United States v. Husayn (Zubaydah)*, 142 S. Ct. 959, 971 (2022), a Supreme Court plurality not only accepted the Government’s claim that the widely known torture of a current Guantánamo detainee was a state secret, but also that the state secrets privilege required dismissal of the plaintiff’s claim. *But see id.* at 994 (Gorsuch & Sotomayor, JJ., dissenting) (charging that dismissal of Zubaydah’s claim “abdicate[s] any pretense of an independent judicial inquiry into the propriety of a claim of [state secrets] privilege and extend[s] instead ‘utmost deference’ to the Executive’s mere assertion of one”).

<sup>44</sup> 566 U.S. 189 (2012).

<sup>45</sup> *Id.* at 201. Chief Justice Roberts’s *Zivotofsky I* opinion called the political question doctrine a “narrow exception” to the general rule that the judiciary has the “responsibility to decide cases properly before it,” reducing the six-factor political question test originally introduced in *Baker v. Carr*, 369 U.S. 186 (1962), to its first two “textual[]” elements: finding a political question exists only when [1] “there is ‘a textually demonstrable constitutional commitment of the issue to a coordinate political department; or [2] a lack of judicially discoverable and manageable standards for resolving it.’” *Id.* at 194–95. *But see* Curtis Bradley & Eric A. Posner, *The Real Political Question Doctrine*, 75 STAN. L. REV. 1031, 1034 (2023) (arguing that lower courts have nonetheless continued applying the political question doctrine).

<sup>46</sup> 564 U.S. 211 (2011).

<sup>47</sup> *Id.* at 214. See, e.g., Ganesh Sitaraman & Ingrid Wuerth, *The Normalization of Foreign Relations Law*, 128 HARV. L. REV. 1897, 1903 (2015) (“In *Zivotofsky v. Clinton* and *Bond v. United States (Bond I)* . . . the Court rejected the exceptionalist approach and declared the issues in those cases as suitable for adjudication.”).

<sup>48</sup> See, e.g., *El-Shifa Pharm. Indus. Co. v. United States*, 378 F.3d 1346, 1362 (Fed. Cir. 2004) (invoking political question doctrine to dismiss a takings suit arising out of the destruction of a Sudanese pharmaceutical plant because it had been erroneously identified as “enemy property”), *cert. denied*, 545 U.S. 1139 (2005); see also Stephen I. Vladeck, *The New National Security Canon*, 61 AM. U. L. REV. 1295 (2012) (citing cases).

political question doctrine to throw out ordinary tort suits.<sup>49</sup> In others, the lower courts have shifted their focus from justiciability to dismissals for failure to state a claim, upholding statutes that strip jurisdiction from the federal courts to hear certain kinds of foreign policy claims<sup>50</sup> or that displace state law in the name of unspecified “foreign policy” interests.<sup>51</sup>

Nor have commentators fully acknowledged the extent to which the courts now go to rule in favor of the Executive *on the merits*. Two theories have emerged to uphold Executive action in foreign affairs at the merits stage. First, as in *Zivotofsky v. Kerry* (“*Zivotofsky II*”),<sup>52</sup> the courts may apply a “*Youngstown* Category Three” theory to find a legislative enactment unenforceable, because it unconstitutionally invades the President’s exclusive constitutional powers.<sup>53</sup> Second, under a “statutory *Curtiss-Wright*” theory of delegation, a court may conclude that Congress has conferred a greater degree of discretion on the President through foreign affairs-related statutes because, as *Curtiss-Wright* suggested, the delegated statutory authority overlaps with or complements the President’s own constitutional foreign affairs powers.<sup>54</sup> This broad theory of statutory delegation apparently now enjoys support from at least five members of today’s Supreme Court.<sup>55</sup> This approach

<sup>49</sup> See, e.g., *Taylor v. Kellogg Brown & Root Servs., Inc.*, 658 F.3d 402, 403 (4th Cir. 2011); *Carmichael v. Kellogg, Brown & Root Servs., Inc.*, 572 F.3d 1271, 1275 (11th Cir. 2009), *cert. denied*, 561 U.S. 1025 (2010); see also *Harris v. Kellogg Brown & Root Servs., Inc.*, 724 F.3d 458, 462–63 (3d Cir. 2013), *cert. denied*, 574 U.S. 1120 (2015); *Lane v. Halliburton*, 529 F.3d 548, 554 (5th Cir. 2008).

<sup>50</sup> *Janko v. Gates*, 741 F.3d 136, 137 (D.C. Cir. 2014), *cert. denied*, 575 U.S. 902 (2015).

<sup>51</sup> See, e.g., *In re Assicurazioni Generali, S.P.A.*, 592 F.3d 113, 115 (2d Cir. 2010), *cert. denied*, 562 U.S. 952 (2010); see also *United States v. Husayn (Zubaydah)*, 142 S. Ct. 959, 971 (2022) (plurality) (ruling that the state secrets privilege required dismissal of the plaintiff’s claim).

<sup>52</sup> 576 U.S. 1 (2015).

<sup>53</sup> See *id.* at 28–29.

<sup>54</sup> *Id.* at 20; Note, *Nondelegation’s Unprincipled Foreign Affairs Exceptionalism*, 134 HARV. L. REV. 1132, 1133 (2021).

<sup>55</sup> The five are Chief Justice Roberts and Justices Thomas, Alito, Gorsuch, and Kavanaugh. See *Gundy v. United States*, 139 S. Ct. 2116, 2135–37 (2019) (Gorsuch, Roberts, and Thomas JJ., dissenting); *id.* at 2130–31 (Alito, J., concurring in the judgment); *Paul v. United States*, 140 S. Ct. 342, 342 (2019) (Kavanaugh, J., respecting the denial of certiorari); *Dep’t of Transp. v. Ass’n of Am. R.Rs.*, 575 U.S. 43, 80 & n.5 (2015) (Thomas, J., concurring in the judgment); see also Note, *supra* note 54, at 1136. Yet in the domestic realm, ironically, largely the same justices, led by Justice Gorsuch in *Gundy*, are trying to revive the *nondelegation* doctrine, while conspicuously taking the opposite approach when foreign affairs-related statutes are at issue. See *Gundy*, 139 S. Ct. at 2136–37 (Gorsuch, J., dissenting) (questioning the constitutionality of agency rulemaking about “private conduct,” but not so long as it overlaps with “authority the Constitution separately vests in another branch,” such as executive power over “foreign affairs”). Such an overly generous approach to delegation when foreign affairs are at issue threatens to treat *Curtiss-Wright*’s dicta as governing law, thereby unbalancing separation of powers in both foreign and domestic affairs. Cf. Nicholas R. Parrillo, *A Critical Assessment of the Originalist Case Against Administrative Regulatory Power: New Evidence from the Federal Tax on Private Real Estate in the 1790s*, 130 YALE L.J. 1288, 1294 (2020) (“[N]ow, for the first time in nearly a century, the Supreme Court is poised

would effectively enshrine *Curtiss-Wright*'s dicta into holding. It would empower the President to operate virtually alone in such traditionally congressional fields as immigration and trade, invoking expansive claims not of constitutional power, but of broadly delegated statutory authority. Citing the Executive's claimed functional monopoly of foreign policy judgment, numerous circuit-level decisions have doubled-down on granting the Executive special deference to make foreign policy through self-serving interpretations of foreign relations statutes.<sup>56</sup>

In short, all three branches have contributed to the persistent unilateral exercise of foreign affairs power by the executive. As yet, these practices have not resulted in a *permanent* redistribution of constitutional authority, given that the establishment of historical practice must be assessed on a case-by-case basis and must meet the rigorous standards for constitutional acquiescence set forth in Justice Frankfurter's separate opinion in *Youngstown*.<sup>57</sup> But the trend is clear: unless we all recognize and address this serious problem, in 21st Century foreign relations law, presidential unilateralism will supplant shared power as the constitutional default.

## II. ACADEMIC SIDESHOWS

The academic community has witnessed these trends, but has chosen to pay disproportionate attention to those few foreign affairs cases that actually make it to plenary Supreme Court review.<sup>58</sup> Among foreign relations law academics, the central scholarly debates over the last few decades have swirled around two issues that have in fact proven largely peripheral to the actual functioning and practice of foreign affairs law

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to reformulate the nondelegation doctrine, opening the possibility of a revolution in separation of powers and administrative law."); see also Harlan Grant Cohen, *The National Security Delegation Conundrum*, JUST SEC. (July 17, 2019), <https://www.justsecurity.org/64946/the-national-security-delegation-conundrum/> [<https://perma.cc/NPA2-PGFL>].

<sup>56</sup> See Curtis A. Bradley, *Chevron Deference and Foreign Affairs*, 86 VA. L. REV. 649, 689–90 (2000); Elad D. Gil, *Rethinking Foreign Affairs Deference*, 63 B.C. L. REV. 1603, 1614–15 (2022).

<sup>57</sup> See Koh, *supra* note 22, at 447–49. See generally GERHARD CASPER, *SEPARATING POWER: ESSAYS ON THE FOUNDING PERIOD* (1997); Curtis A. Bradley & Martin S. Flaherty, *Executive Power Essentialism and Foreign Affairs*, 102 MICH. L. REV. 545 (2004); Curtis A. Bradley & Trevor W. Morrison, *Historical Gloss and the Separation of Powers*, 126 HARV. L. REV. 411 (2012).

<sup>58</sup> Much of the key Supreme Court activity in these cases has occurred not on the Court's plenary calendar, but on its "shadow docket," where there has recently been "a disconcertingly long line of cases in which this Court uses its shadow docket to signal or make changes in the law, without anything approaching full briefing and argument." *Merrill v. Milligan*, 142 S. Ct. 879, 889 (2022) (Kagan, J., dissenting). For a thorough discussion of the recent expansion of the Court's nonplenary "shadow docket," see generally STEPHEN I. VLADECK, *THE SHADOW DOCKET: HOW THE SUPREME COURT USES STEALTH RULINGS TO AMASS POWER AND UNDERMINE THE REPUBLIC* (2023).

and institutions: the “status of customary international law as U.S. law” and “exceptionalism versus normalization.”<sup>59</sup>

In the real world, the first debate has proven to be a distracting sideshow. In the 1990s, the so-called revisionists began challenging the traditional view that international law is federal law, arguing instead that U.S. courts could not incorporate customary international law into federal law except through express incorporation by the political branches through a statute or treaty.<sup>60</sup> But among executive branch and congressional lawyers, the status of international law as federal law has never been seriously questioned and is considered settled. Particularly when matters such as official immunities arise, the executive branch has expressly stated that it looks to customary international law to articulate federal principles of foreign official immunity,<sup>61</sup> as it argued in support of the Supreme Court’s ruling in *Samantar v. Yousuf*.<sup>62</sup> The lower federal courts have largely continued their tradition of following the executive’s lead and incorporating customary international law into federal common law binding on the states, whether or not any particular statute or treaty authorizes them to do so.<sup>63</sup>

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<sup>59</sup> These academic debates have overshadowed such other topics as the decline of treaties and rise of nontreaty substitutes; the changing nature of warfare because of drones, cyberattacks, artificial intelligence, and other technological innovations; war in the Middle East, and the implications of the rise of China and the growing lawlessness of Russia for declining U.S. hegemony in the new world order.

<sup>60</sup> Compare Curtis A. Bradley & Jack L. Goldsmith, *Customary International Law as Federal Common Law: A Critique of the Modern Position*, 110 HARV. L. REV. 815, 817 (1997), with Harold Hongju Koh, *Is International Law Really State Law?*, 111 HARV. L. REV. 1824, 1827 (1998).

<sup>61</sup> See, e.g., Suggestion of Immunity by the United States at Ex. A, *Cengiz v. Mohammed bin Salman*, No. 1:20-cv-03009 (D.D.C. Nov. 17, 2022), [https://docs-cdn-prod.news-engineering.aws.wapo.pub/publish\\_document/9672ed01-b76f-4383-8fb6-968926f6d79a/published/9672ed01-b76f-4383-8fb6-968926f6d79a.pdf](https://docs-cdn-prod.news-engineering.aws.wapo.pub/publish_document/9672ed01-b76f-4383-8fb6-968926f6d79a/published/9672ed01-b76f-4383-8fb6-968926f6d79a.pdf) [<https://perma.cc/2KFG-5RTG>] (recognizing head-of-state immunity “[u]nder common law principles of immunity articulated by the Executive Branch in the exercise of its Constitutional authority over foreign affairs and informed by customary international law”); Suggestion of Immunity by the United States at 7, *Dogan v. Barak*, No. 2:15-CV-08130 (C.D. Cal. June 10, 2016), <https://2017-2021.state.gov/wp-content/uploads/2019/05/29-Suggestion-of-Immunity-in-Dog-an-et-al.-v.-Barak.pdf> [<https://perma.cc/ME3C-7SJL>] (similar). See generally William S. Dodge, *Throwback Thursday: Revisiting Bradley and Goldsmith’s “Critique of the Modern Position,”* TRANSNAT’L LITIG. BLOG (Mar. 31, 2022), <https://tlblog.org/throwback-thursday-revisiting-bradley-and-goldsmiths-critique-of-the-modern-position/> [<https://perma.cc/YQV4-BK7U>]; William S. Dodge & Chimène I. Keitner, *A Roadmap for Foreign Official Immunity Cases in U.S. Courts*, 90 FORDHAM L. REV. 677, 693 n.106 (2021) (“[L]ower courts have considered the common law of foreign official immunity to be ‘federal common law.’” (citation omitted)); JENS DAVID OHLIN, *THE ASSAULT ON INTERNATIONAL LAW* 15–48 (2015).

<sup>62</sup> 560 U.S. 305 (2010).

<sup>63</sup> See MICHAEL J. GLENNON & ROBERT D. SLOANE, *FOREIGN AFFAIRS FEDERALISM: THE MYTH OF NATIONAL EXCLUSIVITY* ch. 7 (2016) (reviewing cases that demonstrate the survival of customary international law as part of federal common law); Bart M.J. Szewczyk, *Customary International Law and Statutory Interpretation: An Empirical Analysis of Federal Court Decisions*, 82 GEO. WASH. L. REV. 1118, 1134–46 (2014).

Nor, when pressed, have the Justices seriously contested the status of customary international law as federal law. Contrary to the revisionists' claims, human rights plaintiffs may still invoke federal common law causes of action to enforce certain claims under the customary international law of human rights.<sup>64</sup> In the Supreme Court's leading Alien Tort Statute ("ATS") case, *Sosa v. Alvarez-Machain*,<sup>65</sup> a six-justice majority expressly recognized that under certain conditions, that statute provides today's federal judges with the power to fashion "a cause of action" for a "modest number" of claims.<sup>66</sup> Such claims may be "based on the present-day law of nations," so long as they "rest on a norm of international character accepted by the civilized world and defined with a specificity comparable to the features" of traditional paradigms.<sup>67</sup>

To be sure, the *Sosa* majority articulated reasons for "judicial caution" in recognizing such implied causes of action,<sup>68</sup> and the Court subsequently imposed territorial limits on the places and the kinds of defendants against whom an ATS cause of action may apply.<sup>69</sup> But only three members of the Court would have held—as the revisionists urged—that the *Erie* doctrine somehow precluded the federal courts from making federal common law to enforce international human rights law.<sup>70</sup> Justice Souter's majority opinion in *Sosa* rejected that claim: "*Erie* did not in terms bar any judicial recognition of new substantive rules, no matter what the circumstances, and post-*Erie* understanding has identified limited enclaves in which federal courts may derive some substantive law in a common law way," including foreign relations law.<sup>71</sup>

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<sup>64</sup> See, e.g., *Sosa v. Alvarez-Machain*, 542 U.S. 692, 724 (2004). The *Sosa* majority cautioned that implied Alien Tort Statute causes of action could be recognized, but only so long as those norms were as widely accepted and specifically defined as the three traditional violations of the law of nations that Congress recognized in 1789, when it first enacted the precursor to the ATS: piracy, infringement of the rights of ambassadors, and violations of safe-conducts. *Id.* Compare Curtis A. Bradley & Jack L. Goldsmith, III, *The Current Illegitimacy of International Human Rights Litigation*, 66 *FORDHAM L. REV.* 319 (1997), with Gary Born, *Customary International Law in United States Courts*, 92 *WASH. L. REV.* 1641, 1642 (2017).

<sup>65</sup> 542 U.S. 692 (2004).

<sup>66</sup> *Id.* at 724.

<sup>67</sup> Compare *id.* at 725, with *Doe I v. Cisco Systems, Inc.*, 73 F.4th 700, 717 (9th Cir. 2023) (holding that under the *Sosa* test, "aiding and abetting liability is a norm of customary international law with sufficient definition and universality to establish liability under the" ATS).

<sup>68</sup> *Sosa*, 542 U.S. at 725.

<sup>69</sup> See *Kiobel v. Royal Dutch Petroleum*, 569 U.S. 108, 124 (2013) (holding that, under the ATS, a claim arising from "violations of the law of nations occurring outside the United States is barred"); *Jesner v. Arab Bank*, 138 S. Ct. 1386, 1407 (2018) (holding that "foreign corporations may not be defendants in suits brought under the ATS"); *Nestlé v. Doe*, 141 S. Ct. 1931, 1937 (2021) (refusing on the facts presented there to allow extraterritorial application of the ATS).

<sup>70</sup> *Sosa*, 542 U.S. at 739–50 (Scalia, J., concurring in part and concurring in the judgment, joined by Rehnquist, C.J., and Thomas, J.).

<sup>71</sup> *Id.* at 729–30 (majority opinion) ("[I]nternational disputes implicating . . . our relations with foreign nations' are one of the 'narrow areas' in which 'federal common law' continues to exist." (quoting *Texas Industries, Inc. v. Radcliff Materials, Inc.*, 451 U.S. 630, 641 (1981) (alteration



Subsequent decisions have confirmed that, despite recent changes in the Court's membership, claims under customary international law arise under federal law for purposes of Article III. In *Jesner v. Arab Bank*,<sup>72</sup> two concurring Justices, Gorsuch and Thomas, argued that customary international law claims do not arise under federal law for purposes of Article III.<sup>73</sup> As a circuit judge, Justice Kavanaugh also adopted some of the revisionists' critiques.<sup>74</sup> Nevertheless, in both *Jesner* and *Kiobel v. Royal Dutch Shell Petroleum Corp.*,<sup>75</sup> the Supreme Court decided ATS suits between aliens *on the merits*,<sup>76</sup> which of course it could not have done had federal courts genuinely lacked Article III federal question jurisdiction over the international law question at issue.<sup>77</sup>

The other main academic debate about foreign relations law has similarly skirted the deeper issue facing the 21st Century National Security Constitution. While they disagree on whether it is a good outcome, academic "exceptionalists" like Curtis Bradley and Carlos Vazquez argue that today's judicial and constitutional norm has become "foreign affairs exceptionalism," i.e., "the view that the federal government's foreign affairs powers are subject to a different, and generally more relaxed, set of constitutional restraints than those that govern its domestic powers."<sup>78</sup> Those who favor "foreign relations exceptionalism"

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in original) (emphasis added))). The *Sosa* Court added, "it would be unreasonable to assume that the First Congress would have expected federal courts to lose all capacity to recognize enforceable international norms simply because the common law might lose some metaphysical cachet on the road to modern realism." *Id.* at 730.

<sup>72</sup> 138 S. Ct. 1386 (2018).

<sup>73</sup> *See id.* at 1408 (Thomas, J., concurring); *id.* at 1416 (Gorsuch, J., concurring in part and concurring in the judgment).

