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Imperial Presidency?

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Imperial Presidency?

Historian Arthur Schlesinger Jr. coined the term "imperial presidency" to characterize what he perceived as the dangerous expansion of presidential power during Richard Nixon's presidency. The term has been revived by critics of the George W. Bush administration. Although many Americans would not go this far in describing the nation's leader, few would deny that the American presidency is among the most powerful offices in the world today. Certainly, the top executive position in the federal government has a much higher profile than either the top legislative or the top judicial body: Congress and the Supreme Court. But this was not always the case. In fact, the early U.S. presidents hesitated to press their executive powers. When did the shift in power to the executive branch begin? And how and why did it happen? These questions are the focus of this text and activity.

As background to these issues, read **Handout 1**, an excerpt from ABC-CLIO's History Reference Online ebook *The Executive Branch of Federal Government: People, Process, and Politics* by Brian R. Dirck. In the text, Dirck traces the modern expansion of executive power to the presidency of Franklin D. Roosevelt (1933–1945). According to the author, the twin crises of FDR's long tenure in office—the Great Depression and World War II—prompted him to begin to reshape the presidency into the preeminently powerful office that it is today. To a greater or lesser degree, his successors have continued that trend to the present day.

However, the other branches of government have rarely gone along with extensions of executive power. Frequently, they have attempted to put brakes on the presidency. For examples of checks on executive power imposed during the last few decades, review the excerpted primary source documents below: the War Powers Resolution (1973) on **Handout 2** and the recent Supreme Court decision *Boumediene v. Bush* (2008) on **Handout 3**. Just as Roosevelt did in the 1930s and 1940s, presidents Richard Nixon and George W. Bush have claimed that national crises justified the means they have used to protect American interests. In Nixon's case, the problem was the Vietnam War, and in Bush's case, the war on terrorism. In the bodies of these documents, we witness the other branches of government imposing limits on executive power.

Evaluate the arguments that the documents contain, then consider the following questions:

- What are the potential advantages and disadvantages of a powerful executive?
- Should periods of national crisis confer special powers on the presidency? What sorts of crises do you think should qualify? Some examples might be: wartime, economic downturn, natural disasters, or riots and public violence?
- Of the three cases you have studied here—Roosevelt, Nixon, and Bush—do you believe that the extension of presidential power was justified in some of the instances, but not others? Why or why not?
- Do you believe that the incoming president in 2008 will continue to increase the power of the executive, or not? Do you think it depends more upon the candidate who is ultimately elected, or the United States' situation during that administration?

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Handout 1

Excerpt from ***The Executive Branch of Federal Government: People, Process, and Politics*** by Brian R. Dirck
*[…] Indicates break in the excerpt

Franklin [Delano Roosevelt] would truly revolutionize presidential relations with Congress and the Supreme Court, setting in motion forces that eventually eclipsed the other two branches—at least in the eyes of the general public—and created a dominating role for the presidency that continues until this day.

The Depression and FDR's response to that harrowing national crisis was a major catalyst for these developments. … Roosevelt used a variety of techniques—his communication skills, his media savvy, his deft manipulation of political party machinery—to ride shotgun on various New Deal legislative programs through Congress. He had his share of allies on Capitol Hill, of course, as what is now known as the Roosevelt coalition created a major new Democratic Party alliance between blue-collar Americans, urban dwellers, civil rights activists, and labor union organizers. New Deal supporters in the Senate and the House gave FDR a powerful cadre of allies as he tried to enact work relief programs, banking and stock market reforms, Social Security and public works programs, and a whole host of other measures.

Previous presidents had adopted a deferential tone toward Congress in large part because the nation's legislative branch could claim to be the collective voice of the American masses. FDR turned this reasoning on its head, bluntly telling Congress that it was he who spoke for the voice of the people in calling for drastic economic and political reform. "I come before you . . . not to make requests for special or detailed items of legislation," he told Congress in his 1934 State of the Union Address. "I come, rather, to counsel with you, who, like myself, have been selected to carry out a mandate of the whole people, in order that without partisanship you and I may cooperate to continue the restoration of our national well being and, equally important, to build on the ruins of the past a new structure designed better to meet the present problems of modern civilization."

