

# For the Want of a Nail . . . the War was Lost: Separation of Powers and United States Counter-Terrorism Policy During the Reagan Years

When terrorism strikes, civilization itself is under attack, no nation is immune. There's no safety in silence or neutrality. If we permit terrorism to succeed anywhere, it will spread like a cancer . . . . We cannot accept these repeated and vicious attacks against our nation and its citizens. Terrorists, and those who support them, must and will be held to account.

Ronald Reagan<sup>1</sup>

## I. Introduction

Terrorism evokes feelings of fear, ethnic distrust, and frustration over the means of dealing with terrorists and their political grievances. United States counter-terrorism policy is constrained by constitutional, political, ethical, and international considerations. Like the elephant bothered by a flea, the United States as a whole is affected by the actions of small terrorist groups.<sup>2</sup> The elephant may use its trunk to swat the offending parasite, but only discretion and timing, not raw strength, will relieve the situation. Successful counter-terrorism programs require precise, directed action. The question that plagues the national effort concerns which political branch is better suited to direct the implementation of antiterrorism policies.

Normatively, the executive, not the legislative, branch is better suited to plan and implement antiterrorism programs. It is as important to support this statement as it is to describe the means by which potential abuses of such a broad mandate may be avoided. The raw use of power must be constrained by the ethical concerns of the greater polity to avoid aimless and uncontrolled strikes at terrorism.

Three elements underlie effective counter-terrorism programs: intelligence gathering, secrecy of operation, and consistency between policy pronouncements and actions. An antiterrorism bureaucracy must be ca-

---

1. N.Y. Times, June 29, 1985, at 5, col. 1.

2. TERRORIST GROUP PROFILES, DEP'T DEFENSE 1 (1988) [hereinafter TERRORIST GROUP PROFILES] ("Mostly small, tightly knit, and politically homogeneous, such [terrorist] groups are incapable of developing popular support for their radical positions and therefore resort to terrorism to gain influence.").

pable of identifying terrorist situations, then quickly planning and implementing fact-specific responses. Active congressional oversight would require more time than the resolution of such situations generally allows. The structure of congressional decision-making—with committee meetings, open debates, and legislative log-rolling—better suits the design of policy than its implementation.

This Note will examine how, given the separation-of-powers tension and the divergent structures of the two political branches, United States counter-terrorism programs have differed from legislative policy. This discussion will highlight a new direction for both the legislative role in fighting terrorism and provide a way for a strong executive branch to meet its own goals in programmatic implementation without totally insulating itself from congressional purposes.

Subpart I(A) describes a systemic difference between the two political branches and how this may affect counter-terrorism policies and programs. A discussion of the constitutional tension in the separation-of-powers arena will follow. Part II then will present the foreign affairs power specifically and explain how Supreme Court policy and the dichotomy raised in subpart I(A) have affected traditional separation-of-powers arguments between the legislative and executive branches in counter-terrorism. Subpart II(B) will present a hypothetical situation that highlights the problems with current United States antiterrorism policy. Part III then will discuss terrorism itself and why the lack of a functional definition has limited the efficacy of United States actions in the control and resolution of international terrorism. Part IV points to the potential responses to terrorism and focuses on the concept of foreign policy by force. Part V presents the United States efforts to combat terrorism during the Reagan years and Part VI then compares the hypothetical scenario to the actual policy and demonstrates how far afield future efforts might travel from the legislative intent.

#### A. The Proactive/Reactive Dichotomy

The executive branch stresses short-term action over long-range policy goals. This emphasis, at least in the counter-terrorism area, differs functionally from legislative branch concerns. A simple model, the proactive/reactive dichotomy, highlights these differences and provides a means of analyzing recent United States counter-terrorism legislation and programmatic efforts.