<sup>74</sup> *See* Al-Bihani v. Obama, 619 F.3d 1, 17–36 (D.C. Cir. 2010) (Kavanaugh, J., concurring).

<sup>75</sup> 569 U.S. 108 (2013).

<sup>76</sup> In *Kiobel*, the Court applied the presumption against extraterritoriality to the ATS cause of action. *Id.* at 124. In *Jesner*, the Court held that the ATS cause of action did not apply to foreign corporations. *Jesner*, 138 S. Ct. at 1407. And in *Nestlé v. Doe*, the Court held that claims against U.S. corporations required conduct occurring in the United States beyond general corporate decision-making. 141 S. Ct. 1931, 1937 (2021). These decisions have sharply limited suits by alien survivors against foreign corporations and individuals based on human rights violations committed abroad, but have left open a narrow window for ATS suits against U.S. corporations. *See, e.g., Doe I v. Cisco Systems, Inc.*, 73 F.4th 700, 717 (9th Cir. 2023).

<sup>77</sup> To be sure, in a footnote, *Sosa* denied that Section 1331's *statutory* grant of federal question jurisdiction invariably applies to claims under customary international law recognized under the ATS, but conspicuously did not address the constitutional question of whether issues of customary international law fall within the broader scope of the federal judicial power created by Article III. *See Sosa v. Alvarez-Machain*, 542 U.S. 692, 731 n.19 (2004). Indeed, the footnote found "consistent with the division of responsibilities between federal and state courts after *Erie*" its recognition that the ATS "was enacted on the congressional understanding that courts would exercise jurisdiction by entertaining some common law claims derived from the law of nations." *See id.*

<sup>78</sup> Curtis A. Bradley, *A New American Foreign Affairs Law?*, 70 U. COLO. L. REV. 1089, 1096 (1999); *see also* Carlos M. Vázquez, *The Abiding Exceptionalism of Foreign Affairs Doctrine*, 128 HARV. L. REV. F. 305, 305–07 (2015).

posit a sharp distinction between decisionmaking in the domestic and foreign relations realms and emphasize the executive's functional advantages in foreign policymaking as reasons why courts are right to defer to the executive's constitutional powers when conducting judicial oversight of decisions affecting foreign relations.<sup>79</sup> This exceptionalist description has been contested by scholars like Harlan Cohen, Ganesh Sitaraman, and Ingrid (Wuerth) Brunk, who argue instead that foreign affairs law became "normalized" in the constitutional jurisprudence of the post-Cold War era.<sup>80</sup> Increasingly, they argue, the courts treat foreign relations law issues "as if they were run-of-the-mill domestic policy issues, suitable for judicial review and governed by ordinary separation of powers and statutory interpretation principles."<sup>81</sup> The competing camps dispute both the descriptive claim—whether normalization is happening<sup>82</sup>—and the normative claim—whether or not normalization is or would be a salutary trend.

If forced to choose, I would stand with the "descriptive exceptionalists" and the "normative normalizationists." But in my view, neither camp has it right. Both theories overemphasize the role of courts in the foreign relations process, minimize the extent to which the lower courts resist or circumvent the infrequent Supreme Court signals in this area,<sup>83</sup> and do not fully account for the likely future reversal of the "normalization" trend by Trump-created majorities on the Supreme Court and a number of the courts of appeals. Neither theory explains how all three branches of government behave, why each feels compelled to act in the way it does, or why the synergy *among* the three branches has led to today's exceptionalist status quo. While as a normative matter, I favor the normalization position, as a descriptive matter, "foreign affairs normalization" seems to me far less a reality than an unfulfilled aspiration. Admittedly, a few recent Supreme Court decisions have declined to

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<sup>79</sup> See Vázquez, *supra* note 78, at 307. One commentator has argued that foreign relations exceptionalism found its fullest and most influential statement in the Third Restatement. See G. Edward White, *From the Third to the Fourth Restatement of Foreign Relations: The Rise and Potential Fall of Foreign Affairs Exceptionalism*, in *RESTATEMENT AND BEYOND*, *supra* note 18, at 46.

<sup>80</sup> Sitaraman & Wuerth, *supra* note 47, at 1902–03 (arguing that since the Cold War, the Supreme Court has increasingly rejected the exceptionalist idea that foreign affairs are different from domestic affairs in the areas of justiciability, federalism, and executive dominance); Harlan Grant Cohen, *Formalism and Distrust: Foreign Affairs Law in the Roberts Court*, 83 *GEO. WASH. L. REV.* 380, 384–87 (2015).

<sup>81</sup> Sitaraman & Wuerth, *supra* note 47, at 1901.

<sup>82</sup> For example, one legal historian argued that foreign affairs exceptionalism rose in the twentieth century but suffered a "potential fall" in the twenty-first. White, *supra* note 79, at 24.

<sup>83</sup> See Stephen I. Vladeck, *The Exceptionalism of Foreign Relations Normalization*, 128 *HARV. L. REV. F.* 322, 322 (2015) ("[T]here are dozens of other examples of foreign relations exceptionalism in recent lower court decisions" that "have been wholly undisturbed by the Supreme Court.") (emphasis omitted).

pay *Curtiss-Wright* style superdeference to executive prerogative on such foreign affairs issues as justiciability, federal supremacy, and executive dominance.<sup>84</sup> But while I agree that such normalization would be normatively preferable, we will not likely see it validated by the current Court. Nor does the normalization theory acknowledge, much less explain, the dramatic changes in the executive or Congress, described above, that have continued the steady march toward unilateral executive power in foreign affairs.

Nor, on the other hand, are those correct who believe that foreign affairs exceptionalism is normatively preferable.<sup>85</sup> To be sure, over more than two centuries of American history, such functional considerations as the executive's expertise, monopoly on information, secrecy, flexibility, and capacity for speedy response have fed the steady flow of decisionmaking authority toward the executive branch.<sup>86</sup> But some of these functional advantages are self-fulfilling expectations. Expertise and information can be shared among the branches, and legislative speed facilitated by empowerment of expert congressional consultative groups.<sup>87</sup> Some scholars have simply asserted that, unlike past judges, modern federal judges are just too ignorant to decide foreign affairs cases.<sup>88</sup> But again, this is a self-fulfilling prophecy; there is no reason why better judicial training, better educated law clerks, better amicus briefs and legal scholarship, and a modernized *Restatement of Foreign Relations Law* could not give judges ample tools to decide the modern transnational cases that come before them. Nor did the Trump era offer proof that purely unilateral executive decisionmaking produces better decisions than when the President must convince people who do not work for him that his actions are both wise and legal. Finally, there is no good reason why executive decisions—especially those made hastily, in crisis

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<sup>84</sup> See Vázquez, *supra* note 78, at 305, 313; Sitaraman & Wuerth, *supra* note 47, at 1902.

<sup>85</sup> Murphy and Swaine avoid this normative debate in their recent treatise on foreign relations law, stating, “[o]ur principal objective in this volume was to describe U.S. foreign relations law and only secondarily to provide our normative perspective on the path that law should take.” SEAN D. MURPHY & EDWARD T. SWAINE, *THE LAW OF U.S. FOREIGN RELATIONS*, at xix (2023).

<sup>86</sup> These changes are chronicled in my forthcoming book manuscript. See KOH, *supra* note 6, at 20–23, 93–94.

<sup>87</sup> See generally KOH, *supra* note 1, at 167–69 (discussing role of the “Gang of Six” senior members of Congress—the President pro tempore, Majority and Minority Leaders of the Senate, the Speaker of the House, her chief deputy, and the House minority leader—who could form a core consultative group on foreign affairs issues).

<sup>88</sup> See, e.g., Thomas H. Lee, *Customary International Law and U.S. Judicial Power*, in *RESTATEMENT AND BEYOND*, *supra* note 18, at 262 (asserting that “[t]oday’s federal judges have little to no experience in foreign affairs or diplomacy,” in contrast to the vast experience of past federal judges like John Jay, William Howard Taft, and Charles Evans Hughes, overlooking such current federal judges with significant international experience as Diane Wood, Margaret McKeown, Jeffrey Meyer, Jon Newman, and José Cabranes).

mode—should thereafter be exempt from judicial oversight, or their factual bases kept hidden by overclassification or evidentiary privilege.<sup>89</sup>

Perhaps most fundamentally, the exceptionalist-normalization debate is the wrong debate to be having about foreign relations law at this moment in history. It focuses too much on the least consistently involved player in foreign affairs decisionmaking—the courts—and not enough on problems within the executive and legislative branches. The more crucial question should be about the *balance of institutional participation* in foreign affairs decisionmaking.<sup>90</sup> The two more relevant divides these days should be the descriptive divide between those observers who see institutional participation in foreign affairs as “balanced” versus “unbalanced” and the normative divide between “dysfunctionalists” who critique the status quo and “apologists” who defend it as appropriate and necessary to protect our homeland security. Only by recognizing the executive monopoly that increasingly unbalances our national security system can we acknowledge and redress the current institutional incentives that have created these dysfunctions, skewing today’s foreign relations decisionmaking.

### III. THE LOOMING PROBLEM: THE PRESIDENT AS A NATIONAL SECURITY THREAT

These twin impulses toward institutional imbalance and normative apology were best illustrated by the extreme presidency of Donald Trump. Trump’s conduct of foreign policy laid bare the ways in which the *Curtiss-Wright* national security vision has run riot within the U.S. government. In many ways, Trump’s presidency amalgamated his predecessors’ worst national security abuses. Like Nixon, Trump illegally used force abroad to kill Iranian General Qassem Soleimani in Iraq.<sup>91</sup>

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<sup>89</sup> Cf. *United States v. Husayn (Zubaydah)*, 142 S. Ct. 959, 999 (2022) (Gorsuch, J., dissenting, joined by Sotomayor, J.) (arguing that dismissal of Zubaydah’s claim based on the state secrets privilege “confuses appropriate deference to the Executive’s predictive judgments about foreign affairs with inappropriate deference to the Executive’s concerns about its own mishaps, misstatements, and mistakes”).

<sup>90</sup> Professor Swaine correctly notes that “[t]he Fourth Restatement has at this point stopped short of the most fundamental questions, very much at issue in this day and age, concerning the unilateral capacity of the president to establish foreign relations law,” and asks whether “future invocations of executive branch statements and activities . . . require clearer ground rules,” that “contemplat[e] what else might be weighed in the balance.” Edward T. Swaine, *Consider the Source: Evidence and Authority in the Fourth Restatement*, in *RESTATEMENT AND BEYOND*, *supra* note 18, at 525.

<sup>91</sup> See Scott R. Anderson, *Did the President Have the Domestic Legal Authority to Kill Qassem Soleimani?*, *LAWFARE* (Jan. 5, 2020, 4:49 PM), <https://www.lawfaremedia.org/article/did-president-have-domestic-legal-authority-kill-qassem-soleimani> [<https://perma.cc/AF2B-63F9>].

Like George W. Bush, he claimed a right to make preemptive strikes.<sup>92</sup> Like Nixon, he distorted law enforcement by influencing the Attorney General and the Justice Department and composing an “enemies list” to target his critics.<sup>93</sup> As in the Iran-Contra Affair, the President allowed foreign policy to be privatized by the intervention of unaccountable rogue agents like Michael Flynn, Roger Stone, and Rudy Giuliani.<sup>94</sup> And the executive’s diversion of a request for arms toward a *quid pro quo* exchange of foreign aid and political information partly echoed Lt. Col. Oliver North’s illegal diversion of proceeds from Iranian arms shipments to fund the anti-Sandinista *Contras* in Nicaragua.<sup>95</sup> Trump took this extreme executive behavior to a new level when he diverted *bona fide* national security requests toward his private political gain, exemplified by his now-infamous July 25, 2019, call seeking opposition political information from Ukrainian President Volodymyr Zelenskyy.<sup>96</sup>

But Trump took executive unilateralism to new heights, invoking an overarching *Curtiss-Wright* theory in an attempt to nullify the rule

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<sup>92</sup> See Koh, *supra* note 16. Because Trump generally *refrained* from pushing the envelope on military interventions abroad, his lawlessness and unilateralism did not cause an even greater national security constitutional crisis than he ended up creating. This, however, only highlights the threat that might arise under a future President more hawkish than Trump.

<sup>93</sup> Julian E. Zelizer, *The New Enemies List*, THE ATLANTIC (Aug. 19, 2018), <https://www.theatlantic.com/ideas/archive/2018/08/the-new-enemies-list/567874/> [<https://perma.cc/833Q-YC84>].

<sup>94</sup> See Koh, *supra* note 1, at 12; Kevin Breuninger, *How Trump Has Used His Power in the Week Since His Impeachment Acquittal*, CNBC (Feb. 13, 2020, 1:33 PM), <https://www.cnbc.com/2020/02/13/how-trump-has-asserted-his-power-since-his-impeachment-acquittal.html> [<https://perma.cc/5Q3F-X6AE>].

<sup>95</sup> See Koh, *supra* note 1, at 25.

<sup>96</sup> On July 25, 2019, facing pressure from Russian military action in the Donbas, Ukraine’s President Zelenskyy famously thanked Trump for the United States’s “great support in the area of defense,” but indicated that Ukraine was “almost ready to buy more Javelins [anti-tank weapon systems] from the United States for defense purposes.” Memorandum of Telephone Conversation with President Zelenskyy of Ukraine (July 25, 2019, 9:03–9:33 a.m. EDT), in *Full Document: Trump’s Call with the Ukrainian President*, N.Y. TIMES (Oct. 30, 2019), <https://www.nytimes.com/interactive/2019/09/25/us/politics/trump-ukraine-transcript.html> [<https://perma.cc/S8TL-J4LV>]. But instead of addressing this *bona fide* national security request, Trump responded by asking Zelenskyy to help him with a partisan political priority: gathering opposition research to use against Biden in the forthcoming 2020 presidential election, saying: “I would like you to do us a favor though . . . . Whatever you can do, it’s very important that you do it if that’s possible.” *Id.* (emphasis added). Trump went on to abuse his foreign affairs authority to freeze \$320 million in U.S. aid to Ukraine to leverage Zelenskyy to comply. See Joshua Yaffa, *How Donald Trump Is Making It Harder to End the War in Ukraine*, NEW YORKER (Dec. 6, 2019), <https://www.newyorker.com/news/news-desk/how-donald-trump-is-making-it-harder-to-end-the-war-in-ukraine> [<https://perma.cc/H6M4-78RP>]. Yet even after his impeachment, Trump remained entirely unrepentant about his request, admitting that he remained open in the future to receiving dirt on his opponents from a foreign power. See *Transcript: ABC News’ George Stephanopoulos’ Exclusive Interview with President Trump*, ABC NEWS (June 16, 2019, 7:58 PM), <https://abcnews.go.com/Politics/transcript-abc-news-george-stephanopoulos-exclusive-interview-president/story?id=63749144> [<https://perma.cc/F8KL-8R64>].

of law for his own Administration. Trump claimed that all of his actions were authorized, justified, and immunized from interbranch interference by his plenary constitutional authorities. Under that theory, any restraints coming from *within* the executive branch could be ignored under a theory of the unitary executive, and any restraints coming from *outside* the executive could be treated as unconstitutional intrusions into the President's plenary national security powers. When Congress sought to investigate or call executive witnesses to testify, Trump asserted executive privilege and fought subpoenas endlessly through the courts.<sup>97</sup> And when his Administration's abuses predictably triggered criminal investigations for violating national security laws, Trump pardoned the suspects or granted them clemency, often even before they came to trial.<sup>98</sup> Even after Trump lost reelection, he engaged in an eleventh hour "pardon whitewash."<sup>99</sup> And despite leaving office, he continued asserting extreme claims of executive impunity that have pushed our constitutional process closer to a breaking point.<sup>100</sup> As Trump launched yet another presidential campaign promising even more extreme assertions of executive power,<sup>101</sup> he became the first former President to be

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<sup>97</sup> See Charlie Savage, *Trump's Claim of Executive Privilege in the Jan. 6 Inquiry, Explained*, N.Y. TIMES (Oct. 13, 2022), <https://www.nytimes.com/2021/10/19/us/politics/trump-executive-privilege.html> [<https://perma.cc/VC4R-J2GK>]; Corinne Ramey, *Trump Fires Back in New York Subpoena Fight*, WALL ST. J. (Feb. 1, 2022, 7:20 PM), <https://www.wsj.com/articles/trump-fires-back-in-new-york-subpoena-fight-11643756993> [<https://perma.cc/ZM2A-79EE>]. See generally Harold Hongju Koh, Opinion, *The Arrogance of Trump's Enablers*, N.Y. TIMES (Jan. 7, 2020), <https://www.nytimes.com/2020/01/07/opinion/trump-impeachment-congress.html> [<https://perma.cc/ZM2A-79EE>].

<sup>98</sup> See Eric Tucker, *New Round of Trump Clemency Benefits Manafort, Other Allies*, AP NEWS (Dec. 24, 2020, 1:56 PM), <https://apnews.com/article/joe-biden-donald-trump-elections-campaigns-baghdad-a6741e5cf9032ce004c8f6751b3cc968> [<https://perma.cc/E7T3-3ENF>]. Bill Clinton similarly pardoned dozens in his last days before leaving office, including most famously, financier Marc Rich. *Clinton's Pardon of Marc Rich*, PBS NEWSHOUR (Jan. 26, 2001, 12:00 AM), <https://www.pbs.org/newshour/show/clintons-pardon-of-marc-rich> [<https://perma.cc/H3WZ-M948>].

<sup>99</sup> Hours before Trump was to leave office, he issued 143 pardons and commutations. Beth Reinhard, Rosalind Helderman & Josh Dawsey, *Trump Grants Clemency to 143 People in Last Night as President*, THE SEATTLE TIMES (Jan. 19, 2021, 10:18 PM), <https://www.seattletimes.com/nation-world/trump-grants-clemency-to-143-people-in-last-night-as-president/> [<https://perma.cc/JN9G-VLW6>]. But see Harold Hongju Koh, Rosa Hayes, Dana Khabbaz, Michael Loughlin, Nicole Ng, Ayoub Ouederni & Brandon Willmore, *Is the Pardon Power Unlimited?* JUST SEC. (July 11, 2020), <https://www.justsecurity.org/68900/is-the-pardon-power-unlimited/> [<https://perma.cc/VVZ8-RNPE>] (arguing that "pardons could independently form the basis for criminal charges of obstruction of justice, in both state and federal courts, after Trump leaves office").

<sup>100</sup> See President Joseph R. Biden, Remarks by President Biden on the Continued Battle for the Soul of the Nation (Sept. 1, 2022), <https://www.whitehouse.gov/briefing-room/speeches-remarks/2022/09/01/remarks-by-president-bidenon-the-continued-battle-for-the-soul-of-the-nation/> [<https://perma.cc/K7EM-3J64>].