The president, however, was being disingenuous when he claimed he wanted to merely "counsel" Congress. He was not the sort of man who would settle for mere suggestions in his State of the Union Addresses or for passively counting on the exertions of others, even his own party allies. With the Depression dragging on year after year, and the recovery spotty and uneven at best, Roosevelt took steps to work his will in Congress on a scale and with a verve never before seen in the American presidency. He called Congress into special session in early 1933 with the expressed purpose of enacting new measures to alleviate the Depression, and during that session he sent no less than fifteen special messages to Congress calling for various legislative reforms. Later dubbed Roosevelt's One Hundred Days, the special session produced a blizzard of new laws desired by FDR and his allies. "Here at last was a leader who could lead, and a Congress that could be made to follow," observed historian David Kennedy (Kennedy, 1999, 139).
[…]

In pursuing these goals, Roosevelt's administration made no apologies for its intrusion into the affairs of Congress. Ever since the days of George Washington, presidents had been reluctant to breach the wall of separation of powers between executive and legislative functions. FDR wanted to keep that wall intact, but he also wanted the wall to be as permeable as possible. "Out of these friendly contacts [between the president and Congress] we are, for-

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tunately, building a strong and permanent tie between the legislative and executive branches of the Government," he declared. "The letter of the Constitution wisely declared a separation, but the impulse of common purpose declares a union. In this spirit we join once more in serving the American people."

For FDR, combating the Great Depression was just that—combat, a waging of war against an implacable economic foe. A shrewd observer of public opinion, Roosevelt understood that Americans would rally around an activist president in a time of war—indeed, they expected energy on the part of the nation's commander in chief. The Great Depression was not a war, and the New Deal was not combat, per se—and yet FDR often used martial metaphors whenever he described his administration's programs. "Our greatest primary task is to put people to work . . . [which] can be accomplished in part by direct recruiting by the Government itself, treating the task as we would treat the emergency of a war," he declared in his first inaugural address.

Congressional critics of Roosevelt were disturbed by this robust flexing of presidential muscle, however it may have been justified, and they said so often and loudly. But FDR's most potent critics sat on the nation's highest court. Occasional spates of reformism aside (the Warren Court of the 1950s and 1960s, for example), the Supreme Court has throughout most of its history been an essentially conservative institution, acting far more often to preserve than to change existing American institutions. By the 1930s the Court had an established track record of laissez-faire economics and a tendency to look askance at any government regulation of capitalism that might conceivably interfere with what it saw as the free exchange of goods and services.

If Roosevelt thought the justices would buy his New-Deal-as-war-making political metaphor, he was mistaken. The Court served notice that it would not simply award the presidency the wide latitude previously allowed to it in other national emergencies like the Civil War. A 1936 decision, *Schechter v. United States*, struck down key provisions of the National Industrial Recovery Act of 1933 as an unconstitutional intrusion of executive power into local economic decision making. The ruling was delivered in such a way that it threatened to bring down many of FDR's New Deal aspirations. Indeed, administration insiders and the press called the day on which the *Schechter* decision was delivered Black Monday. Justice Brandeis even went so far as to send a private note to Roosevelt's aides (an extremely unusual occurrence, harkening back to the days of Buchanan, Taney, and *Dred Scott*), warning Roosevelt that he had been "living in a fool's paradise" with his extraordinarily activist decision making. "This is the end of this business of centralization," he lectured. "We're not going to let this government centralize everything. It has come to an end" (Davis, 1993, 517).

Angry and stunned, Roosevelt experienced a rare moment in which his political talents deserted him and he badly overreached. Convinced that the American people were no more enamored of Court obstructionism than himself—and would therefore support nearly anything the president might do to cut the Supreme Court down to size—FDR proposed in a message to Congress a plan that would have allowed him to add a new justice to the Supreme Court anytime a sitting justice over the age of seventy refused to retire. Roosevelt hoped that this would either encourage elderly justices to step down (reflecting his belief that the people who opposed the New Deal were fossilized reactionaries) or allow him to add judges who were pro–New Deal and would eventually drown out the more conservative voices already on the Court. Dubbed FDR's "court-packing plan," it was a measure designed to bring the nation's highest tribunal to the president's heel.

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While many Americans may have been dismayed at the Court's lack of support for the New Deal, many more were shocked at this instance of presidential aggression toward the judicial branch. Granted, there was nothing unconstitutional about it, on its face. The Constitution does not specify the precise number of justices allowed to sit on the Court, and Congress has the authority to organize federal judicial appointments as it sees fit. But as a matter of political culture, Americans revere separation of powers as a time-honored American principle, and they quickly saw what Roosevelt was trying to do. Howls of protest greeted the court plan as it tried to make its way through Congress. …In the end, the plan died in Congress, never to be revived.

If the Great Depression was a "war" in the symbolic sense to Roosevelt, December 7, 1941, quickly landed Roosevelt in the real thing. The methods Roosevelt introduced in his relations with Congress during the New Deal in many ways would be accentuated and expanded after Pearl Harbor. Now an entire nation was under arms on a scale unprecedented. It would be "hard work—grueling work—day and night, every hour and every minute," Roosevelt warned during a fireside chat two days after the Japanese attack, but "we are going to win the war and we are going to win the peace that follows . . . [and] we know that the vast majority of the members of the human race are on our side. . . . For in representing our cause, we represent theirs as well" (Davis, 2000, 350). […]

With this grand war making came a tremendous explosion in the size and complexity of the federal government. Almost overnight an army of new federal employees appeared in Washington, D.C., and around the country. Two floors were hastily added to the planned three stories for the new Department of Defense building, dubbed "the Pentagon" because of its pentagonal shape. The Pentagon opened in the middle of the war and would eventually house over 35,000 employees. From the sprawling new Pentagon and elsewhere came a veritable flood of orders, contracts, and demands. During the first six months of 1942 alone, the military handed out over $100 billion in contracts. [...]

Congress was not always a pliant instrument of the president's agenda. The Democratic Party in fact suffered serious losses during the 1942 off-year elections, and there were quite a few anti-New Dealers on Capitol Hill. But despite this—or perhaps because of it—FDR continued his hands-on approach to congressional activities. He was not at all shy about making his wishes known concerning military appropriations, economic planning, manpower recruitment, and a whole host of other war-related issues.

For its part, the Supreme Court seemed to have taken notice of the president's general popularity and political skill. Yes, the court-packing plan was a debacle, arguably the biggest political disaster of FDR's long tenure in office. But after 1937 the Court proved more amenable to the expansionist reading of federal power championed by FDR and his Democratic Party followers as it upheld a variety of state and federal economic regulations that it had earlier decided were unconstitutional. And during World War II the Court likewise proved generally amenable to the Roosevelt Administration's policies, including such controversial measures as the forced internment of Japanese Americans. […]

Shadows of FDR

For better or worse, Roosevelt revolutionized the relationship between the presidency, Congress, and the Supreme Court—revolutionized it by diminishing the independence and power of the other federal branches. By the end of World War II, the presidency was firmly established as the dominant political office in America and the world's most powerful job. It has remained so ever since.

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To his admirers, Roosevelt was a gifted revolutionary. He modernized the presidency, finally transforming it from its laissez-faire origins into a vital part of American democracy. A great many Americans then and since have sympathized with Roosevelt's values—rescuing the victims of the Great Depression, defeating the twin evils of Nazism and Japanese imperialism—and have argued with fervor that he was an American hero. And if in the process of this crusade Congress and the Supreme Court lost power and stature, what of it? For all of its virtues, Congress had long been dominated by some of the more reactionary elements in American society: isolationists, white segregationists, staunchly conservative businesspeople who opposed nearly any government interference with their profit margin, and so forth. Roosevelt at least tried to address problems of poverty, bigotry, and general backwardness that plagued American life, and if the result was an enormously ballooned executive branch that would dwarf Congress in public perception and authority, then that was a relatively small price to pay. Or so the argument goes.

On the other hand, there were thoughtful observers who worried that the sea change in favor of executive authority at the expense of Congress was an ominous development, a turning of the ratchet irreversibly in the direction of Big Brother-type centralized power at the expense of individual autonomy and local authority. It is probably no coincidence that the amplification of presidential power under FDR coincided with the erosion of public interest in state and local politics, declining voter participation in off-year (that is, nonpresidential) elections, and a general apathy toward participation in grassroots campaigning and policymaking.

All eyes would now be focused on the media fishbowl that was the White House. Congress and the Supreme Court increasingly became secondary attractions in the public mind, a fact that strikes some observers as an unhealthy development in American democracy. Whatever its virtues as a response to modern problems like depression and war, this was clearly not what the designers of the office envisioned in 1787.