<sup>101</sup> See Jonathan Swan, Charlie Savage & Maggie Haberman, *Trump and Allies Forge Plans to Increase Presidential Power in 2025*, N.Y. TIMES (July 18, 2023), <https://www.nytimes.com/2023/07/17/us/politics/trump-plans-2025.html> [<https://perma.cc/F5KL-T3Y9>] (The Trump

indicted in both state and federal court, including on national security charges. He was charged in Florida federal court for illegally hoarding at his Florida home the most highly classified information potentially exposing classified operative identities, and in Washington, D.C. federal court for leading a conspiracy to subvert American democracy by repeating knowingly false claims of election fraud, encouraging false electors, pressuring the Vice President to reject legitimate electors and accept false ones, and directing a mob of supporters to the U.S. Capitol on January 6, 2021, to obstruct the congressional session certifying Joe Biden's election as President.<sup>102</sup> Detailing the latter set of allegations, in a sweeping set of forty-one charges from which Trump could not be federally pardoned, a Georgia state grand jury invoked state racketeering charges to accuse Trump and eighteen codefendants of leading a criminal enterprise to overturn his 2020 loss in Georgia.<sup>103</sup>

Trump's two impeachments highlighted his broad willingness to condone and encourage electoral interference: first by a foreign government, then by his own domestic supporters. Like the Iran-Contra

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plan's "legal underpinning is a maximalist version of the so-called unitary executive theory. The legal theory rejects the idea that the government is composed of three separate branches with overlapping powers to check and balance each other. Instead, the theory's adherents argue that Article [II] of the Constitution gives the president complete control of the executive branch . . .").

<sup>102</sup> See Alan Feuer & Maggie Haberman, *Investigation of Trump Documents Case Continues After His Indictment*, N.Y. TIMES (June 29, 2023), <https://www.nytimes.com/2023/06/29/us/politics/trump-documents-indictment-subpoenas.html> [<https://perma.cc/V6LY-Q36A>]; see also Tom Joscelyn, *Comparing the Trump Indictment and the January 6th Select Committee's Final Report*, JUST SEC. (Aug. 3, 2023), <https://www.justsecurity.org/87473/comparing-the-trump-indictment-and-the-january-6th-select-committees-final-report/> [<https://perma.cc/85PJ-Y3Y8>]. In early 2023, classified government documents were also found in the private files of former Vice Presidents Joe Biden and Mike Pence, but unlike Trump, both officials voluntarily returned the documents to the National Archives. See Glenn Thrush, *Discovery of More Classified Records Raises Questions over Biden's Handling of Documents*, N.Y. TIMES (Jan. 11, 2023), <https://www.nytimes.com/2023/01/11/us/politics/biden-classified-documents.html> [<https://perma.cc/ER97-QTUQ>]; see also Maggie Haberman, *Classified Documents Found at Pence's Home in Indiana*, N.Y. TIMES (Jan. 24, 2023), <https://www.nytimes.com/2023/01/24/us/politics/mike-pence-classified-documents.html> [<https://perma.cc/JC5F-2JWC>]. Special Counsel Jack Smith's indictment for Trump's activities leading to the January 6 attack on the Capitol mirrored many of the same charges made in the January 6th Select Committee's final report. See Joscelyn, *supra*.

<sup>103</sup> Richard Fausset & Danny Hakim, *Trump Indicted in Georgia: Ex-President Accused of Leading Push to Overturn 2020 Vote*, N.Y. TIMES (Aug. 15, 2023), <https://www.nytimes.com/live/2023/08/15/us/trump-indictment-georgia-election?smid=nytcore-ios-share&referringSource=articleShare> [<https://perma.cc/T98V-G4TA>]. In a fourth case, also immune from federal pardon, Trump was indicted by a Manhattan, N.Y. grand jury for allegedly making illegal hush-money payments to cover up a sex scandal that arose during his 2016 presidential campaign. See generally *Keeping Track of the Trump Investigations*, N.Y. TIMES (Aug. 28, 2023), <https://www.nytimes.com/interactive/2023/us/trump-investigations-charges-indictments.html?smid=nytcore-ios-share&referringSource=articleShare> [<https://perma.cc/U4UP-683Y>] (tracking status of each of the four criminal cases against Trump).

Affair and 9/11, Trump's first impeachment exposed a dire national security vulnerability: the dramatic exposure of U.S. electoral processes to attack, both from hostile foreign powers and from a President bent upon his own reelection. The Mueller Report described a pattern of violation and coverup that comprised a thoroughgoing assault on the National Security Constitution.<sup>104</sup> Volume One of the Report exhaustively detailed a hostile foreign power's systematic initiative to infiltrate, influence, and support one side in a closely contested presidential campaign—an official foreign initiative that by all accounts, the President's campaign neither reported nor resisted, but welcomed.<sup>105</sup> Volume Two chronicled Trump's unrelenting efforts to cover up that campaign of infiltration, which continue to this day.<sup>106</sup>

But strangely lost was the core message of the first Article of Impeachment: “President Trump used the powers of the Presidency in a manner that [1] *compromised the national security of the United States* and [2] undermined the integrity of the United States democratic process.”<sup>107</sup> These twin threats, to national security and democracy, are deeply interconnected. Free and fair elections are the lifeblood of U.S. constitutional democracy. Whether from foreign or domestic sources, an attack on the integrity of our democratic process—and an administration's repeated willingness to encourage it—threatens our national security and constitutional stability as much as, if not more than, a terrorist attack on a major American city.

Election tampering most threatens national security when it prolongs in office a leader who endorses extreme executive unilateralism. But the December 2019 Articles of Impeachment underplayed that national security threat by flattening it into two counts: abuse of power and obstruction of Congress.<sup>108</sup> Since 2013, Russia has conducted nearly forty election influence campaigns targeting nineteen different countries.<sup>109</sup> Before congressional committees, Mueller and other senior U.S. intelligence officials reported that Russia was poised to influence future elections.<sup>110</sup> Combined with expanding cyber capabilities, the

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<sup>104</sup> See generally 1 ROBERT S. MUELLER, III, REPORT ON THE INVESTIGATION INTO RUSSIAN INTERFERENCE IN THE 2016 PRESIDENTIAL ELECTION (2019) [hereinafter MUELLER REPORT VOL. I]; 2 *id.* [hereinafter MUELLER REPORT VOL. II]. Both of these reports are available at <http://www.justice.gov/storage/report.pdf>. [<https://perma.cc/8UZ5-RP54>].

<sup>105</sup> See MUELLER REPORT VOL. I, *supra* note 104, at 4–8.

<sup>106</sup> See MUELLER REPORT VOL. II, *supra* note 104, at 3–6.

<sup>107</sup> H.R. RES. 755, 116th Cong. (2019) (emphasis added).

<sup>108</sup> *Id.*

<sup>109</sup> See Diego A. Martin, Jacob N. Shapiro & Michelle Nedashkovskaya, *Recent Trends in Online Foreign Influence Efforts*, 18 J. INFO. WARFARE 15, 16–20 (2019).

<sup>110</sup> *Full Transcript: Mueller Testimony Before House Judiciary, Intelligence Committees*, NBC NEWS (July 25, 2019, 11:45 AM), <https://www.nbcnews.com/politics/congress/full-transcript-robert-mueller-house-committee-testimony-n1033216> [<https://perma.cc/96LK-ZYSW>] (statement of Special Counsel Mueller) (“The [Russians are] doing it as we sit here, and they expect to do



historical anomaly of the Electoral College, and political manipulation of the electoral base through gerrymandering and census management, future election-hacking episodes could jeopardize the very legitimacy of America's constitutional order.

After being voted out of office in November 2020, Trump's national security threats only accelerated. As the January 6 House Select Committee investigation chronicled, against even Attorney General Bill Barr's advice, Trump pushed to overturn the free and fair election, lying, pressuring state and federal officials to toss out contrary election results, and goading his supporters to storm the Capitol to block the seating of his constitutional successor.<sup>111</sup> When his own Vice President, Mike Pence, refused to manipulate the electoral count to keep him in office, Trump welcomed the thought that the mob should attack Pence to change his mind.<sup>112</sup> Military officials and top generals feared that Trump would improperly invoke his national security powers to create a foreign policy crisis abroad or commit troops to American streets to consolidate his power.<sup>113</sup> During Trump's final days in office, his frightening instability led Cabinet members to contemplate invoking the Twenty-Fifth Amendment.<sup>114</sup> All ten living Secretaries of Defense

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it during the next campaign.”); *see also* NAT'L INTEL. COUNCIL, FOREIGN THREATS TO THE 2020 U.S. FEDERAL ELECTIONS (2021), <https://www.dni.gov/files/ODNI/documents/assessments/ICA-declass-16MAR21.pdf> [<https://perma.cc/6GH5-NVPU>].

<sup>111</sup> *See* Peter Baker, *Trump Is Depicted as a Would-Be Autocrat Seeking to Hang onto Power at All Costs*, N.Y. TIMES (June 9, 2022), <https://www.nytimes.com/2022/06/09/us/politics/trump-jan-6-hearing.html> [<https://perma.cc/RF72-VWNT>].

<sup>112</sup> *See id.*

<sup>113</sup> *See* Susan B. Glasser & Peter Baker, *Inside the War Between Trump and His Generals*, NEW YORKER (Aug. 8, 2022), <https://www.newyorker.com/magazine/2022/08/15/inside-the-war-between-trump-and-his-generals> [<https://perma.cc/N5FN-M8PV>] (“Two nightmare scenarios kept running through [General] Milley’s mind. One was that Trump might spark an external crisis, such as a war with Iran, to divert attention or to create a pretext for a power grab at home. The other was that Trump would manufacture a domestic crisis to justify ordering the military into the streets to prevent the transfer of power.”); *id.* (“Trump kept asking for alternatives, including an attack inside Iran on its ballistic-weapons sites. Milley explained that this would be an illegal preemptive [sic] act: . . . ‘If we do what you’re saying,’ [Milley] said, ‘we are all going to be tried as war criminals in The Hague.’”). This second crisis revealed the special vulnerability created by the distinctive American process of allowing a several-month transition period between the general election and the presidential transition, in contrast to countries where leaders ousted by election must leave office the next day.

<sup>114</sup> *See* Tom LoBianco, *Trump Was Alerted that Cabinet Considered Using 25th Amendment, Aide Testifies*, YAHOO NEWS (June 28, 2022), <https://news.yahoo.com/trump-was-alerted-cabinet-looked-at-using-25th-amendment-after-jan-6-aide-testifies-234627087.html> [<https://perma.cc/8MLE-5H6S>]. By design, the Twenty-Fifth Amendment can work only if the Vice President and the Cabinet are both committed to take action against their own President. *See* YALE LAW SCH. RULE OF LAW CLINIC, THE TWENTY-FIFTH AMENDMENT TO THE UNITED STATES CONSTITUTION: A READER’S GUIDE 11 (2018), [https://law.yale.edu/sites/default/files/area/clinic/document/mn082208\\_ls\\_reader-guide\\_interior\\_final.pdf](https://law.yale.edu/sites/default/files/area/clinic/document/mn082208_ls_reader-guide_interior_final.pdf) [<https://perma.cc/77ZK-VYJ8>].

signed a public letter attesting that any effort by Trump to “involve the U.S. armed forces in resolving election disputes would take us into dangerous, unlawful and unconstitutional territory.”<sup>115</sup> Yet when Trump was again impeached without conviction, national security threats were again underemphasized; the single Article voted by the House charged him simply with “incitement of insurrection” against the U.S. government and encouraging “lawless action at the Capitol” on January 6.<sup>116</sup> As the House changed hands, ending the January 6 Committee’s work, many Americans kept insisting that the issue simply go away.

The Trump presidency thus glaringly exposed how dangerous executive unilateralism can be in the hands of a lawless executive. Trump was twice impeached not just because he was a bad President, but because as President, he became a *glaring national security threat*, who used his constitutional powers to normalize both election insecurity and an extreme form of executive unilateralism.<sup>117</sup> Executive unilateralism that may feel tolerable when the leader remains mindful of her constitutional oath directly threatens democracy when it empowers a lawless leader.

During both impeachments, Trump’s defenders and detractors narrowly focused on questions of individual wrongdoing, not on the broader institutional failures that had enabled his abuses. Although Trump characterized Mueller’s Report as a “total exoneration,”<sup>118</sup> it read instead like a detailed recounting of criminal activity that could not be redressed because it was immunized from prosecution by executive branch constitutional interpretation. After Mueller declined to charge criminal misconduct,<sup>119</sup> Trump used exorbitant constitutional claims of executive privilege to stonewall legislative subpoenas until they became irrelevant.<sup>120</sup> Only months later, when the January 6

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<sup>115</sup> Ashton Carter, Dick Cheney, William Cohen, Mark Esper, Robert Gates, Chuck Hagel, James Mattis, Leon Panetta, William Perry & Donald Rumsfeld, Opinion, *All 10 Living Former Defense Secretaries: Involving the Military in Election Disputes Would Cross into Dangerous Territory*, WASH. POST (Jan. 3, 2021, 5:00 PM), [https://www.washingtonpost.com/opinions/10-former-defense-secretaries-military-peaceful-transfer-of-power/2021/01/03/2a23d52e-4c4d-11eb-a9f4-0e668b9772ba\\_story.html](https://www.washingtonpost.com/opinions/10-former-defense-secretaries-military-peaceful-transfer-of-power/2021/01/03/2a23d52e-4c4d-11eb-a9f4-0e668b9772ba_story.html) [<https://perma.cc/6CLC-3NJU>].

<sup>116</sup> H.R. Res. 24, 117th Cong. (2021).

<sup>117</sup> As Congressman Adam Schiff put it in his closing statement during Trump’s first impeachment, “He has betrayed our national security, and he will do so again. . . . You cannot constrain him. He is who he is.” DAREH GREGORIAN, *Schiff’s Powerful Closing Speech: ‘Is There One Among You Who Will Say, Enough!’?*, NBC NEWS (Feb. 3, 2020, 11:42 AM), <https://www.nbcnews.com/politics/trump-impeachment-inquiry/closing-argument-democrats-say-not-removing-trump-would-render-him-n1128766> [<https://perma.cc/S6RM-HV8Y>].

<sup>118</sup> Mark Mazzetti & Katie Benner, *Mueller Finds No Trump-Russia Conspiracy, but Stops Short of Exonerating President on Obstruction*, N.Y. TIMES (Mar. 24, 2019), <https://www.nytimes.com/2019/03/24/us/politics/mueller-report-summary.html> [<https://perma.cc/R5H5-KZF6>].

<sup>119</sup> See *id.*

<sup>120</sup> See Savage, *supra* note 97.

House Select Committee was finally composed, did the full scope of the constitutional violations committed begin to come to light.<sup>121</sup>

Such a sustained effort to dodge the rule of law could not have succeeded had our constitutional checks and balances functioned as planned. If successor administrations or other governmental institutions were strongly to push the pendulum the other way, the historical march toward unilateral presidentialism could be arrested or slowed. But instead, America's persistent institutional political response has been to *undercorrect*, increasingly exposing more of our constitutional democracy to existential threat. The Mueller Report illustrated this recurrent tendency toward undercorrection at work, aided by expansive theories of presidential discretion, immunity, and exemption.<sup>122</sup>

Trump's twin impeachments thus teach that we cannot count on America's National Security Constitution to protect itself. Because impeachment was designed as an extreme constitutional remedy for individual unfitness in office, it was never intended as a substitute for ongoing interbranch accountability or as a tool for fixing deeper systemic malfunctions of our constitutional system. After Watergate—another case of deliberate, malicious domestic interference into electoral processes—a Special Prosecutor named Richard Nixon as an unindicted criminal coconspirator.<sup>123</sup> Congress enacted stiffer laws regarding campaign conduct and began impeachment proceedings against Nixon based

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<sup>121</sup> See Baker, *supra* note 111 (summarizing the Committee's description of Trump's alleged "seven-part conspiracy"). The January 6 Committee prominently included only two Republican members who later lost their seats, in part because of their willingness to break from their party to investigate Trump's post-defeat abuses. See Bridget Bowman, *Four Jan. 6 Committee Members Won't Return to Congress in 2023*, MEET THE PRESS BLOG (Dec. 19, 2022, 1:05 PM), <https://www.nbcnews.com/meet-the-press/meetthepressblog/four-jan-6-committee-members-wont-return-congress-2023-rcna62385> [<https://perma.cc/F7EG-3ZHS>]. As 2023 began, the Committee's work came to an abrupt end when the Republicans assumed control of the House. See discussion of Jan. 6 Committee's Final Report *infra* note 127.

<sup>122</sup> Mueller clearly felt limited by the executive regulations constraining the Special Counsel and pro-Executive branch Justice Department opinions touting expansive claims of executive privilege and prosecutorial inability to indict a sitting President. Cf. MUELLER REPORT VOL. I, *supra* note 104, at 191–199 (listing the individuals against whom Mueller considered bringing charges for obstruction of justice or making false statements, conspicuously omitting, at least in the unredacted portions, Trump himself). Mueller's public presentations of his Report's findings also seemed chilled by his understandable desire not to emulate former FBI Director Jim Comey's flagrant pronouncements elaborating his decision not to indict Hillary Clinton for her private emails. See Mazzetti and Benner, *supra* note 118. Popular disappointment in the Report's carefully worded findings flowed from Attorney General Bill Barr's prerelease spinning, unrealistic public expectations created by media overhype, and a distinctively American tendency to expect that narrow legal tools of the kind that Mueller was authorized to wield could in fact solve deeper structural problems. See *id.*

<sup>123</sup> Anthony Ripley, *Jury Named Nixon a Co-Conspirator But Didn't Indict*, N.Y. TIMES (Jun. 7, 1974), <https://www.nytimes.com/1974/06/07/archives/jury-named-nixon-a-coconspirator-but-didnt-indict-st-clair-confirms.html> [<https://perma.cc/C3F2-TMNQ>].

on his extensive cover up efforts, even though no one seriously claimed that Nixon had personally participated in the Watergate burglary.<sup>124</sup> After both the Iran-Contra Affair and 9/11, bipartisan commissions and congressional investigations chronicled in detail what happened and made policy recommendations to avoid repetition in the future.<sup>125</sup> To address the foreign policy dysfunction exposed by Vietnam, Congress passed national security “framework statutes” to constrain war powers, intelligence oversight, emergency economic powers, and international agreement making.<sup>126</sup> But no similar official response seems forthcoming. The most detailed accounts that we have—from the Mueller Report and the January 6 Committee—were not designed to make broad policy suggestions for institutional reform.<sup>127</sup>

When our constitutional decisionmaking process has become so seriously imbalanced, we cannot hope to restore constitutional equilibrium simply by “throwing these rascals out.” The undercorrection that now seems almost certain again to follow will only license more nakedly unilateralist Presidents. The national security danger posed by an executive’s extreme contempt for the rule of law demands a more

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<sup>124</sup> See *The Nixon Resignation*, N.Y. TIMES (Aug. 9, 1974), <https://www.nytimes.com/1974/08/09/archives/the-nixon-resignation.html> [<https://perma.cc/3FXZ-3GMX>]; *At a Glance; Campaign Finance Laws Over the Years*, N.Y. TIMES (Feb. 27, 1998), <https://www.nytimes.com/1998/02/27/us/at-a-glance-campaign-finance-laws-over-the-years.html> [<https://perma.cc/J7TT-SYQH>].

<sup>125</sup> See KOH, *supra* note 1, at 16; THE 9/11 COMMISSION REPORT (2004).

<sup>126</sup> See KOH, *supra* note 1, at 38–62 (describing these past national security investigations and legislative moments, including the response to the Vietnam War). Previously, presidential impeachments had been rare and cataclysmic events in American political life, and moments for intense national self-reflection. But the stubborn resistance of Trump’s supporters converted both impeachments into rote political exercises that ended in almost party-line votes of House impeachment and Senate nonconviction. The President’s party then went to extraordinary lengths to minimize both incidents by normalizing his behavior with denialist apologies that continue to this day.