Roosevelt's multiple terms likewise caused consternation in the minds of some. He remains the only president in American history to serve more than two terms in office. After his death, Republicans pushed through a new amendment to the Constitution that forbade such a thing outright. Ratified in 1951, the Twenty-second Amendment held that "no person shall be elected to the office of the President more than twice, and no person who has held the office of President, or acted as President, for more than two years of a term to which some other person was elected President shall be elected to the office of the President more than once." While few seriously believed that FDR himself wanted to become a despot, many Americans feared that in the future a man with his talents—media presence, political gifts, and a strong party base—and fewer scruples might turn the now all-powerful office of the presidency into something disturbing and dangerous that the other two branches might not be able to control.

If this were to ever happen, one suspects that it would occur under the aegis of a war. As we have seen, wars provide American presidents with authority that is largely unrivaled by Congress or the Supreme Court. Since FDR's time, other presidents have used wars as a means to further enhance White House authority. Lyndon Johnson would dramatically increase America's involvement in Vietnam during the mid-1960s with relatively little oversight by Congress—and with tragic results. In the 1970s and 1980s American presidents would literally have the power of global destruction at their fingertips as commanders in chief of a fearful nuclear arsenal. And at the turn of the twenty-first century, President George Bush Jr. would use the terrorist assault on the World Trade Center and the Pentagon in 2001 to begin conventional wars in Afghanistan and Iraq and wage a low-grade "war on terror" that many Americans felt impinged upon individual liberties and played fast and loose with international law. [...]

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Source: Brian R. Dirck. *The Executive Branch of Federal Government: People, Process, Politics*. Santa Barbara: ABC-CLIO, 2007. History Reference Online. ABC-CLIO. 31 Jul. 2008

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Handout 2

War Powers Resolution (1973) [excerpts]
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With growing public discontent over the Vietnam War and new revelations that President Richard Nixon was secretly bombing the neutral country of Cambodia, Congress attempted to reassert its power to declare war and gain control over the president's use of military force by passing the War Powers Resolution in 1973. Congressional support for the resolution was so strong that it was passed over the president's veto. The resolution has been generally considered ineffective in achieving its goals. Although most presidents have abided by the reporting requirements when committing troops abroad, the resolution has not restricted the president's ability to deploy troops as he sees fit.

Joint Resolution Concerning the war powers of Congress and the President.

Resolved by the Senate and the House of Representatives of the United States of America in Congress assembled,

Section 1. Short Title

This joint resolution may be cited as the "War Powers Resolution."

Section 2. Purpose and Policy

(a) It is the purpose of this joint resolution to fulfill the intent of the framers of the Constitution of the United States and insure that the collective judgement of both the Congress and the President will apply to the introduction of United States Armed Forces into hostilities, or into situations where imminent involvement in hostilities is clearly indicate by the circumstances, and to the continued use of such forces in hostilities or in such situations.

(b) Under article I, section 8, of the Constitution, it is specifically provided that the Congress shall have the power to make all laws necessary and proper for carrying into execution, not only its own powers but also all other powers vested by the Constitution in the Government of the United States, or in any department or officer thereof.

(c) The constitutional powers of the President as Commander-in-Chief to introduce United States Armed Forces into hostilities, or into situations where imminent involvement in hostilities is clearly indicated by the circumstances, are exercised only pursuant to (1) a declaration of war, (2) specific statutory authorization, or (3) a national emergency created by attack upon the United States, its territories or possessions, or its armed forces.

Section 3. Consultation

The President in every possible instance shall consult with Congress before introducing United States Armed Forces into hostilities or into situation where imminent involvement in hostilities is clearly indicated by the circumstances, and after every such introduction shall consult regularly with the Congress until United States Armed Forces are no longer engaged in hostilities or have been removed from such situations.

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Section 4. Reporting

(a) In the absence of a declaration of war, in any case in which United States Armed Forces are introduced—[…]

The President shall provide such…information as the Congress may request in the fulfillment of its constitutional responsibilities with respect to committing the Nation to war and to the use of United States Armed Forces abroad.

(c) Whenever United States Armed Forces are introduced into hostilities or into any situation described in subsection (a) of this section, the President shall, so long as such armed forces continue to be engaged in such hostilities or situation, report to the Congress periodically on the status of such hostilities or situation as well as on the scope and duration of such hostilities or situation, but in no event shall he report to the Congress less often than once every six months.