<sup>127</sup> The January 6 Committee made history by concluding “that President Trump and a number of other individuals made a series of very specific plans, ultimately with multiple separate elements, but all with one overriding objective: to corruptly obstruct, impede, or influence the counting of electoral votes on January 6th, and thereby overturn the lawful results of the election.” FINAL REPORT OF THE SELECT COMM. TO INVESTIGATE THE JANUARY 6TH ATTACK ON THE U.S. CAPITOL, H.R. REP. NO. 117-663, at 99 (2022). Based on that conclusion, the Committee for the first time made four criminal referrals to the Justice Department regarding the conduct of a former president: recommending that Trump be prosecuted for obstructing an official proceeding, conspiracy to defraud the United States, conspiracy to make a false statement, and to “incite,” “assist,” or “aid and comfort” an insurrection.” *Id.* at 103–09. The Committee’s full report concluded with a handful of legislative proposals, mostly excluding national security reforms, including enactment of electoral count reform, which was done before the end of 2022, *see infra* note 131, reforming certain criminal statutes to add more severe penalties, enhanced federal penalties for certain threats against persons involved in the election process, and evaluation of threats posed by the Insurrection Act. FINAL REPORT OF THE SELECT COMM. TO INVESTIGATE THE JANUARY 6TH ATTACK ON THE U.S. CAPITOL, H.R. REP. NO. 117-663, at 689–92 (2022); *cf. infra* note 150 (discussing more detailed reforms of the Insurrection Act).

sustained and ambitious counteragenda to avoid undercorrection. But the current political environment gives no political actor incentives to address underlying systemic problems.<sup>128</sup> We must therefore rouse our constitutional system from its complacency to respond to the threat of executive unilateralism. But what specifically can and should be done at this perilous moment?

#### IV. PLAUSIBLE REFORMS

I have long argued that we need a strong Chief Executive *within* a strong system of internal and external checks and balances to make him constitutionally accountable to the electorate.<sup>129</sup> But we cannot avert the next catastrophe without defining and implementing a coherent menu of politically achievable acts for corrective national security reform. In my forthcoming book, I address a great many policy recommendations designed to revise institutional incentives within each branch, which I briefly summarize here.<sup>130</sup> These start with urgent congressional proposals to reduce election insecurity by modernizing the Electoral Count Act and reducing foreign influence in elections.<sup>131</sup> But the deeper challenge

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<sup>128</sup> As Minority Leader McConnell's behavior during Trump's impeachments revealed, even when the legislative leaders of a defeated President's own party disapprove his behavior, they may decline to support conviction because he is leaving office anyway. The person named winner of the next presidential election—in 2020, Joe Biden—will rarely wish to revisit such a backward-looking issue. When legislative control is closely contested, the ruling party will have strong political incentives to back the President and avoid seeking institutional fixes. When such gaps are exposed during a President's first term, even an aggressive opposition will hesitate to call for impeachment, opting instead to use any evidence unveiled to defeat the incumbent at the polls. For all these reasons, both impeachment efforts against Trump failed and the impeachment efforts against Richard Nixon and Bill Clinton happened during their second terms, when no other political mechanism was available for their removal. After both Clinton and Trump survived impeachment and finished out their elected terms, it seems far less likely that after impeachment, any President with majority support in the Senate would ever again resign.

<sup>129</sup> See generally KOH, *supra* note 1, at 7 (“Today’s world demands not simply a strong president, but one who operates within an institutionally balanced constitutional structure of decision making.”).

<sup>130</sup> See generally KOH, *supra* note 6, chs. 10–11. To be sure, some of my proposed reforms may parallel other recent reform proposals that address America’s democratic decline more broadly. See, e.g., E. J. DIONNE, JR., NORMAN J. ORNSTEIN & THOMAS E. MANN, *ONE NATION AFTER TRUMP: A GUIDE FOR THE PERPLEXED, THE DISILLUSIONED, THE DESPERATE, AND THE NOT-YET DEPORTED* 11 (2018); ROBERT BAUER & JACK GOLDSMITH, *AFTER TRUMP: RECONSTRUCTING THE PRESIDENCY* (2020); COMMISSION ON THE PRACTICE OF DEMOCRATIC CITIZENSHIP, *OUR COMMON PURPOSE: REINVENTING AMERICAN DEMOCRACY FOR THE 21ST CENTURY 2* (2020), amacad.org. But this overlap only confirms the extent to which today’s national security issues have become inseparable from other policy issues, making it unrealistic to “democratize national security” without democratizing constitutional governance more generally. See generally Jean Galbraith, *Derivative Foreign Relations Law*, 91 GEO. WASH. L. REV. 1449, 1450–52 (2023).

<sup>131</sup> As part of the last-minute spending bill enacted at the end of 2022, Congress finally enacted the Electoral Count Reform Act and Presidential Transition Improvement Act, which

will be preventing the pattern of pernicious executive unilateralism in foreign relations from becoming the new normal. Addressing that challenge will demand a broader package of forward-looking responses, from both private and public actors.

As our constitutional checks and balances increasingly tip toward executive unilateralism, we need both a master strategy and a detailed blueprint of constitutionally appropriate responses to address the institutional defects that have been recently laid bare. The master strategy

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reaffirmed “that the vice president has only a ministerial role at the joint session of Congress where electoral college votes are counted” and raised “the threshold necessary for members of Congress to object to a state’s electors.” See Amy B. Wang & Liz Goodwin, *Congress Moves Ahead on Electoral Count Act Reforms in Response to Jan. 6*, WASH. POST (Dec. 20, 2022, 2:29 PM), <https://www.washingtonpost.com/politics/2022/12/19/electoral-count-reform-omnibus/> [https://perma.cc/JZ3H-ZPVS]. But this is not enough. To address election insecurity, Congress should enact the Foreign Influence Reporting in Elections Act, S. 1562, 116th Cong. (2019), and the “Duty to Report” Act, S. 1247, 116th Cong. (2019), two bills imposing sanctions on any entity that attacks a U.S. election. A campaign and its members should be required to disclose relationships with foreign governments on pain of criminal penalty. And because handmarked paper ballots remain the most secure and cost-effective, better election security most likely entails disconnecting election infrastructure from the internet and returning to modern domestically produced machines, backup paper ballots, and optical scanners less vulnerable to foreign interference. See SECURE OUR VOTE, <https://secureourvote.us> [https://perma.cc/7ZW3-EY2R]; Kim Zetter, *Exclusive: Critical U.S. Elections Systems Have Been Left Exposed Online Despite Official Denials*, VICE (Aug. 8, 2019, 1:55 PM), <https://www.vice.com/en/article/3kxzk9/exclusive-critical-us-election-systems-have-been-left-exposed-online-despite-official-denials> [https://perma.cc/5AAZ-F6MV]. Almost all states already use machines that produce paper records that can be recounted and audited. Turquoise Baker, Lawrence Norden, Warren Stewart & Megan Maier, *Voting Machines at Risk in 2022*, BRENNAN CENTER FOR JUSTICE (Mar. 1, 2022), <https://www.brennancenter.org/our-work/research-reports/voting-machines-risk-2022> [https://perma.cc/7ZER-TK2D]. In 2020, only thirty-two jurisdictions nationwide depended solely on voting machines with no paper records, according to the U.S. Election Assistance Commission. ELECTION ASSISTANCE COMM’N, ELECTION ADMINISTRATION AND VOTING SURVEY 2020 COMPREHENSIVE REPORT 25 (2021), [https://www.eac.gov/sites/default/files/document\\_library/files/2020\\_EAVS\\_Report\\_Final\\_508c.pdf](https://www.eac.gov/sites/default/files/document_library/files/2020_EAVS_Report_Final_508c.pdf) [https://perma.cc/6FL7-5PFS]. And because Trump supposedly favors this change, in theory his supporters should not oppose it. See Isaac Arnsdorf, *Six Drastic Plans Trump Is Already Promising for a Second Term*, WASH. POST (Aug. 16, 2022, 6:00 AM), <https://www.washingtonpost.com/politics/2022/08/16/trump-speeches-extreme-agenda-2024-bid/> [https://perma.cc/BHP2-FMU8]. Additional major changes could be implemented simply by the Senate passing a law already passed by the House: the Securing America’s Federal Elections (SAFE) Act. H.R. 2722, 116th Cong. (2019). Foundation officials and cyber experts must find an antidote for technologies that enable social media to drive voter preferences. Campaign finance laws should be clarified to bar receiving opposition research from foreign governments as a “thing of value.” And perhaps most important, election watchdog organizations should develop a pledge, to which all future presidential candidates commit, to condemn election insecurity as a virulent national security threat that merits “zero tolerance.” See generally Joshua Geltzer, *Good Governance Paper No. 10: Addressing Foreign Election Interference—An Overdue To-Do List*, JUST SEC. (Oct. 27, 2020), <https://www.justsecurity.org/73068/good-governance-paper-no-10-addressing-foreign-election-interference-an-overdue-to-do-list> [https://perma.cc/9RBF-XMCR]; Elizabeth Warren, *My Plan to Strengthen Our Democracy*, MEDIUM (June 25, 2019) <https://medium.com/@teamwarren/my-plan-to-strengthen-our-democracy-6867ec1bcd3c> [https://perma.cc/2ND3-8XUQ].

follows from the diagnosis above: Break the interactive institutional cycle that leads to executive unilateralism. Reform the executive branch by strengthening internal checks and balances to discourage *Curtiss-Wright* and encourage *Youngstown* tendencies. Limit resort in executive legal opinions to overbroad assertions of plenary constitutional power. Equalize the playing field on speed and expertise in foreign affairs through institutional reforms in Congress. Make the judiciary a more potent source of oversight by reducing barriers to justiciability and limiting doctrines that overly credit national security claims as reasons to defer to impulsive executive action. And create space for other actors—states and localities, the media, private-public partnerships, and alliance politics—to act as meaningful counterweights to executive unilateralism in foreign affairs. These piecemeal steps all point to a single overarching goal: to modify normative expectations *within* each institution to reduce cynicism about balanced institutional participation in foreign affairs decisionmaking. Over time, the interaction among these revised incentives should generate a more virtuous circle through progressive changes in institutional and interactive behavior.

#### A. *Executive Restructuring*

A more detailed, specific blueprint for action follows from these general prescriptions. First and most obviously, the executive branch must address its own deficiencies by recasting its current structure. The executive should incorporate more reliable mechanisms to ensure internal checks and balances with regard to transparency, law enforcement independence, abuse of plenary constitutional authorities, and restraints on public corruption and impulsive military action.

This means strengthening internal checks and balances *within* the executive branch.<sup>132</sup> The Biden administration should put in place internal regulations to protect the independence and integrity of law enforcement, particularly the Justice Department and the Federal Bureau of Investigation, by establishing institutional checks to ensure that the President does not abuse law enforcement powers for partisan political purposes. The Office of Legal Counsel (“OLC”) should revise its opinions to clarify that no person is above the law with respect to

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<sup>132</sup> Cf. Neal Kumar Katyal, *Internal Separation of Powers: Checking Today's Most Dangerous Branch from Within*, 115 YALE L.J. 2314, 2314 (2006) (arguing for “separate and overlapping cabinet offices, mandatory review of government action by different agencies, civil-service protections for agency workers, reporting requirements to Congress, and an impartial decision-maker to resolve inter-agency conflicts”). At some times, entrenched national security bureaucracies (the “Deep State”) can act as internal checks and balances, resisting rash political impulses; but at others, they may simply obstruct a new President from carrying out campaign promises that arguably are part of his electoral mandate.

investigation, indictment, conviction, or sentencing.<sup>133</sup> It should further clarify that a sitting or former President can violate federal criminal law and is in fact constitutionally indictable when he commits obstruction of justice, even while still in office. Where the Constitution grants the President broad authorities like the pardon power, the procedures for ensuring constitutional exercise of those powers should be clarified and regularized. This could be done through a combination of executive practice, institutional reform, and statute.<sup>134</sup>

Four changes should be made to ensure that the President receives loyal but impartial national security legal advice. First, the White House Counsel's office should shrink in size and the National Security Council Legal Advisor should no longer function as a "double-hatted" Deputy White House Counsel vulnerable to political oversight and influence. Instead, the National Security Council's Legal Advisor should give independent advice directly to the National Security Advisor and Deputy, advised by a group of foreign relations and national security lawyers from the general counsels' offices of the participating

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<sup>133</sup> Even as extreme an advocate of presidential power as the late former Solicitor General and Whitewater Prosecutor Ken Starr argued that the Office of Legal Counsel had incorrectly concluded that a sitting President is not indictable. See Charlie Savage, *Can the President Be Indicted? A Long-Hidden Legal Memo Says Yes*, N.Y. TIMES (July 22, 2017), <https://www.nytimes.com/2017/07/22/us/politics/can-president-be-indicted-kenneth-starr-memo.html> [<https://perma.cc/KRV6-F42K>]. Many of those OLC opinions generated since the George W. Bush Administration greatly exaggerate the breadth of presidential power in foreign affairs, and should be both systematically reviewed for their correctness, and withdrawn where incorrect. See Walter Dellinger, et al., *Principles to Guide the Office of Legal Counsel* (2004) [hereinafter *OLC Guidelines*], reprinted in Dawn E. Johnsen, *Faithfully Executing the Laws: Internal Legal Constraints on Executive Power*, 54 UCLA L. REV. 1559 app. 2, at 1603 (2007) (drafted by attorneys who worked in OLC during the Clinton, George W. Bush, and Obama Administrations); Trevor W. Morrison, *Stare Decisis in the Office of Legal Counsel*, 116 COLUM. L. REV. 1448, 1455 (2010) (arguing that OLC should not follow a strong form of stare decisis); cf. Memorandum from David J. Barron, Acting Assistant Att'y Gen., Off. of Legal Counsel, to Attorneys of the Office, *Re: Best Practices for OLC Legal Advice and Written Opinions*, at 1 n.\* (Jul. 16, 2010) [hereinafter 2010 OLC Best Practices Memorandum], <http://www.justice.gov/olc/pdf/olc-legal-advice-opinions.pdf> [<https://perma.cc/DR4S-QN2T>] ("This memorandum updates a prior memorandum, 'Best Practices for OLC Opinions,' issued May 16, 2005.").

<sup>134</sup> President Biden could officially declare, for example, the norm that the President may not pardon himself. The federal government could establish the kind of independent clemency commission that many states have created. And Congress could enact a statute, as a majority of states have recently done, authorizing federal prisoners to go back to court, not to the executive, to seek reduction of their sentences. See, e.g., Margaret Colgate Love, Opinion, *Trump's Self-serving Pardons Should Renew Calls for a Reckoning with Presidential Power*, WASH. POST (Jan. 20, 2021, 4:43 PM), [https://www.washingtonpost.com/opinions/trumps-self-serving-pardons-should-renew-calls-for-a-reckoning-with-the-presidential-power/2021/01/20/04b4c65e-5b48-11eb-a976-bad6431e03e2\\_story.html](https://www.washingtonpost.com/opinions/trumps-self-serving-pardons-should-renew-calls-for-a-reckoning-with-the-presidential-power/2021/01/20/04b4c65e-5b48-11eb-a976-bad6431e03e2_story.html) [<https://perma.cc/J7QW-P9YP>] (noting that "a desire to regain firearms rights accounts for nearly half of the pardon applications filed. It is beyond absurd to make the president a one-person gun-licensing bureau for people convicted of nonviolent federal crimes who want to go hunting again.").



agencies.<sup>135</sup> Second, as in earlier times, the National Security Legal Advisor's Office should rarely generate written opinions, instead seeing its main role as discerning consensus, breaking ties, and deriving the best advice available from the more detailed analyses of the expert agencies. The participants in the interagency legal process must press the National Security Legal Advisor to ensure that public written rationales are offered for all major legal decisions.<sup>136</sup> Third, we should return to the more efficient and effective foreign policy legal advice-giving system that functioned in the 1980s, when most detailed foreign affairs legal advice came from two large, established foreign policy offices with expertise in both foreign affairs law and international and humanitarian law: the Legal Adviser's Office at the State Department and the General Counsel's office at the Defense Department.<sup>137</sup> Despite the Justice Department's OLC celebrated failures during the George W. Bush era, over the last four decades, academic scholarship—much of it written by law professor alumni of both parties from OLC (of whom I am one)—has continued to exaggerate the Justice Department's (and OLC's) centrality in the giving of foreign policy and national security legal advice.<sup>138</sup> But in most of the interagency legal meetings on national

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<sup>135</sup> See Harold Hongju Koh, *National Security Legal Advice in the New Administration*, JUST SEC. (Nov. 16, 2016), <https://www.justsecurity.org/34507/national-security-legal-advice-administration/> [<https://perma.cc/E86G-AAU9>].

<sup>136</sup> As one government lawyer has explained, “making the [legal] output public (or as much of it as possible) incentivizes clarity of output and allows for broader debate and accountability when the legal rationale for government action is overly generalized or otherwise weak.” Rebecca Ingber, *Good Governance Paper No. 17: How to Use the Bureaucracy to Govern Well*, JUST SEC. (Oct. 31, 2020) (emphasis omitted), <https://www.justsecurity.org/73126/good-governance-paper-no-17-how-to-use-the-bureaucracy-to-govern-well/> [<https://perma.cc/HMT6-SD2K>]; see also *id.* (“When the question on the table is the legality of action, and there are differing views on the appropriate legal rationale, this may result in a decision to act but with no clear consensus on why it is lawful. *In fact, this may mean that the government takes action even when a majority of the relevant officials are opposed to any one legal rationale for doing so.*”) (emphasis added); Harold Hongju Koh, *The Legal Adviser's Duty to Explain*, 41 YALE J. INT'L L. 189, 195 (2016) (“Providing a public justification is a necessary step to explain why others should agree that actions taken by those government officials are consistent with international law. As a prudential matter, such public explanations prove to be critically important in bringing along the rest of the country and prospective allies in establishing the legitimacy of a public action.”).

<sup>137</sup> As Rebecca Ingber has correctly observed, “Group decision-making is often hailed for bringing together all the relevant players with expertise and interest, and for allowing the full airing of views. But it can also stifle dissent, promote group think, and reduce a sense of accountability among the various decisionmakers. It can dilute the relevant expertise in the room, for example when the entire group is asked to weigh in on a matter on which only a small subset have expertise—such as a question of international law.” Ingber, *How to Use Bureaucracy*, *supra* note 136.

<sup>138</sup> See Morrison, *supra* note 133, at 1450–51 nn.4–7 (citing articles). In the 1980s, I had the privilege of serving in that fine office, but I have long expressed hesitations about the ways in which its actual and desired prominence is exaggerated by its academic alumni from both parties. See, e.g., Harold Hongju Koh, *Protecting the Office of Legal Counsel from Itself*, 15 CARDOZO L. REV. 513, 513 (1993). OLC attorneys may have expertise in constitutional law, but generally have far

security that I have attended since 2009, the Justice Department input came not from OLC, but from its National Security Division (“NSD”), created after September 11.<sup>139</sup> Fourth and finally, the Justice Department should review and publicly overrule a number of plainly incorrect OLC opinions from previous eras, some of which were apparently generated as *post hoc* justifications for controversial national security decisions.<sup>140</sup>

When executive national security abuse is exposed, the Mueller investigation revealed the weakness of the current Special Counsel procedures for addressing it. Trump showed that unrelenting threats to fire the Special Counsel, limit the scope of his investigation, spin the sealed findings to his advantage, and offer to pardon the targets could intimidate, then hamstring a Special Counsel’s investigation. After a number of uncontrolled Special or Independent Counsel investigations in the late 20th Century, the Justice Department revised its regulations to prevent abuse of the Special Counsel system.<sup>141</sup> Past abuses by Independent Counsel had warranted some revision.<sup>142</sup> But those revisions went too far, now treating the Special Counsel as an internal DOJ employee, barred by DOJ rules from making public statements about ongoing investigations and authorized only to file a confidential internal report to the attorney general.<sup>143</sup> DOJ regulations should thus be further revised to authorize the Special Counsel to issue a public report similar to the bipartisan 9/11 Commission’s report. Such reports should offer factual background, specific public recommendations to prevent recurrence, and a public finding as to whether the facts gathered are

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less expertise in international law than other attorneys across the government. *See, e.g.*, Harold Hongju Koh, *Can the President be Torturer-in-Chief?*, 81 *IND. L. J.* 1145, 1166–67 (2006) (analyzing international law errors in OLC’s infamous “Torture Memo”).

<sup>139</sup> *About the National Security Division*, DOJ, <https://www.justice.gov/nsd/about-national-security-division-nsd> [<https://perma.cc/LK3S-KX8J>].

<sup>140</sup> Prime candidates for disavowal are the legal opinions that justified after the fact the killing of Iranian General Qassem Soleimani, which was illegal when ordered. *See* Koh, *supra* note 16. *See generally* Brian Finucane, *Time for the Biden Administration to Disavow the Dangerous Soleimani Legal Opinions*, *JUST SEC.* (Jan. 3, 2022), <https://www.justsecurity.org/79700/time-for-the-biden-administration-to-disavow-the-dangerous-soleimani-legal-opinions/> [<https://perma.cc/SQ8E-GDHA>].

<sup>141</sup> *See* Roberto Suro, *Power Shifts to Reno Without Special Counsel*, *WASH. POST* (June 30, 1999), <https://www.washingtonpost.com/wp-srv/politics/special/counsels/stories/counsel063099.htm> [<https://perma.cc/W9TV-PW98>].

<sup>142</sup> Independent Counsel Alexia Morrison’s investigation into Ted Olson led to the Supreme Court decision in *Morrison v. Olson*. 487 U.S. 654 (1988). That case recognized certain limitations on the President’s power of appointment and removal of executive branch officials, at least in the case of independent counsel. *See id.* at 695–97. But even after *Morrison*, independent counsel investigations like Ken Starr’s Whitewater probe ventured far afield from their original purposes. *See* Suro, *supra* note 141.

<sup>143</sup> *See* ANDREW WEISSMAN, *WHERE LAW ENDS: INSIDE THE MUELLER INVESTIGATION* 342 (2020); CYNTHIA BROWN, *CONG. RSCH. SERV.*, *LSB10270, THE SPECIAL COUNSEL’S REPORT: WHAT DO CURRENT DOJ REGULATIONS REQUIRE?* 1–2 (2019).

sufficient to show that the President has committed a crime (whether or not he may be indicted for it while he is still in office).<sup>144</sup>

The Trump era also exposed conflicts of interest as a serious national security threat. Why should the Saudis, for example, ever deal with the U.S. Embassy in Riyadh if they can simply do business directly with the White House by quietly meeting with the President’s proxies at his local D.C. hotel?<sup>145</sup> Reading the Foreign Emoluments Clause of the U.S. Constitution to prohibit private financial interactions with foreign governments—unless the President first obtains the consent of Congress—would enable Congress to exercise its critical oversight role under the Constitution, by diminishing foreign influences that improperly interfere with American national security and foreign policy.<sup>146</sup> And that clause does not operate alone: it sits atop a broad web of governmental ethics rules designed to protect against undue influence in the national security and foreign policymaking process. Within that broader framework, new transparency and disclosure laws are needed to expressly apply public corruption and ethics laws to the President and senior foreign policy officials to ensure that they cannot mix foreign policy with private business initiatives.<sup>147</sup>

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<sup>144</sup> See WEISSMAN, *supra* note 143. Indeed, the main public advice given in November of 2022 to prosecutor Jack Smith, when he was appointed Special Counsel to investigate Trump’s activities during January 6, 2021, and his document hoarding at Mar-a-Lago, was to take a “sensible approach to communicating where needed with the American public.” Andrew Weissman, Opinion, *Some Advice for Jack Smith, the New Special Counsel in the Trump Investigations*, N.Y. TIMES (Nov. 22, 2022), <https://www.nytimes.com/2022/11/22/opinion/trump-special-counsel-mueller.html> [<https://perma.cc/BTR3-MWCH>].

<sup>145</sup> See Bernard Condon, *Documents Show Big Foreign Gov’t Spending at Trump Hotel*, AP NEWS (Nov. 15, 2022, 2:20 PM), <https://apnews.com/article/travel-business-saudi-arabia-malaysia-15835346f75bc5f152a58842eb7c8609> [<https://perma.cc/3KQP-RTJK>].

<sup>146</sup> See U.S. CONST. art. I, § 9, cl. 8 (“[N]o Person holding any Office of Profit or Trust under them, shall, without the Consent of the Congress, accept of any present, Emolument, Office, or Title, of any kind whatever, from any King, Prince, or foreign State.”); see also Richard Painter, *2022 Update: Good Governance Paper No. 15: Enforcing the Emoluments Clauses*, JUST SEC. (Jan. 20, 2022), <https://www.justsecurity.org/79908/2022-update-good-governance-paper-no-15-enforcing-the-emoluments-clauses/> [<https://perma.cc/A4PD-4VBQ>]. The Justice Department’s current reading of the Foreign Emoluments Clause to allow private business deals would permit foreign nations to curry favor with the President by purchasing real estate from one of his companies; to pursue an advantage by granting intellectual property benefits to the President immediately upon his taking office; and to approve a regulatory deal that personally enriches the President. These are not hypotheticals, but rather, specific allegations in *Blumenthal v. Trump*, 949 F.3d 14 (D.C. Cir. 2020), which involved suspicious transactions in Saudi Arabia, China, and Argentina. See Second Amended Complaint at 40–47, *Blumenthal v. Trump*, 335 F. Supp. 3d 45 (D.D.C. 2018) (No. 17-cv-01154).

<sup>147</sup> New laws should require the President and all presidential candidates to disclose their taxes for the previous decade, and to account publicly for their income, holdings, and management of assets and investments. Upon taking office, the President should be required by law, enforced by criminal penalties, to put his holdings into blind trust and expressly relinquish any supervisory role in his businesses. Many applicable principles are set forth in the American Law Institute’s (“ALI”)

To restrain impulsive and illegal presidential use of military power, four urgent internal executive restraints should be clarified by clearer executive interpretation of existing laws. These could be codified into later legislation if necessary, when that becomes politically possible. First, Executive Order 12,333 should be clarified to reinforce the ban on preemptive assassinations.<sup>148</sup> Second, the Biden Administration should promptly reissue and strengthen Obama's Executive Order 13,732, which among other things, required all U.S. government agencies to disclose publicly the number of civilians killed in drone strikes, if those killings occurred outside of areas of active hostilities.<sup>149</sup> Third, new OLC opinions should be drafted to prevent abuse of the Insurrection Act.<sup>150</sup> A correct legal interpretation of existing law would make clear that the President does not have authority under the Act to deploy military forces against domestic protestors in civilian streets over the objections of state governments, when it is unrelated to enforcing a court order or protecting civil rights.<sup>151</sup> The same interpretation should make clear that contrary to some claims, there is no "widespread public disorder" exception that authorizes presidential use of federal troops in American city streets.<sup>152</sup> Fourth and finally, domestic regulations and processes

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proposed government ethics rules, which focus on ethical standards applicable to the operations of the legislative and executive branches. See PRINCIPLES OF LAW, GOVERNMENT ETHICS (AM. LAW INST. Tent. Drafts 1–3, 2015–2021).

<sup>148</sup> In 1977, following revelations of U.S. assassinations in the Church (Senate) and the Pike (House) Committee hearings, President Gerald Ford issued Executive Order 11,905 prohibiting Executive Branch personnel from engaging in, or conspiring to engage in, political assassination. Exec. Order No. 11,905, 41 Fed. Reg. 7,703 (Feb. 18, 1976). In 1981, President Reagan issued Executive Order 12,333, which, as amended, remains in effect today and limits the prohibition's application to individuals "acting on behalf of" the U.S. government. Exec. Order No. 12,333, 46 Fed. Reg. 59,941 (Dec. 4, 1981); Michael N. Schmitt, *Assassination in the Law of War*, LIEBER INST., WEST POINT (Oct. 15, 2021); see also Koh, *supra* note 16.

<sup>149</sup> United States Policy on Pre- and Post-Strike Measures To Address Civilian Casualties in U.S. Operations Involving the Use of Force, Exec. Order No. 13,732, 81 Fed. Reg. 44,485 (July 1, 2016), <https://www.federalregister.gov/documents/2016/07/07/2016-16295/united-states-policy-on-pre--and-post-strike-measures-to-address-civilian-casualties-in-us> [<https://perma.cc/YA36-2DHR>]. The Trump administration revoked the reporting requirement in 2019. See Rosen, *supra* note 25.

<sup>150</sup> For a description of Trump's apparent intent to commit such abuse, see Glasser & Baker, *supra* note 113 ("The President wanted to invoke the Insurrection Act of 1807 and use active-duty military to quell the protests. He wanted ten thousand troops in the streets and the 82nd Airborne called up. He demanded that [General] Milley take personal charge. When Milley and the others resisted . . . [t]urning to Milley, Trump said, 'Can't you just shoot them? Just shoot them in the legs or something?'").

<sup>151</sup> Harold Hongju Koh & Michael Loughlin, *The President's Legal Authority to Commit Troops Domestically Under the Insurrection Act*, AM. CONST. SOC'Y (Sept. 2020), [https://www.acslaw.org/issue\\_brief/briefs-landing/the-presidents-legal-authority-to-commit-troops-domestically-under-the-insurrection-act/](https://www.acslaw.org/issue_brief/briefs-landing/the-presidents-legal-authority-to-commit-troops-domestically-under-the-insurrection-act/) [<https://perma.cc/RL3T-9XHD>].

<sup>152</sup> *Contra* Tom Cotton, Opinion, *Tom Cotton: Send in the Troops*, N.Y. TIMES (June 3, 2020), <https://www.nytimes.com/2020/06/03/opinion/tom-cotton-protests-military.html> [<https://perma.cc/>]

must be strengthened to enhance internal controls over deployment of nuclear weapons. In situations where the United States or its allies have been attacked with nuclear weapons, when a decision about retaliating must be made within minutes, the President should retain the sole power to authorize their use. But in instances of first use, when the United States has time to decide whether to initiate an attack, Congress should invoke its textual war powers to enact legislation conditioning authorization to launch nuclear weapons. Those statutory prerequisites should include interagency dialogue and consent among the President, Vice President, and the Secretaries of Defense and State, as well as interagency legal review to determine that such a launch would comply with the Constitution and the international law of armed conflict.<sup>153</sup>

Finally, executive branch reforms must address the growing autonomy of the national security bureaucracy, which has been revealed as a double-edged sword. On the one hand, entrenched national security bureaucracies (the “Deep State”) can act as internal checks and balances, resisting rash political impulses from extreme leaders. But at other times, they may simply obstruct a new President from carrying out campaign promises that arguably are part of his electoral mandate. Thus, the bureaucracy enabled a Deep State to frustrate extreme political initiatives during the Trump era. But during the Biden era, it has frustrated political directives by slow-walking such reforms as

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N7QE-TDRA] (claiming that the Insurrection Act authorizes an “overwhelming show of force” by state and federal troops against domestic protestors “to protect law-abiding citizens from disorder”).

<sup>153</sup> Congress’s Article I “Declare War” and “Necessary and Proper” powers should be sufficient to sustain the constitutionality of such legislation. See Dakota S. Rudesill, *Nuclear Command and Statutory Control*, 11 J. NAT’L SEC. L. & POL’Y 365, 429 (2021); Saikrishna Bangalore Prakash, *Deciphering the Commander-in-Chief Clause*, 133 YALE L.J. 1, 87 (2023) (suggesting that consultation and approval requirements for nuclear strikes would be constitutional). Requiring the approval of the Vice President includes the individual who is first in the presidential line of succession and the only other politically accountable U.S. official elected by the entire nation. Requiring the concurrence of the Defense Secretary would ensure participation by the Cabinet officer possessing the necessary military knowledge to understand the utility and consequences of deploying a nuclear weapon, the risks of further escalation, and the practicalities of ensuing armed conflict. And including the Secretary of State, who negotiates nuclear weapons treaties and monitors compliance with these agreements, ensures participation by the Cabinet member most likely to assess and deal with the likely diplomatic fallout from any nuclear decision. The current interagency legal review, which already makes legal compliance determinations regarding the use of force and conventional weapons targeting, could simply extend its function to cover this situation. David S. Jonas & Bryn McWhorter, *Nuclear Launch Authority: Too Big a Decision for Just the President*, ARMS CONTROL ASSOC. (June 2021) <https://www.armscontrol.org/act/2021-06/features/nuclear-launch-authority-too-big-decision-just-president> [https://perma.cc/9UHJ-GZVY]; see also Dakota Rudesill, *2022 Update: Good Governance Paper No. 20: Repairing and Strengthening Norms of Nuclear Restraint*, JUST SEC. (Feb. 16, 2022), <https://www.justsecurity.org/80248/2022-update-good-governance-paper-no-20-repairing-and-strengthening-norms-of-nuclear-restraint/> [https://perma.cc/2NRJ-VLJT].

completing Guantánamo closure, reversing draconian immigration policies, and issuing stricter guidance for drone strikes.<sup>154</sup>

Even if today's sprawling national security agencies cannot be quickly downsized, they need to be better shaped and their legal marching orders clarified.<sup>155</sup> Successive political leaders of Cabinet agencies have found it far easier to answer today's short-term fire-drills, while leaving untouched the longer-term specification of how the bureaucracy should give, receive, and incorporate foreign affairs legal advice. This has led to a shared bias among both politically appointed and career executive branch lawyers to adopt legal positions that preserve, enhance, and extend executive power.

Even if this shared bias cannot be dislodged, the national security bureaucracy can respond better to lawful political direction without becoming obstructionist. Conscientious executive officials must take deliberate longer-term steps to reframe elements of the "intentional bureaucratic architecture" to promote better national security governance.<sup>156</sup> In particular, new political appointees to agency general counsel positions should be skeptical—and press for internal overruling—when bureaucracies seek to continue, on grounds of executive *stare decisis*, past legal analyses "that are not reached through cautious, deliberative, forward-looking processes, that do not appropriately buffer law enforcement or intelligence decisions from partisan politics, that do not appropriately marry expertise to authority, and that do not reflect well-considered rules for addressing conflict and reaching a clear output."<sup>157</sup>

### B. Congressional Reforms

Second, Congress must tackle the national security threat of executive unilateralism, which has stymied core legislative prerogatives. As John Hart Ely reminded us, foreign affairs scholarship is full of "half-time pep-talk[s] imploring that body to pull up its socks and reclaim

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<sup>154</sup> See Rebecca Ingber, *Bureaucratic Resistance and the National Security State*, 104 IOWA L. REV. 139, 220–21 (2018). See generally GLENNON, *supra* note 12. Because of a protracted bureaucratic approval process, the Biden Administration took nearly two years to issue new rules to govern out-of-theater use of drones and detention. See Charlie Savage, *White House Tightens Rules on Counterterrorism Drone Strikes*, N.Y. TIMES (Oct. 7, 2022) <https://www.nytimes.com/2022/10/07/us/politics/drone-strikes-biden-trump.html> [<https://perma.cc/8A5J-7CTN>].

<sup>155</sup> More than twenty years after September 11, when a huge and diverse number of agencies were urgently cobbled together to form a Department of Homeland Security, the resulting conglomerate has still not been well streamlined nor rationalized to perform its stated mandates.

<sup>156</sup> See Ingber, *supra* note 136.

<sup>157</sup> *Id.* (explaining why, citing internal executive *stare decisis*, the bureaucracy tends to entrench legal "decisions reached outside of a well-functioning Intentional Bureaucratic Architecture").

its rightful authority.”<sup>158</sup> But history also teaches that Congress legislates most strongly when it perceives that a salient crisis has occurred, demanding a strong regulatory response.<sup>159</sup>

The crucial first step thus would be for Members to accept, as illustrated by the January 6 hearings, that we have indeed reached a point of constitutional crisis. Biden’s first-term legislative successes at least offer some glimmer of hope that under the right circumstances, foreign affairs-related legislation can be passed.<sup>160</sup> Recent bipartisan legislative proposals, like the Senate’s National Security Powers Act and its House counterpart, the National Security Reform and Accountability Act, represent a promising foundation on which to base broader structural reform to rebalance the allocation of national security powers between Congress and the President.<sup>161</sup>

Congress should begin by further revising the Presidential Transition Enhancement Act to make clear what kinds of activities both the incoming and outgoing administrations may lawfully engage in during the several-month transition period between an election and inauguration.<sup>162</sup> Mindful that a whistleblower complaint by an anonymous CIA official triggered the events that led to Trump’s first impeachment, Congress should strengthen internal checks and balances by enacting stronger legal protections for foreign affairs whistleblowers willing to obey their constitutional oath against lawless actions by senior officials.<sup>163</sup>

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<sup>158</sup> ELY, *supra* note 10, at 52.

<sup>159</sup> Cf. Roberta Romano, *Are There Empirical Foundations for the Iron Law of Financial Regulation?* 9–10 (Working Paper, 2023), <http://dx.doi.org/10.2139/ssrn.4340042> [<https://perma.cc/8EDE-43S9>] (empirical study demonstrating that with respect to financial crises, “i) Congress, like clockwork, will not permit a financial crisis to go unanswered, whereas there is no determinate timing for when it might enact financial legislation in noncrisis times; and ii) crisis-driven legislation is unidirectional and significantly greater in regulatory impact than noncrisis-driven legislation”).

<sup>160</sup> See legislation referenced *supra* note 31; David Leonhardt, *A Functional Congress? Yes*, N.Y. TIMES (Aug. 16, 2022), <https://www.nytimes.com/2022/08/16/briefing/congress-productive-democrats-republicans.html> [<https://perma.cc/NLS6-YTEF>].

<sup>161</sup> See National Security Powers Act, S. 2391, 117th Cong. (2021), <https://www.congress.gov/bill/117th-congress/senate-bill/2391/text> [<https://perma.cc/6GHL-ACNA>]; National Security Reforms and Accountability Act, H.R. 5410, 117th Cong. (2021), <https://www.congress.gov/bill/117th-congress/house-bill/5410> [<https://perma.cc/TCC2-F5S4>]. For analysis of this legislation, see Tess Bridgeman & Stephen Pomper, *A Giant Step Forward for War Powers Reform*, JUST SEC. (July 20, 2021), <https://www.justsecurity.org/77533/a-giant-step-forward-for-war-powers-reform/> [<https://perma.cc/Q54J-GFMJ>].

<sup>162</sup> The Presidential Transition Enhancement Act of 2019 took an important step in that direction by requiring implementation of an ethics plan, including a prohibition on conflicts of interest for transition team members. Presidential Transition Enhancement Act of 2019, Pub. L. No. 16-121, 134 Stat. 138 (2020).