Section 5. Congressional Action

(a) Each report submitted pursuant to section 4(a)(1) shall be transmitted to the Speaker of the House of Representatives and to the President pro tempore of the Senate on the same calendar day. Each report so transmitted shall be referred to the Committee on Foreign Affairs of the House of Representatives and to the Committee on Foreign Relations of the Senate for appropriate action. If, when the report is transmitted, the Congress has adjourned sine die or has adjourned for any period in excess of three calendar days, the Speaker of the House of Representatives and the President pro tempore of the Senate, if they deem it advisable (or if petitioned by at least 30 percent of the membership of their respective Houses) shall jointly request the President to convene Congress in order that it may consider the report and take appropriate action pursuant to this section.

(b) Within sixty calendar days after a report is submitted or is required to be submitted pursuant to section 4(a)(1), whichever is earlier, the President shall terminate any use of United States Armed Forces with respect to which such report was submitted (or required to be submitted), unless the Congress (1) has declared war or has enacted a specific authorization for such use of United States Armed Forces, (2) has extended by law such sixty-day period, or (3) is physically unable to meet as a result of an armed attack upon the United States. Such sixty-day period shall be extended for not more than an additional thirty days if the President determines and certifies to the Congress in writing that unavoidable military necessity respecting the safety of United States Armed Forces requires the continued use of such armed forces in the course of bringing about a prompt removal of such forces.

(c) Notwithstanding subsection (b), at any time that United States Armed Forces are engaged in hostilities outside the territory of the United States, its possessions and territories without a declaration of war or specific statutory authorization, such forces shall be removed by the President if the Congress so directs by concurrent resolution.
[…]

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Handout 3

***Boumediene v. Bush* (2008)** [excerpts]
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This court case was one of many that petitioned the U.S. Supreme Court to define the rights of enemy combatants. In 2002, Lakhdar Boumediene and five other Algerians were arrested by Bosnian authorities on U.S. suspicions of terrorist activities and transferred to the prison camp at Guantanamo Bay, Cuba. Boumediene filed a writ of habeas corpus, which was dismissed by the U.S. Court of Appeals on the grounds that the Military Commissions Act (MCA) of 2006 removed the jurisdiction of federal courts to hear habeas writs from enemy combatants. The MCA had been approved by Congress after the Supreme Court permitted detainees to petition their imprisonment and rejected the military tribunal system because it had not gained congressional approval in Hamdan v. Rumsfeld *(2006). On June 12, 2008, the Supreme Court ruled 5–4 that enemy combatants are entitled to the habeas writ. Furthermore, the Court stated that the MCA violated the U.S. Constitution and the Geneva Convention because it restricted enemy combatants to the alternative legal court system created by the Detainee Treatment Act (2005), which did not include adequate means for detainees to petition their right to due process. Below is the full text of the majority decision written by Justice Anthony Kennedy.*

JUSTICE KENNEDY delivered the opinion of the Court.

Petitioners are aliens designated as enemy combatants and detained at the United States Naval Station at Guantanamo Bay, Cuba. There are others detained there, also aliens, who are not parties to this suit.

Petitioners present a question not resolved by our earlier cases relating to the detention of aliens at Guantanamo: whether they have the constitutional privilege of habeas corpus, a privilege not to be withdrawn except in conformance with the Suspension Clause, Art. I, §9, cl. 2. We hold these petitioners do have the habeas corpus privilege. Congress has enacted a statute, the Detainee Treatment Act of 2005 (DTA), 119 Stat. 2739, that provides certain procedures for review of the detainees' status. We hold that those procedures are not an adequate and effective substitute for habeas corpus. Therefore §7 of the Military Commissions Act of 2006 (MCA), 28 U. S. C. A. §2241(e) (Supp. 2007), operates as an unconstitutional suspension of the writ. We do not address whether the President has authority to detain these petitioners nor do we hold that the writ must issue. These and other questions regarding the legality of the detention are to be resolved in the first instance by the District Court. […]

Our basic charter cannot be contracted away like this. The Constitution grants Congress and the President the power to acquire, dispose of, and govern territory, not the power to decide when and where its terms apply. Even when the United States acts outside its borders, its powers are not "absolute and unlimited" but are subject "to such restrictions as are expressed in the Constitution." *Murphy v. Ramsey*, 114 U. S. 15, 44 (1885). Abstaining from questions involving formal sovereignty and territorial governance is one thing. To hold the political branches have the power to switch the Constitution on or off at will is quite another. The former position reflects this Court's recognition that certain matters requiring political judgments are best left to the political branches. The latter would permit a striking anomaly in our tripartite system of government, leading to a regime in which Congress and the President, not this Court, say "what the law is." *Marbury v. Madison*, 1 Cranch 137, 177 (1803).