<sup>163</sup> For a review of current federal whistleblower laws, and the gaps within them, see generally National Whistleblower Center, *Whistleblower Protection Laws for Federal Employee*

To level the playing field with the Executive, Congress should channel its reform efforts in three directions—(1) creating a counter-arena of centralized foreign-affairs expertise within Congress that empowers it to check the President, (2) building a central repository within Congress of legal advice regarding international and foreign relations law, and (3) developing better tools to counter executive overreach. To create a stronger central repository of national security expertise, Congress should establish a Joint Committee on National Security, akin to the Joint Committee on Taxation, that would act as a core group of expert members on national security matters. That joint committee should receive centralized legal advice from a congressional national security legal adviser mirroring similar legal offices in the executive branch.<sup>164</sup> Many legislative revisions regarding covert action that I suggested thirty years ago are still needed today, including: inter-agency review of legal opinions authorizing covert action; mandatory release of certain legal opinions to congressional intelligence committees; and statutory requirements that Presidents make “findings” for all covert action and that the National Security Adviser be a civilian.<sup>165</sup> As one government practitioner has chronicled, international lawmaking processes and the United States’s reputation as a law-abiding actor are particularly harmed when the covert conduct of a leading nation like the United States later comes to public light.<sup>166</sup>

Congress should enact stronger legislation to check executive unilateralism. It should make clear, as it did in the No NATO Withdrawal Act, that the President does not have *carte blanche* unilaterally to terminate any and all international agreements. He must come to Congress

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*Whistleblowers*, <https://www.whistleblowers.org/whistleblower-protection-laws-for-federal-whistleblowers/> [<https://perma.cc/DJ8R-6DMT>].

<sup>164</sup> See KOH, *supra* note 1, at 169–71. The Joint Committee on Taxation, which has existed since 1926, is a nonpartisan committee of Congress with five members from the Senate Finance Committee and five from the House Ways and Means Committee, supported by a nonpartisan staff of economists, lawyers, and other tax professionals. See *About the Joint Committee on Taxation*, JOINT COMM. ON TAX’N, <https://www.jct.gov/about-us/overview/> [<https://perma.cc/M95C-VA56>]. The parallel Joint Committee on National Security that I propose could have eight to twelve members, drawn from the leaders of the foreign affairs, armed services and intelligence committees in the House and Senate. The four congressional leaders, the Speaker and minority leader of the House and the majority and minority leaders of the Senate, could sit on the committee, *ex officio*, as needed. The committee could hire a bipartisan, expert, professional staff, including a congressional legal adviser, to consult, investigate, write reports and legislative histories, and meet regularly with national security staff from executive agencies. See KOH, *supra* note 6, at 275–78.

<sup>165</sup> KOH, *supra* note 1, at 162–66; see also Katyal, *supra* note 132, at 2322 n.21. Currently, a three- or four-star general may be appointed as National Security Advisor, but subject to Senate confirmation. See 10 U.S.C. § 601.

<sup>166</sup> See Alexandra H. Perina, *Black Holes and Open Secrets: The Impact of Covert Action on International Law*, 53 COLUM. J. TRANSNAT’L L. 507, 582–83 (2015).



before he can withdraw the United States from such vital international agreements as NATO, the WHO, the Paris Climate Accord, and the WTO.<sup>167</sup> The House should enact recent pending proposals for new national security framework legislation to guide interbranch conduct to end the Forever War.<sup>168</sup> New legislative mechanisms must regulate the use of statutory emergency powers, strengthen congressional oversight, restore congressional power over international trade, and limit executive power to reprogram appropriations.<sup>169</sup> In addition, Congress must adopt a stricter framework to regulate and oversee the use of force in Iran, Somalia, Syria, and Yemen, and against emerging terrorist groups.<sup>170</sup>

At the same time, Congress must develop more effective tools to check executive overreach. As in the trade area, if the President proposes to commit U.S. armed forces for particularly compelling reasons such as humanitarian purposes, he could simultaneously have a bill introduced in Congress under expedited “fast track” legislative procedures

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<sup>167</sup> No NATO Withdrawal Act, H.R. 6530, 115th Cong. (2018); *see also* Koh, *supra* note 22, at 481.

<sup>168</sup> See the National Security Powers Act and its House counterpart discussed *supra* note 161; *see also* Koh, *Finally Ending Part I*, *supra* note 25; Koh, *Finally Ending Part II*, *supra* note 25; Rosen, *supra* note 25; Tess Bridgeman, *In Support of Sunsets: Easy Yes Votes on AUMF Reform*, JUST SEC. (July 13, 2022), <https://www.justsecurity.org/82312/in-support-of-sunsets-easy-yes-votes-on-aumf-reform/> [<https://perma.cc/KNR9-XWTE>]; Tess Bridgeman & Stephen Pomper, *2022 Update: Good Governance Paper No. 14: War Powers Reform*, JUST SEC. (Jan. 21, 2022), <https://www.justsecurity.org/79933/2022-update-good-governance-paper-no-14-war-powers-reform/> [<https://perma.cc/4YNG-M7DJ>].

<sup>169</sup> See Elizabeth Goitein, *Good Governance Paper No. 18: Reforming Emergency Powers & 2022 Update*, JUST SEC. (Oct. 31, 2020), <https://www.justsecurity.org/73196/good-governance-paper-no-18-emergency-powers/> [<https://perma.cc/EQ3J-QSL5>]; Jim Townsend & Elise Bean, *Good Governance Paper No. 8: How to Strengthen Oversight by Congress & 2022 Update*, JUST SEC. (Feb. 11, 2022), <https://www.justsecurity.org/80114/2022-update-good-governance-paper-no-8-how-to-strengthen-oversight-by-congress/> [<https://perma.cc/VQJ4-MQ85>]; Gary Clyde Hufbauer, *Memo to Congress on How to Reclaim Oversight of U.S. Trade Policy*, PIIE (Oct. 20, 2020, 12:00 PM), <https://www.piie.com/blogs/trade-and-investment-policy-watch/memo-congress-how-reclaim-oversight-us-trade-policy> [<https://perma.cc/557M-K97Q>]; *Power of the Purse: Restoring Congress' Directed Spending Authority*, BIPARTISAN POL'Y CTR. (Dec. 12, 2022), <https://bipartisanpolicy.org/event/power-of-the-purse/> [<https://perma.cc/RQ3R-UDKR>].

<sup>170</sup> See, e.g., Robbie Gramer, *Lawmakers Redouble Push to Stop Trump from Going to War with Iran*, FOREIGN POL'Y (Aug. 5, 2019, 3:23 PM), <https://foreignpolicy.com/2019/08/05/lawmakers-redouble-push-to-stop-trump-from-going-to-war-with-iran-defense-policy-bill-armed-services-committee-war-powers-congress-trump-middle-east-tensions/> [<https://perma.cc/R3Z2-2ZSE>]; Tess Bridgeman & Brianna Rosen, *Still at War: The United States in Syria*, JUST SEC. (Apr. 29, 2022), <https://www.justsecurity.org/81313/still-at-war-the-united-states-in-syria/> [<https://perma.cc/YY9U-LXG4>]; Brian Finucane, *An Unauthorized War: The Shaky Legal Ground for the U.S. Operation in Syria*, FOREIGN AFF'S (Jan. 11, 2022), <https://www.foreignaffairs.com/articles/syria/2022-01-11/unauthorized-war> [<https://perma.cc/EW5M-HK4X>]; Oona Hathaway & Luke Hartig, *Still at War: The United States in Somalia*, JUST SEC. (Mar. 24, 2022), <https://www.justsecurity.org/80921/still-at-war-the-united-states-in-somalia/> [<https://perma.cc/KA2R-2XG6>].

that would require Congress to vote a joint resolution of approval or disapproval of the action within ninety days.<sup>171</sup> This would, in effect, force Congress to approve or disapprove any particular intervention by action, not silence. I have previously described how the Supreme Court's 1983 invalidation of the legislative veto diminished Congress's ability to check executive military action with which it disagrees, and how informal substitutes have sometimes evolved to fill the gap.<sup>172</sup> As one such substitute, the President and Congress could, in effect, resurrect a constitutional, jointly authorized "legislative veto" over executive military action. To do so, the two branches would agree to a joint resolution that amends the War Powers Resolution such that Congress authorizes the President to carry on military actions in particular countries for, say, one year, but states that such action shall cease upon a concurrent resolution of the House and Senate—i.e., a bicameral vote not subject to presidential veto. Under this proposal, the President will have agreed *ex ante* in the joint resolution to abide by Congress's disapproval of his action.<sup>173</sup>

Congress must also take meaningful steps to close the transparency deficit. My multiple tours in the U.S. government have taught me that executive decisions are far more likely to be made correctly and with full process, if all participants are aware that their decision-making will soon undergo public scrutiny. Congress should start by forbidding the practice of secret agency legal opinions, and require their submission, under seal if needed, to the relevant select congressional committees.<sup>174</sup> In my experience, many government documents are wildly overclassified, with default classifications enduring long after any of the information concealed is of more than historical interest.<sup>175</sup> The most recent Trump classification scandal presents a prime opportunity for Congress to hold new hearings—as the Church Senate Select Committee on intelligence oversight did after Vietnam<sup>176</sup>—to finally

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<sup>171</sup> Cf. Harold Hongju Koh, *The Fast Track and United States Trade Policy*, 18 BROOK. J. INT'L L. 143, 143–44 (1992) (describing use of the fast track expedited legislative process in the trade field).

<sup>172</sup> See KOH, *supra* note 1, at 128–29, 178–79, 190.

<sup>173</sup> For a similar proposal, see Charles Tiefer, *Can the President and Congress Establish a Legislative Veto Mechanism for Jointly Drawing Down a Long and Controversial War?*, 6 J. NAT'L SEC. L. & POL'Y 131, 132–33 (2012).

<sup>174</sup> See Dakota S. Rudesill, *Coming to Terms with Secret Law*, 7 HARV. NAT'L SEC. J. 241, 356–57 (2015).

<sup>175</sup> As one scholar confirms, there “has been an ever-expanding asymmetry between national security secrecy and other forms of secrecy . . . [E]ven as the transparency laws of the 1960s and 1970s placed increasingly onerous demands on the domestic policy process, they grew increasingly detached from the state's most violent and least visible components.” David E. Pozen, *Transparency's Ideological Drift*, 128 YALE L.J. 100, 156 (2018).

<sup>176</sup> *Senate Select Committee to Study Governmental Operations with Respect to Intelligence Activities*, U.S. SENATE, <https://www.senate.gov/about/powers-procedures/investigations/church-committee.htm> [https://perma.cc/AJ6U-YX5F].

start installing a more nuanced classification system, better calibrated to genuine national security needs.

In addition to these larger changes, there are any number of smaller internal changes that Congress should adopt to help restore a bipartisan spirit, capable of swift action and unified appreciation of clear facts in national security situations.<sup>177</sup> Congressional incentive structures should be revised to reward Members for taking bipartisan foreign policy seriously, reducing political polarization, and challenging the opposing party with true facts rather than unfalsifiable sound bites. The filibuster rule should be revised to require Senators to appear on the floor personally if they want to block nominees or legislation. Under current lax procedures, Senators can simply offload these responsibilities onto low-level aides who can indefinitely block unanimous consent for treaties, bills, or key nominees, simply by sending a daily text from their subway ride home at night. Of course, “Congress will always be a sausage factory,” one distinguished Congressman observed, “but it can be a *better* sausage factory if we get the incentives right and if top-quality people volunteer or at least help those who do.”<sup>178</sup>

### C. *Transnational Judicial Engagement*

Because such legislative proposals require exercises of political coalition-building that may not be possible in a sharply divided Congress, the courts have a crucial role to play. Wherever possible, they should modify existing judicial doctrine, continuing the trend toward normalization advocated in the exceptionalism/normalization debate. To address the self-fulfilling claim that federal judges have little foreign affairs experience, judicial selection should focus more on global, rather than merely local, experience. Federal Judicial Center and Circuit Conference trainings on international law subjects should continue, as they have done for many years, for both judges and their law clerks, and written guides to international law doctrines should be improved, updated, and widely distributed.<sup>179</sup>

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<sup>177</sup> During Speaker Gingrich’s tenure, the House approved unlimited travel by representatives back to their home districts, which meant that Members did not need to stay in Washington, D.C. or develop cross-party friendships through regular social interaction. Repealing or modifying this rule could be one of many small but important changes to reduce intrabranched frictions, with real-world consequences. *See, e.g.*, Thomas B. Langhorne, *Congress Doesn’t Live Here Anymore | Secrets of the Hill*, COURIER & PRESS (Oct. 14, 2018, 6:05 AM), <https://www.courierpress.com/story/news/2018/10/14/congress-doesnt-live-here-anymore-secrets-hill/1265733002/> [https://perma.cc/Z2XN-TQLD].

<sup>178</sup> Cooper, *supra* note 26.

<sup>179</sup> *See, e.g.*, AM. SOC’Y INT’L L., BENCHBOOK ON INTERNATIONAL LAW (Diane Marie Amann ed., 2014), [https://www.asil.org/sites/default/files/benchbook/ASIL\\_Benchbook\\_Complete.pdf](https://www.asil.org/sites/default/files/benchbook/ASIL_Benchbook_Complete.pdf) [https://perma.cc/MFD8-TDTL].

Most obviously, the courts should continue to reduce barriers to justiciability. As Chief Justice Roberts recognized in *Zivotofsky I*, “[i]n general, the Judiciary has a responsibility to decide cases properly before it, even those it ‘would gladly avoid.’”<sup>180</sup> Exceptions to that responsibility should therefore be narrowly construed. In many cases, “[t]o resolve [a plaintiff’s] claim, the Judiciary must decide if [plaintiff’s] interpretation of [a] statute is correct, and whether the statute is constitutional. This is a familiar judicial exercise.”<sup>181</sup> This task should thus not be shirked simply because some courts would prefer to avoid making those decisions.<sup>182</sup>

On the merits, the courts should reexamine and modify a number of existing foreign relations doctrines to better adapt them to the age of globalization. These range from the applicability of administrative law doctrines in foreign affairs to reforms in the foreign sovereign immunity and state secrets regimes.<sup>183</sup> With respect to facts, the Court should take greater pains to scrutinize and invalidate executive actions taken in foreign affairs when the justifications offered in court by the United States government are transparently manufactured motivations for the government’s actions. In the Travel Ban case, *Trump v. Hawaii*, Justice Sotomayor correctly called out the majority for deferring to the Trump Administration’s “masquerade[] behind a facade of national-security concerns.”<sup>184</sup> The Court should build instead on its approach in the recent census case, *Department of Commerce v. New York*,<sup>185</sup> where Chief Justice Roberts wrote that the reasons proffered there by the Commerce Department “seem[ed] to have been contrived” and pretextual, and that, under the Administrative Procedure Act, the Court could demand that the relevant agency “offer genuine justifications for important decisions, reasons that can be scrutinized by courts and the interested public.”<sup>186</sup>

In the same vein, the courts should show far more skepticism toward Justice Department arguments based on the Executive’s “*Youngstown* Category Three” and “Statutory *Curtiss-Wright* theory of delegation” arguments described above.<sup>187</sup> If there is indeed a “normalization” impulse within today’s Court, this would appear to be a ripe area for

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<sup>180</sup> *Zivotofsky v. Clinton*, 566 U.S. 189, 194 (2012) (quoting *Cohens v. Virginia*, 19 U.S. (6 Wheat.) 264, 404 (1821)).

<sup>181</sup> *Id.* at 196.

<sup>182</sup> *Id.* at 201 (“Resolution of [that] claim demands careful examination of the textual, structural, and historical evidence put forward by the parties regarding the nature of the statute and of the passport and recognition powers. This is what courts do.”).

<sup>183</sup> See Sitaraman & Wuerth, *supra* note 47, at 1970–74.

<sup>184</sup> *Trump v. Hawaii*, 138 S. Ct. 2392, 2433 (2018) (Sotomayor, J., dissenting).

<sup>185</sup> 139 S. Ct. 2551 (2019) (dealing with 2020 United States Census).

<sup>186</sup> *Id.* at 2575–76.

<sup>187</sup> See *supra* text accompanying notes 53–56.

such principles to be applied. In *West Virginia v. EPA*, the Supreme Court rejected Obama’s Clean Power Plan to implement the United States’s Paris climate commitments because of “a particular and recurring problem: agencies asserting highly consequential power beyond what Congress could reasonably be understood to have granted” even in the face of congressional silence.<sup>188</sup> The Court held that rather than treating such assertions of power as normal agency statutory interpretations, to which judges should give broad *Chevron* deference, courts should approach such “major” executive actions with far-reaching consequences with greater degree of skepticism by requiring a “clear congressional authorization.”<sup>189</sup> Obviously, in the domestic realm, this “major questions” doctrine remains highly controversial, probably overstated, and likely to be narrowed significantly in the years ahead.<sup>190</sup> But if the Roberts Court insists on demanding specific congressional authorizations for certain major executive actions that dramatically affect our climate security, what is its rationale for not also demanding similarly specific delegations to justify major executive actions in other areas of foreign affairs?

I have also long argued in favor of courts exercising “procedural scalpels” rather than “jurisdictional meat cleavers.”<sup>191</sup> Sometimes citing their own self-reinforcing ignorance and institutional incompetence, courts have mechanistically applied presumptions and canons to avoid

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<sup>188</sup> *West Virginia v. EPA*, 142 S. Ct. 2587, 2609 (2022).

<sup>189</sup> *Id.*; see also Mila Sohoni, *The Major Questions Quartet*, 136 HARV. L. REV. 262, 309 n.335 (2022) (one reading of this case and related decisions is that “Congress may not delegate the power to make legally binding rules for important subjects *unless foreign affairs is involved*,” but without explaining when a case genuinely implicates foreign affairs) (emphasis added).

<sup>190</sup> The decision has already been widely and harshly criticized. See, e.g., Biden v. Nebraska, 143 S. Ct. 2355, 2391 (2023) (Kagan, J., dissenting) (charging the Court majority with “substitut[ing] itself for Congress and the Executive Branch—and the hundreds of millions of people they represent—in making this Nation’s most important, as well as most contested, policy decisions”); Thomas W. Merrill, *Major Questions about West Virginia v. EPA—and the Future of the Chevron Doctrine*, MARQUETTE LAWYER 39, 44 (Fall 2022) (“The major questions doctrine inverts the *Chevron* doctrine, is indeterminate, and as a practical matter, will encourage courts to engage in something more akin to political punditry than law.”); E. Donald Elliott, *How West Virginia v. EPA Changed the Administrative State*, THE AM. SPECTATOR (July 27, 2022, 9:53 PM), <https://spectator.org/how-west-virginia-v-epa-changed-the-administrative-state/> [<https://perma.cc/6KWM-XGZM>] (“Chief Justice Roberts did not need to write a major opinion of constitutional and historical significance. He could have decided the case on conventional grounds under existing law.”).

<sup>191</sup> See, e.g., Harold Hongju Koh, *Transnational Public Law Litigation*, 100 YALE L.J. 2347, 2382–94 (1991); see also HAROLD HONGJU KOH, *TRANSNATIONAL LITIGATION IN UNITED STATES COURTS* 247–60 (2008) [hereinafter KOH, *TRANSNATIONAL LITIGATION*]; Pamela K. Bookman, *Litigation Isolationism*, 67 STAN. L. REV. 1081, 1086 (2015) (arguing that judicially adopted avoidance doctrines in transnational litigation have proliferated to the point where they “fail[] to serve or positively undermine[] the values that the doctrines purport to advance”—e.g., separation of powers, international comity, U.S. sovereign interests, and fairness and efficiency for all parties).

engaging with our modern global environment.<sup>192</sup> Those applications have led to broad jurisdictional interpretations that oust from the courts entire classes of cases, rather than more nuanced application of existing procedural doctrines to eliminate from dockets those *particular* cases that truly do not belong in U.S. courts.<sup>193</sup> As two Justices put it in a recent state secrets case, the Court’s approach “abdicates judicial responsibility to use ordinary tools of litigation management in favor of the Executive’s wish to brush this case out the door.”<sup>194</sup> Such rulings have licensed lower courts to use presumptions and canons overly to defer to executive branch arguments—even when they are not based on vocally expressed foreign policy interests<sup>195</sup>—in the process frustrating congressional intent to regulate extraterritorially. At the same time, such canons and presumptions limit constructive judicial participation to better align U.S., foreign, and international regulatory interests, a task to which the American common law case-by-case method of judging is well-suited.

Three doctrinal areas deserve special attention. The first and most glaring is the non-self-executing treaty doctrine, a judicially created distinction between self-executing treaties and non-self-executing treaties that dramatically limits the enforceability of negotiated treaties in the U.S. courts.<sup>196</sup> The lower courts have overread a footnote in *Medellín v. Texas*<sup>197</sup> to read into the Supremacy Clause the notion that ratified treaties are presumptively non-self-executing unless the political branches expressly say otherwise. Given that the text of the Treaty Clause draws no such distinction, and the first treaties were all self-executing, it is not clear why any presumption should not run the other way. As currently applied, the doctrine undermines the diplomatic process by creating a glaring asymmetry in the negotiating process. While other countries enter treaty discussions seeing themselves as “negotiating for

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<sup>192</sup> See Steven Arrigg Koh, *Foreign Affairs Prosecutions*, 94 N.Y.U. L. REV. 340, 395–97 (2019) (discussing how in transnational criminal cases, federal courts have managed the presumption against extraterritoriality and other doctrines, such as the rule of lenity, in U.S. prosecutions with foreign affairs implications).

<sup>193</sup> See Bookman, *supra* note 191.

<sup>194</sup> *United States v. Husayn (Zubaydah)*, 142 S. Ct. 959, 999 (2022) (Gorsuch, J., dissenting).

<sup>195</sup> See, for example, the second brief of the United States in *Kiobel*. That brief’s authors argued without persuasive proof—and without the participation of the State Department’s Legal Adviser—that foreign affairs interests are being damaged by Alien Tort litigation against foreign corporations. Supplemental Brief for the United States as Amicus Curiae in Partial Support of Affirmance at 17–19, *Kiobel v. Royal Dutch Petroleum Co.*, 569 U.S. 108 (2013) (No. 10-1491). But see the Supreme Court of Canada’s decision in *Nevsun Resources Ltd. v. Araya*, [2020] 1 S.C.R. 166, 170 (S.C.C.) (Abella, J.) (holding that Canadian corporations may be sued in tort for violations of international human rights law that occur abroad).

<sup>196</sup> See Carlos Manuel Vázquez, *Treaties as Law of the Land: The Supremacy Clause and the Judicial Enforcement of Treaties*, 122 HARV. L. REV. 599, 606 (2008).

<sup>197</sup> 552 U.S. 491, 506 n.3 (2008).

keeps,” they too often see United States negotiators as only committing themselves to conditional and limited domestic compliance with any treaty obligations concluded in the negotiations. The doctrine further undermines the treatymaking process by reserving for later judicial interpreters conclusions about national intent that are better reflected in the executive and legislative actions taken at the time that those treaties were originally negotiated, concluded, and ratified.

In addition, the Court should soften its recent modification of the presumption against extraterritoriality. The Court has for many years applied this presumption inconsistently, to prevent statutes from reaching extraterritorial conduct even in the face of contrary legislative history.<sup>198</sup> Under the Court’s current interpretation, a statutory provision should not be considered extraterritorial if a judicially identified “focus” of that provision can be located in the United States.<sup>199</sup> Setting aside the difficulty of making that determination with respect to many statutes, the Court’s presumption unwisely removes discretion from the lower courts. The presumption does so in the name of safeguarding U.S. foreign relations interests by avoiding unintended clashes with the laws of other nations.<sup>200</sup> But as modified, the presumption is too vulnerable to being misapplied.<sup>201</sup> It is not well-suited to a global age because it overprotects foreign sovereigns even absent diplomatic protest and restricts judicial oversight without clear proof of congressional intent. It is not clear why this protective goal would not be better served by a case-by-case approach, as Justice Scalia argued in his dissent in the *Hartford Fire Insurance* case.<sup>202</sup> A more flexible approach would be to have courts apply a reasonableness requirement to the balancing of U.S. and foreign interests before hearing a case in U.S. court, making the

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<sup>198</sup> *Sale v. Haitian Centers Council, Inc.*, 509 U.S. 155, 176–77 (1993); *EEOC v. Arabian Am. Oil Co.*, 499 U.S. 244, 260–75 (1991) (Marshall, J., dissenting) (noting that the House Report made it clear that the statute was intended to apply to discrimination by U.S. employers against U.S. employees employed abroad). See generally Koh, *TRANSNATIONAL LITIGATION*, *supra* note 191, at 58–59, 71–83; Harold Hongju Koh, *The “Haiti Paradigm” in United States Human Rights Policy*, 103 *YALE L.J.* 2391, 2418–19 (1994).

<sup>199</sup> *Morrison v. Nat’l Austl. Bank Ltd.*, 561 U.S. 247, 255, 266 (2010).

<sup>200</sup> See *Kiobel*, 569 U.S. at 116.

<sup>201</sup> *Morrison* and *Kiobel* held, respectively, that the presumption against extraterritoriality applies to section 10(b) of the Securities Exchange Act and to the federal common law cause of action recognized under the ATS by *Sosa v. Alvarez-Machain*. *Morrison*, 561 U.S. at 273; *Kiobel*, 569 U.S. at 124–25. As one commentator has noted, “[i]t is certainly possible that a Supreme Court bent on restricting private litigation in transnational cases might read [the recent caselaw regarding the presumption against extraterritoriality] broadly to require domestic injury in every case.” William S. Dodge, *The New Presumption Against Extraterritoriality*, 133 *HARV. L. REV.* 1582, 1620 (2020).

<sup>202</sup> See *Hartford Fire Ins. Co. v. California*, 509 U.S. 764, 814–15 (1993) (Scalia, J., dissenting).

kind of nuanced assessment of the affected U.S. federal interests found in Justice Breyer's concurrence in *Kiobel*.<sup>203</sup>

Finally, the Justices should relax their unrealistic and ahistoric mantra that judges should not look to foreign and international law to interpret the meaning of U.S. constitutional law.<sup>204</sup> As I have argued elsewhere, that claim cannot be originalist, as the original American judges looked to foreign and international law on a regular basis.<sup>205</sup> More fundamentally, it counterproductively cuts off American judges from learning from the experiences of neighboring courts who may first encounter legal challenges to global phenomena that will soon challenge the United States. In our diverse society, it runs deeply against our national nature to decree that any sector of American life—law, culture, or cuisine—is categorically barred from “borrowing” from foreign sources.<sup>206</sup> As a jurisprudential matter, we should candidly accept that borrowing is just as American as the hot dog (*frankfurter*) or apple pie (*apfelkuchen*).

Despite their contrary rhetoric, in recent years, twelve Supreme Court Justices have looked to foreign and international precedents as an aid to constitutional interpretation.<sup>207</sup> These include, ironically, Justice Alito in the *Dobbs* abortion case,<sup>208</sup> Justice Gorsuch

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<sup>203</sup> *Kiobel*, 569 U.S. at 127–28 (Breyer, J., concurring in the judgment); Hannah L. Buxbaum & Ralf Michaels, *Reasonableness as a Limitation on the Extraterritorial Application of U.S. Law*, in *RESTATEMENT AND BEYOND*, *supra* note 18, at 295 (noting that the Supreme Court has not rejected a case-by-case reasonableness requirement, and “the practice of reasonableness analysis has wide application in the lower courts”). For the counterargument that a reasonableness balancing approach gives judges too much discretion to indulge their isolationist instincts, see, for example, the Second Circuit’s decision in *In re Vitamin C Antitrust Litigation*, 8 F.4th 36 (2d Cir. 2021). William S. Dodge, *Cert Petition Challenges Second Circuit’s Comity Abstention Doctrine*, *TRANSNAT’L LITIG. BLOG* (Apr. 7, 2022), <https://tlblog.org/cert-petition-challenges-second-circuits-comity-abstention-doctrine/> [<https://perma.cc/DQ4K-KHNE>].

<sup>204</sup> See Harold Hongju Koh, *International Law as Part of our Law*, 98 *AM. J. INT’L L.* 43, 47–48 (2004).

<sup>205</sup> *Id.* at 44–45; Harold Hongju Koh & William Michael Treanor, *Keynote Address: A Community of Reason and Rights*, 77 *FORDHAM L. REV.* 583, 591 (2008); FLAHERTY, *supra* note 41, at 250 (“[T]he Court has long and consistently drawn upon international law to interpret constitutional rights. . . . [T]he range is truly wide.”).

<sup>206</sup> By their nature, Americans borrow. As a Korean-American who has witnessed the importation into American cinema and music of such Korean influences as *Parasite* and *Gangnam Style*, and the infusion into Americanized tacos of such Korean ingredients as kimchi, I can only marvel at the insularity of Supreme Court Justices who claim we can and must maintain an “American rule of law,” hermetically sealed in an age of globalization, from all foreign and international influences.

<sup>207</sup> In addition to Justices Alito, Gorsuch, and Kavanaugh, see *infra* note 210, over the years, nine other Justices—Blackmun, Breyer, Ginsburg, Kennedy, O’Connor, Scalia, Souter, Stevens, and Rehnquist—have all referenced constitutional practice from other democratic countries in support of particular arguments. Koh, *supra* note 22, at 456–57 and accompanying notes (citing cases).

<sup>208</sup> *Dobbs v. Jackson Women’s Health Org.*, 142 S. Ct. 2228, 2270 (2022).



in *Buffington v. McDonough*,<sup>209</sup> and Justices Gorsuch and Kavanaugh during oral argument in the Census Case.<sup>210</sup> The Court as a whole has regularly done so in at least three situations, which for simplicity's sake I have elsewhere called: "parallel rules," "empirical light," and "community standards." First, the Court has noted when American legal rules parallel those of other nations, particularly those with similar legal and social traditions.<sup>211</sup> Second, as Justice Breyer has noted, the "Court has long considered as relevant and informative the way in which foreign courts have applied standards roughly comparable to our own constitutional standards in roughly comparable circumstances,"<sup>212</sup> reasoning that "their experience may nonetheless cast an empirical light on the

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<sup>209</sup> 143 S. Ct. 14 (2022).

<sup>210</sup> Despite Justice Alito's confirmation testimony that he did not think it "appropriate or useful to look to foreign law in interpreting the provisions of our Constitution," his majority opinion in *Dobbs v. Jackson Women's Health Organization* found it "telling that other countries almost uniformly eschew" using viability as a line for determining the legality of abortion. *Compare Confirmation Hearing on the Nomination of Samuel A. Alito to Become an Associate Justice of the Supreme Court of the United States*, 109th Cong. 277 (2006), <https://www.congress.gov/109/chrg/shrg25429/CHRG-109shrg25429.htm> [<https://perma.cc/TR5M-K8MA>], with *Dobbs*, 142 S. Ct. at 2270 (noting also that *Casey* and *Roe* "allowed the States less freedom to regulate abortion than the majority of western democracies enjoy"). In his confirmation hearing, Justice Gorsuch testified, "I do not know why we would look to the experience of other countries rather than to our own," but dissenting in *Buffington*, he wrote: "courts in other countries that often consult American administrative law practices have declined to adopt the [*Chevron*] doctrine." *Confirmation Hearing on the Nomination of Hon. Neil M. Gorsuch to Become an Associate Justice of the Supreme Court of the United States*, 115th Cong. 208 (2017), <https://www.congress.gov/115/chrg/CHRG-115shrg28638/CHRG-115shrg28638.htm> [<https://perma.cc/U84H-V6VF>]; *Buffington*, 143 S. Ct. at 22 (Gorsuch, J., dissenting from denial of certiorari). Asking during oral argument in *Department of Commerce v. New York*, 139 S. Ct. 2551 (2019), about a citizenship question on the U.S. Census, Justice Gorsuch further noted, "Virtually every English-speaking country and a great many others besides ask this question in their censuses?" Transcript of Oral Argument at 80–81, *Dep't of Com. v. New York*, 139 S. Ct. 2551 (2019) (No. 18-996). Justice Kavanaugh, who had previously written that "international-law norms are not domestic U.S. law," added, "The United Nations recommends that countries ask a citizenship question on the census . . . And a number of other countries do it. Spain, Germany, Canada, Australia, Ireland, Mexico ask a citizenship question. It's a very common question internationally." Adam Liptak, *Conservatives, Often Wary of Foreign Law, Embrace It in the Census Case*, N.Y. TIMES (Apr. 29, 2019), <https://www.nytimes.com/2019/04/29/us/politics/foreign-law-census.html> [<https://perma.cc/6EYS-LD94>].

<sup>211</sup> As the Court has repeatedly recognized, the concept of "ordered liberty" is not uniquely American but, rather, is "enshrined" in the legal history of "English-speaking peoples," as well as other legal systems. *E.g.*, *Wolf v. Colorado*, 338 U.S. 25, 28 (1949). In *Lawrence v. Texas*, the Supreme Court acknowledged that the concept of privacy is not American property, unique to the United States, but rather, part of a privacy concept recognized and shared in other countries in the world. 539 U.S. 558, 576 (2003). In asking a question under U.S. law—whether there is a compelling governmental interest in preventing people from having sex with same-sex partners—the *Lawrence* Court found that the claimed compelling governmental interest had not been found elsewhere, in countries with whom we arguably shared a common heritage of privacy. *Id.* at 577.

<sup>212</sup> *Knight v. Florida*, 528 U.S. 990, 997 (1999).

consequences of different solutions to a common legal problem.”<sup>213</sup> Third, the Court has looked outside the United States when an American constitutional concept, by its own terms, implicitly references a community standard—e.g., “cruel and unusual,” “due process of law,” “unreasonable searches and seizures”—recognizing that it makes sense in a global age to consult a broader set of community standards than just those within the United States.<sup>214</sup>

The centuries-old *Charming Betsy*<sup>215</sup> canon states that “an act of Congress ought never to be construed to violate the law of nations if any other possible construction remains.”<sup>216</sup> In the *Aerospatiale* case, Justice Blackmun built on that notion by presciently suggesting that domestic courts should look beyond the United States’ immediate interests to the “mutual interests of all nations in a smoothly functioning international legal regime.”<sup>217</sup> U.S. courts, Justice Blackmun added, should

consider if there is a course that furthers, rather than impedes, the development of an ordered international system. A functioning system for solving disputes across borders serves many values, among them predictability, fairness, ease of commercial interactions, and stability through satisfaction of mutual expectations. These interests are common to all nations, including the United States.<sup>218</sup>

This suggests a different, more sensible kind of canon for the 21st Century: that when a U.S. judge is faced with an interpretive question regarding a statute or constitutional provision, absent a convincing governmental showing that such a construction would genuinely interfere with the conduct of national foreign affairs, she should construe the

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<sup>213</sup> *Printz v. United States*, 521 U.S. 898, 977 (1997) (Breyer, J., dissenting). In *Printz v. United States*, Justice Breyer elaborated, “[o]f course, we are interpreting our own Constitution, not those of other nations, and there may be relevant political and structural differences between their systems and our own,” but if somebody else has considered a constitutional question before, why shouldn’t U.S. courts look to what those countries have decided to determine whether or not the sister country’s solution has led to a good outcome? *Id.* See generally STEPHEN BREYER, *THE COURT AND THE WORLD: AMERICAN LAW AND THE NEW GLOBAL REALITIES* (2015).

<sup>214</sup> See FLAHERTY, *supra* note 41.

<sup>215</sup> *Murray v. Schooner Charming Betsy*, 6 U.S. (2 Cranch) 64 (1804).

<sup>216</sup> *Id.* at 118. The roots of the canon can be traced back at least two decades earlier, to a case argued by Alexander Hamilton, *Rutgers v. Waddington* (NY City Mayor’s Ct. 1784), reprinted in 1 *THE LAW PRACTICE OF ALEXANDER HAMILTON: DOCUMENTS AND COMMENTARY* 417 (JULIUS GOEBEL JR. ED. 1964), and then another two decades before that in principles of statutory interpretation stated in BLACKSTONE’S COMMENTARIES. See William S. Dodge, *The Charming Betsy and The Paquete Habana (1804 and 1900)*, in *LANDMARK CASES IN PUBLIC INTERNATIONAL LAW* 11, 15–16 (Elrik Bjorge & Cameron Miles eds. 2017).

<sup>217</sup> *Société Nationale Industrielles Aérospatiale v. U.S. Dist. Ct. for S. Dist. Of Iowa*, 482 U.S. 522, 555, 565 (1987) (Blackmun, J., concurring in part and dissenting in part) (quotations and citations omitted).

<sup>218</sup> *Id.* at 567.

provision in a manner most consistent with the modern consensus of the international legal community, if one can be clearly discerned. Judicial interpretation of the Constitution in light of international and foreign law is nothing more or less than an informed choice-of-law decision, but guided by an outward-looking, rather than inward-facing, canon of judicial interpretation.<sup>219</sup>

Taken together, these proposed doctrinal modifications would be far from radical. They would simply ask common law American judges to seek to reconcile the legality of U.S. practices with those of a wider civilization. Courts everywhere are tasked with tackling the same global issues, which cannot be managed by America alone and over which the United States can exert only so much regulatory control. In so doing, the overall judicial approach recommended here is not radical, but rather “originalist,” inasmuch as it would emulate the efforts of the early Supreme Court to help manage the United States’s legal relationship with a rapidly evolving world order. To recall Chief Justice Marshall’s famous plea, “we must never forget, that it is a constitution we are expounding:”<sup>220</sup> a document that was “intended to endure for ages to come, and, consequently, to be adapted to the various crises of human affairs.”<sup>221</sup>

#### *D. Empowering Other Counterweights Through Transnational Legal Process*

It will not be enough, however, simply to strengthen the checking power of the coordinate branches of the federal government. Reforms are also needed to empower an additional set of counterweights capable of acting against a unilateralist executive. These include activist states and localities engaged in foreign affairs federalism, an aggressive and persistent mainstream and social media, private-public partnerships, and alliance politics. Elsewhere, I have chronicled the role of these counterweights, individually and collectively, in supporting many effective “resistance measures” taken to challenge the Trump

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<sup>219</sup> Some have pejoratively analogized this to letting a justice “look over the heads of the crowd and pick out your friends.” ANTONIN SCALIA, *A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW* 36 (Amy Gutmann, ed., 1997) (quoting Judge Harold Leventhal). But if a Justice may already look at persuasive law review articles written by publicists, which happen to be a subsidiary source of international law under Article 38 of the Statute of the International Court of Justice, why shouldn’t she also be allowed to consult international or foreign law decisions that express reasoned, enlightened views that cast light on community standards, parallel rules, or empirical lessons from other legal systems?

<sup>220</sup> *McCulloch v. Maryland*, 17 U.S. (1 Wheat.) 316, 407 (1819) (emphasis omitted).

<sup>221</sup> *Id.* at 415 (emphasis omitted).