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These concerns have particular bearing upon the Suspension Clause question in the cases now before us, for the writ of habeas corpus is itself an indispensable mechanism for monitoring the separation of powers. The test for determining the scope of this provision must not be subject to manipulation by those whose power it is designed to restrain. [...]

It is true that before today the Court has never held that noncitizens detained by our Government in territory over which another country maintains de jure sovereignty have any rights under our Constitution. But the cases before us lack any precise historical parallel. They involve individuals detained by executive order for the duration of a conflict that, if measured from September 11, 2001, to the present, is already among the longest wars in American history. See Oxford Companion to American Military History 849 (1999). The detainees, moreover, are held in a territory that, while technically not part of the United States, is under the complete and total control of our Government. Under these circumstances the lack of a precedent on point is no barrier to our holding.

We hold that Art. I, §9, cl. 2, of the Constitution has full effect at Guantanamo Bay. If the privilege of habeas corpus is to be denied to the detainees now before us, Congress must act in accordance with the requirements of the Suspension Clause. Cf. *Hamdi*, 542 U. S., at 564 (*Scalia, J.*, dissenting) ("[I]ndefinite imprisonment on reasonable suspicion is not an available option of treatment for those accused of aiding the enemy, absent a suspension of the writ"). This Court may not impose a de facto suspension by abstaining from these controversies. See *Hamdan*, 548 U. S., at 585, n. 16 ("[A]bstention is not appropriate in cases ... in which the legal challenge 'turn[s] on the status of the persons as to whom the military asserted its power' " (quoting *Schlesinger v. Councilman*, 420 U. S. 738, 759 (1975))). The MCA does not purport to be a formal suspension of the writ; and the Government, in its submissions to us, has not argued that it is. Petitioners, therefore, are entitled to the privilege of habeas corpus to challenge the legality of their detention. [...]

Where a person is detained by executive order, rather than, say, after being tried and convicted in a court, the need for collateral review is most pressing. A criminal conviction in the usual course occurs after a judicial hearing before a tribunal disinterested in the outcome and committed to procedures designed to ensure its own independence. These dynamics are not inherent in executive detention orders or executive review procedures. In this context the need for habeas corpus is more urgent. The intended duration of the detention and the reasons for it bear upon the precise scope of the inquiry. Habeas corpus proceedings need not resemble a criminal trial, even when the detention is by executive order. But the writ must be effective. The habeas court must have sufficient authority to conduct a meaningful review of both the cause for detention and the Executive's power to detain. [...]

Our opinion does not undermine the Executive's powers as Commander in Chief. On the contrary, the exercise of those powers is vindicated, not eroded, when confirmed by the Judicial Branch. Within the Constitution's separation-of-powers structure, few exercises of judicial power are as legitimate or as necessary as the responsibility to hear challenges to the authority of the Executive to imprison a person. Some of these petitioners have been in custody for six years with no definitive judicial determination as to the legality of their detention. Their access to the writ is a necessity to determine the lawfulness of their status, even if, in the end, they do not obtain the relief they seek.

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Because our Nation's past military conflicts have been of limited duration, it has been possible to leave the outer boundaries of war powers undefined. If, as some fear, terrorism continues to pose dangerous threats to us for years to come, the Court might not have this luxury. This result is not inevitable, however. The political branches, consistent with their independent obligations to interpret and uphold the Constitution, can engage in a genuine debate about how best to preserve constitutional values while protecting the Nation from terrorism. Cf. *Hamdan*, 548 U. S., at 636 (*Breyer, J.*, concurring) ("[J]udicial insistence upon that consultation does not weaken our Nation's ability to deal with danger. To the contrary, that insistence strengthens the Nation's ability to determine—through democratic means—how best to do so").

It bears repeating that our opinion does not address the content of the law that governs petitioners' detention. That is a matter yet to be determined. We hold that petitioners may invoke the fundamental procedural protections of habeas corpus. The laws and Constitution are designed to survive, and remain in force, in extraordinary times. Liberty and security can be reconciled; and in our system they are reconciled within the framework of the law. The Framers decided that habeas corpus, a right of first importance, must be a part of that framework, a part of that law.

The determination by the Court of Appeals that the Suspension Clause and its protections are inapplicable to petitioners was in error. The judgment of the Court of Appeals is reversed. The cases are remanded to the Court of Appeals with instructions that it remand the cases to the District Court for proceedings consistent with this opinion.

It is so ordered.

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