Administration's illegal initiatives through participation in "transnational legal process."<sup>222</sup>

Further revisions in judicial doctrine will likely be required to enable these other actors to act as more effective counterweights to executive unilateralism in foreign affairs. Traditional judicial views of federalism have sought rigidly to bar states and localities from participation in foreign affairs with multiple doctrines of foreign affairs preemption.<sup>223</sup> In the early 20th century, judicial negation of state roles in foreign affairs led to absolutist dicta pronouncing "[a]s to such [foreign affairs] purposes the State of New York does not exist."<sup>224</sup> But today, such assertions seem rigid and anachronistic. In modern times, there seems to be little need for a broad theory of "foreign affairs preemption of state activity," à la *Zschernig v. Miller*,<sup>225</sup> or of "dormant foreign affairs preemption." The latter doctrine invalidates state policies that only potentially impact the U.S. relationship with foreign nations, even where the United States government has not protested the policies in question.<sup>226</sup>

The Constitution nowhere expressly excludes states from engaging in acts that affect U.S. foreign relations, which now seem inevitable when a state like California ranks as the fifth largest economy in the world.<sup>227</sup> When Trump abandoned federal efforts to combat climate change, there was seemingly little reason why that decision required states to abandon their own ongoing climate change abatement policies—for example, California's cap-and-trade agreements with Canadian provinces—in cases where the federal government could not demonstrate that those particular state policies would genuinely interfere with the conduct of national foreign affairs.<sup>228</sup> Nor is there a persuasive federal

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<sup>222</sup> See generally HAROLD HONGJU KOH, *THE TRUMP ADMINISTRATION AND INTERNATIONAL LAW* 6–37 (2019).

<sup>223</sup> For example, the Court held in *American Insurance Ass'n v. Garamendi* that a presidential policy of settling the claims of Holocaust survivors through international agreements preempted a California statute. 539 U.S. 396, 420 (2003).

<sup>224</sup> *United States v. Belmont*, 301 U.S. 324, 331 (1937) (additionally stating that, in foreign affairs, "state lines disappear").

<sup>225</sup> *Zschernig v. Miller*, 389 U.S. 429, 441 (1968) (barring Oregon from "establish[ing] its own foreign policy").

<sup>226</sup> See *Crosby v. Nat'l Foreign Trade Council*, 530 U.S. 363, 388–89 (2000).

<sup>227</sup> See *ICYMI: California Poised to Become World's 4th Biggest Economy*, OFF. GOVERNOR GAVIN NEWSOM (Oct. 24, 2022), <https://www.gov.ca.gov/2022/10/24/icymi-california-poised-to-become-worlds-4th-biggest-economy/> [<https://perma.cc/VHV9-X9T7>].

<sup>228</sup> For example, after Trump withdrew from the 2015 Paris Agreement, an international climate change treaty, a coalition of twenty-four state governors committed to the Paris goals enacted policies on behalf of fifty-four percent of the U.S. population. *Fact Sheet*, U.S. CLIMATE ALLIANCE (Sept. 2022), <https://static1.squarespace.com/static/5a4cfbfe18b27d4da21c9361/t/6321f6519adb5028800a2b9e/1663170130030/USCA+2022+Fact+Sheet.pdf> [<https://perma.cc/JH2N-G6TW>]. Composing the equivalent of the third-largest national economy in the world by GDP, these states enacted policies that they estimated would achieve a combined twenty-six to twenty-eight percent reduction in greenhouse gas emissions by 2025, which would place them

interest in truncating the recent wave of climate change lawsuits that make state law claims in state courts. These cases are seeking remedies from major fossil fuel producers who contributed to climate injury based on public and private nuisance, negligence, fraud and misinformation, and defendants' failure to warn, despite knowing about the harms of climate change.<sup>229</sup> With little disruption of the real life *status quo*, these federal-state preemption doctrines could be narrowed to genuine issues of conflict preemption, which would give states and localities needed freedom to experiment on such issues as clean energy and local compliance with international human rights treaties.<sup>230</sup>

Traditional mainstream and social media played an enormous role in exposing rule of law abuses in the Trump Administration, including on national security matters.<sup>231</sup> The Trump Administration responded to that scrutiny through a series of petty punishments, for example, scapegoating particular journalists and barring others from receiving White House press passes.<sup>232</sup> In foreign countries, executive abuses through media regulation make clear why such matters should not be

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below 2005 levels. *Id.* Although some of their policies were challenged by the Trump Administration, those challenges were ultimately rejected by the courts. See Memorandum and Order, United States v. California II, No. 2:19-cv-02142 (E.D. Cal. 2020), ECF No. 129, at 30; United States v. California I, 444 F. Supp. 3d 1181, 1198 (E.D. Cal. 2020).

<sup>229</sup> These lawsuits were generally filed by cities, counties, and states. See, e.g., County of San Mateo v. Chevron Corp., 294 F. Supp. 3d 934 (N.D. Cal. 2018), *aff'd in part, appeal dismissed in part*, 960 F.3d 586 (9th Cir. 2020), *cert. granted, judgment vacated*, 141 S. Ct. 2666 (2021), and *aff'd*, 32 F.4th 733 (9th Cir. 2022); City of Oakland v. BP PLC, 960 F.3d 570 (9th Cir. 2020), *opinion amended and superseded on denial of reh'g*, 969 F.3d 895 (9th Cir. 2020), *cert. denied sub nom.*, Chevron Corp. v. City of Oakland, 141 S. Ct. 2776 (2021); City of New York v. BP PLC, 325 F. Supp. 3d 466 (S.D.N.Y. 2018), *aff'd sub nom.*, City of New York v. Chevron Corp., 993 F.3d 81 (2d Cir. 2021); Rhode Island v. Chevron Corp., 393 F. Supp. 3d 142 (D.R.I. 2019), *aff'd sub nom.*, Rhode Island v. Shell Oil Prod. Co., 979 F.3d 50 (1st Cir. 2020), *cert. granted, judgment vacated*, 141 S. Ct. 2666 (2021), and *aff'd sub nom.*, Rhode Island v. Shell Oil Prod. Co., 35 F.4th 44 (1st Cir. 2022); Mayor & City Council of Baltimore v. BP PLC, 952 F.3d 452 (4th Cir. 2020), *cert. granted*, 141 S. Ct. 222 (2020), and *vacated and remanded*, 141 S. Ct. 1532 (2021); City & Cnty. of Honolulu v. Sunoco LP, 39 F.4th 1101 (9th Cir. 2022); Connecticut v. Exxon Mobil Corp., No. 3:20-CV-1555, 2021 WL 2389739 (D. Conn. June 2, 2021). While the move to state courts holds more favorable prospects for plaintiffs, should their cases be heard before state juries, there is a widening circuit split on preliminary federal venue and preemption issues. See Matthew Blaschke, Rachel Rubens & Oliver Peter Thomas, *The Widening Circuit Split on State Court Climate Claims*, LAW360 (July 11, 2022, 5:52 PM), <https://www.law360.com/articles/1509964/the-widening-circuit-split-on-state-court-climate-claims> [<https://perma.cc/6HJ2-B2QV>] (reviewing decisions).

<sup>230</sup> See MURPHY & SWAINE, *supra* note 85, ch. 9 (describing three forms of preemption of state law: express, conflict, and field).

<sup>231</sup> Particularly invaluable roles have been played by such dedicated national security journalists as Charlie Savage of the NEW YORK TIMES, and such dedicated foreign affairs and national security law blogs as JUST SECURITY and LAWFARE.

<sup>232</sup> See Mathew Ingraham, *White House Revokes Press Passes for Dozens of Journalists*, COLUM. JOURNALISM REV. (May 9, 2019), [https://www.cjr.org/the\\_media\\_today/white-house-press-passes.php](https://www.cjr.org/the_media_today/white-house-press-passes.php) [<https://perma.cc/58YZ-Y5AS>].

subject to the discretion of any particular elected leader.<sup>233</sup> Instead, they should be regularized and distributed through an administrative process—managed for example by the Federal Communications Commission—that would meet due process standards. To address individual violations, Congress should give the Justice Department Inspector General authority to review credible allegations of executive retaliation against the news media. Finally, the courts can and should play a pivotal role. In one recent incident described as “the ‘National Security Constitution’ at work,” the courts refused to defer to the President’s claim of national security to ban a social media company on the grounds that the President lacked the statutory authority to implement such a ban.<sup>234</sup>

For alliance politics to act as a more effective counterweight against executive unilateralism, the courts will need to carefully scrutinize the limitations on the President’s unilateral power to terminate international agreements. I have argued elsewhere that absent legislation restricting such termination, courts should apply a constitutional “mirror principle,” whereby the courts should require as much legislative input to exit an international agreement as was constitutionally required to enter it.<sup>235</sup> The courts should give stronger weight to clear expressions of U.S. and foreign diplomatic interests in maintaining long-standing multilateral institutions, particularly when private lawsuits or intrusive state and local activity genuinely disrupt foreign interests.<sup>236</sup>

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<sup>233</sup> For example, Turkish President Recep Tayyip Erdoğan’s allies in parliament recently presented a “disinformation law” that criminalizes “fake news”—without defining the term. Emre Kizilkaya, *In Turkey, Erdoğan’s Crackdown on the Free Press Intensifies*, NIEMAN REFS. (June 22, 2022), <https://niemanreports.org/articles/turkey-erdogan-free-press-crackdown/> [https://perma.cc/WLA5-DZT3]. Similarly, Russian President Vladimir Putin has blocked foreign news and social media access in the country and signed a law criminalizing “false information” regarding his war of aggression in Ukraine. Anton Troianovski & Valeriya Safronova, *Russia Takes Censorship to New Extremes, Stifling War Coverage*, N.Y. TIMES (Mar. 4, 2022), <https://www.nytimes.com/2022/03/04/world/europe/russia-censorship-media-crackdown.html> [https://perma.cc/LN7J-A4CP]. Since then, foreign news media have left, Russian outlets have closed, and journalists have fled the country. Elahe Izadi & Sarah Ellison, *Russia’s Independent Media, Long Under Siege, Teeters Under New Putin Crackdown*, WASH. POST (Mar. 4, 2022, 8:58 AM), <https://www.washingtonpost.com/media/2022/03/04/putin-media-law-russia-news/> [https://perma.cc/C39N-8U7S].

<sup>234</sup> See Anupam Chander, *Trump v. TikTok*, 55 VAND. J. TRANSNAT’L L. 1145, 1147 (2022) (arguing that “the failed TikTok ban . . . demonstrated . . . the ‘National Security Constitution’ at work—the checks and balances between the three branches of government in the context of what the President deems to be a national emergency”).

<sup>235</sup> Koh, *supra* note 22, at 453–54; see also *Goldwater v. Carter*, 444 U.S. 996, 1003 (1979) (Rehnquist, Burger, Stewart, Stevens, JJ., concurring in the judgment) (“[D]ifferent termination procedures may be appropriate for different treaties.”).

<sup>236</sup> See, e.g., *Crosby v. Nat’l Foreign Trade Council*, 530 U.S. 363, 385 (2000) (discussing *Barclays Bank PLC v. Franchise Tax Bd. of Cal.*, 512 U.S. 298 (1994) (“In *Barclays*, we had the question of the preemptive effect of federal tax law on state tax law with discriminatory extraterritorial effects. We found the reactions of foreign powers and the opinions of the Executive irrelevant

Similarly, as private companies engage in more international lawmaking, for example, in the realm of global cyberlaw, artificial intelligence, and the use of private security contractors, the resulting norms can have important restraining and channeling effects on U.S. executive action. Increasingly, private-public partnerships have played an active role in helping to shape governmental and corporate standards on climate change, environmental, social and corporate governance (“ESG”), and cyberconflict. The private Facebook Oversight Board, for example, played a crucial role in limiting Trump’s capacity to post in support of violence on January 6.<sup>237</sup> At a time when intergovernmental fora have moved slowly to articulate global cyber-rules, private information and communication technology companies have convened productive discussions spurring the development of international law rules restricting military use of cybertools and artificial intelligence.<sup>238</sup> Global universities and hotel chains have helped set higher standards for smoke-free environments, recycling, plant-based cuisine, and COVID-19 protocols. As private American actors inevitably multiply their global contacts, foreign affairs law must develop doctrines of delegation and discretion that will encourage private experimentation, so that such actors can operate creatively and constructively in setting customary norms of best practice.

Obviously, too many reforms in combination could end up hamstringing a future law-conscious President facing an extreme foreign policy crisis. But similar concerns were expressed in the 1980s, following the barrage of post-Vietnam and post-Watergate reforms.<sup>239</sup> As *The National Security Constitution* documented, in bona fide emergencies, undeniable proof of serious national security threats have empowered successive presidents to act decisively despite these

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*in fathoming congressional intent because Congress had taken specific actions rejecting the positions both of foreign governments and the Executive.* Here, however, Congress has done nothing to render such evidence beside the point.”) (emphasis added) (citations omitted)); *see also* Brief for the United States as Amicus Curiae Supporting Reversal at 1, *Jam v. Int’l Fin. Corp.*, 138 S. Ct 2026 (2018) (No. 17-1011) (“The United States participates in or supports nearly 200 international organizations and other multilateral entities, including major international financial institutions such as the International Monetary Fund (IMF) and the World Bank. The United States contributes billions of dollars annually to those organizations and entities. In recognition of the United States’ leadership role, nearly 20 international organizations are headquartered in the United States, and many others have offices here.”).

<sup>237</sup> *See Oversight Board Upholds Former President Trump’s Suspension, Finds Facebook Failed to Impose Proper Penalty*, OVERSIGHT BOARD (May 2021), <https://www.oversightboard.com/news/226612455899839-oversight-board-upholds-former-president-trump-s-suspension-finds-facebook-failed-to-impose-proper-penalty/> [<https://perma.cc/AF9C-M5DL>].

<sup>238</sup> *See, e.g., The Oxford Process on International Law Protections in Cyberspace*, OXFORD INST. FOR ETHICS, LAW AND ARMED CONFLICT (2020), <https://www.elac.ox.ac.uk/wp-content/uploads/2022/10/Oxford-Process-Compendium-Digital.pdf> [<https://perma.cc/2HAY-5BTT>].

<sup>239</sup> *See, e.g., THE TETHERED PRESIDENCY: CONGRESSIONAL RESTRAINTS ON EXECUTIVE POWER* 57 (Thomas M. Franck ed., 1981).

accumulated constraints.<sup>240</sup> In my experience, whenever authentic threats arise, the executive finds a way: in such crises, the President leads, Congress acknowledges the emergency, and the courts defer for understandable reasons. The resulting institutional interaction will almost inevitably create the necessary play in the joints to permit a robust American response.

In the years to come, probably the best way to ensure that a prudent balance is struck and maintained within the rules of foreign relations law is to ensure that such legal rules are clarified, restated, and fleshed out somewhere other than the U.S. courts or in self-serving executive documents generated during crisis mode. This legal dialogue should transpire in a considered fashion over an extended period of time with all stakeholders participating. One possible venue will be the American Law Institute (“ALI”), which will bring judges, academics, private and public practitioners, and foreign advisers together over the next decade to complete the *Fourth Restatement of the Foreign Relations Law of the United States*. These Restatements, which run on roughly thirty-year cycles, address rules of U.S. law with substantial significance for U.S. foreign relations and rules of international law that apply within the United States and to the United States in its relations with other states.<sup>241</sup> After a nearly three-decade hiatus, in 2018, the ALI completed work on three discrete topics as the first pieces of a *Restatement (Fourth)*: the status of treaties in U.S. law; exercise of U.S. jurisdiction (and recognition and enforcement of judgments); and immunity of foreign states from U.S. jurisdiction.<sup>242</sup> Some of the topics addressed in the *Restatement (Fourth)* clearly need reexamination in light of more recent executive abuses.<sup>243</sup>

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<sup>240</sup> See KOH, *supra* note 1, at 47–48.

<sup>241</sup> The ALI has published two full and one partial restatements on the “foreign relations law of the United States”: the first a single volume published in 1965 during the period when the ALI was issuing its “second” restatement series, hence called the *RESTATEMENT (SECOND) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES* (1965). This was followed twenty-two years later by a two-volume edition called the *RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES* (1987). The ALI has chosen a new executive director, Judge Diane Wood, with deep knowledge of foreign relations law, and two co-chairs (John Bellinger and myself) and three Reporters (Curtis Bradley, William Dodge, and Oona Hathaway) have now been chosen to work on the *RESTATEMENT (FOURTH)* project in the coming years. *The American Law Institute Launches Project to Complete Restatement of the Law Fourth, The Foreign Relations Law of the United States*, AM. L. INST. (Jan. 19, 2023), <https://www.ali.org/news/articles/american-law-institute-launches-project-complete-restatement-law-fourth-foreign-relations-law-united-states/> [<https://perma.cc/85GC-8MHC>]; *Diane P. Wood Named Director Designate of the American Law Institute*, AM. L. INST. (Jan. 19, 2023), <https://www.ali.org/news/articles/diane-p-wood-named-director-designate-american-law-institute/> [<https://perma.cc/2P5M-4RZT>].

<sup>242</sup> 1 *RESTATEMENT (FOURTH) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES* (2018).

<sup>243</sup> For a detailed discussion of why careful review will be needed of section 313 of the *RESTATEMENT (FOURTH)*, regarding the president’s power unilaterally to terminate treaties, see, for example, Koh, *supra* note 18, at 67–68.



And for other topics not yet addressed by the *Restatement (Fourth)*, the relevant provisions of the *Restatement (Third)* remain the ALI's most recent, and most authoritative, position.<sup>244</sup> Significant debate over the future shape of foreign relations law will inevitably occur during these multistakeholder ALI discussions, which will determine how effective that forum will be in helping to find consensus on the most contested issues.

Last, but by no means least, the collective search for the most accurate restatement of the governing rules in those divisive areas will be greatly aided by the publication of sober, fair-minded treatises such as the one produced by Sean Murphy and Ed Swaine, whose publication this symposium issue celebrates. This area of law will keep crying out for clarification, not just of what the governing rules of foreign relations and national security law are, but also of what they should be.

#### CONCLUSION

My core message is simple: today, the 21st Century National Security Constitution is dangerously off-kilter. Particularly in the last quarter century, it has moved a very long way from its constitutional moorings.

The daunting to-do list outlined above could take decades to complete. Restoring *Youngstown's* vision of balanced institutional participation in foreign relations will require multiple steps on multiple fronts over an extended period of time. To be meaningful and effective, a national security reform movement will require broader reconceptualization by the many current players in the foreign policy process of how U.S. institutions should operate and interact in an increasingly turbulent twenty-first century.

We should candidly acknowledge that institutional reforms can only accomplish so much in today's intensely polarized political environment. Such reforms can address structural defects, but not crippling partisan political behavior. Striving to constrain presidential powers cannot fully restrain a President bent on lawlessness. Giving Congress and the courts greater institutional capacities can only accomplish so much unless legislators and judges also share a nonpartisan commitment to the rule of law.

Effective reform will demand that all players in this process remember that they are Americans first, and partisans second. Real change will remain difficult so long as our government officials insist upon engaging in crippling partisan behavior.

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<sup>244</sup> See RESTATEMENT (FOURTH), *supra* note 241, at 3 (expressing this view with respect to Part I of the RESTATEMENT (THIRD)).

But in the end, we have little choice. Our only alternatives are acceptance, despair, or reform. We are only one election away from another presidential onslaught on our Constitution. But if we cannot change, then we will be stuck with the National Security Constitution we deserve. And change cannot realistically happen without a considered, achievable roadmap that envisions how best to restore the balanced spirit of our National Security Constitution.