The United States record in prevention and resolution of international terrorist incidents<sup>3</sup> during President Reagan's tenure has been

---

3. The scope of this Note is limited to international terrorism. International terrorism is terrorism affecting the citizens of more than one country. For a brief discussion of domestic terrorism concerns, see *infra* notes 197-201 and accompanying text.

soundly criticized by the press,<sup>4</sup> legal scholars,<sup>5</sup> and members of Congress.<sup>6</sup> With United States responses to terrorism varying from military reprisal<sup>7</sup> to providing the nephew of the Speaker of the Iranian Parliament with "escort services to arrange for night visitors to . . . [his] hotel,"<sup>8</sup> this period has been described as "an account of failure, with precious few victories in between."<sup>9</sup> Yet the executive branch claims that the record does not truly reflect the volume of successes<sup>10</sup> and that by the relation of goals sought to outcomes received, what has been viewed as

---

4. See generally CONTEMPORARY RESEARCH ON TERRORISM (P. Wilkinson & A. M. Stewart eds. 1987); D. MARTIN & J. WALCOTT, BEST LAID PLANS: THE INSIDE STORY OF AMERICA'S WAR AGAINST TERRORISM (1988); Note, *The First Amendment and National Security: The Constitutionality of Press Censorship and Access Denial in Military Operations*, 17 INT'L L. & POL. 369 (1985); Note, *The Press and the Invasion of Grenada: Does the First Amendment Guarantee the Press a Right of Access to Wartime News?*, 58 TEMP. L.Q. 873 (1985); Pincus, *Press Access to Military Operations: Grenada and The Need For a New Analytic Framework*, 135 U. PA. L. REV. 813 (1987).

5. See generally Levitt, *Is "Terrorism" Worth Defining?*, 13 OHIO N.U.L. REV. 97 (1986); Halberstam, *Terrorism*, 9 GEO. MASON U.L. REV. 12 (1986); Quigley, *Eliminating Terrorism: A Law and Justice Approach*, 3 CONN. J. INT'L L. 47 (1987); Paust, *An Introduction to and Commentary on Terrorism and the Law*, 19 CONN. L. REV. 697 (1987); M. CELMER, TERRORISM, U.S. STRATEGY, AND REAGAN POLICIES (1987).

6. See generally HOUSE COMMITTEE ON FOREIGN AFFAIRS, 100TH CONG., 1ST SESS., REPORT ON INTERNATIONAL TERRORISM: COMPILATION OF MAJOR LAWS, TREATIES, AGREEMENTS, AND EXECUTIVE DOCUMENTS (Comm. Print 1987) [hereinafter HOUSE REPORT]; *War Powers, Libya and State-Sponsored Terrorism, Hearings Before the Subcommittee on Arms Control, International Security and Science of the Committee on Foreign Affairs*, 99th Cong., 2d Sess. (Apr. 29, May 1, and May 15, 1986) [hereinafter *War Powers Hearing*].

7. The military reprisal theme is borne out most specifically by the United States bombing of Libya on April 14, 1986, but could also include the shelling of Lebanon in 1985. M. CELMER, *supra* note 5, at 151-52. Marc Celmer draws a crucial distinction in the use of force between actions in self-defense and actions with reprisal as the theme. *Id.* at 107-08. This distinction will be drawn out in detail, *see infra* notes 165-177 and accompanying text, with the discussion of the Shultz doctrine.

8. D. MARTIN & J. WALCOTT, *supra* note 4, at 356.

9. *Id.* at xi. The authors qualify this indictment, stating that "*Best Laid Plans* is not just a tale of unrelieved failure, it is also a story of courage and conviction, of brave men doing what they believed was right." *Id.* This qualification is illustrative of the general media reaction to United States actions with regard to terrorism management—that the government means well but has no clear idea of the consequences of their actions. One purpose of this Note is to carry this qualification one step further—to address the systemic failure to define and agree on the terms the Legislature will apply to terrorism policy.

10. The executive branch claims that secrecy concerns prevent the publication of all successful antiterrorism operations. "Successful preemption of terrorist attacks is seldom publicized because of the sensitive intelligence that may be compromised." PUBLIC REPORT OF THE VICE PRESIDENT'S TASK FORCE ON COMBATTING TERRORISM 9 (1986) [hereinafter PUBLIC REPORT]. *Contra* M. CELMER, *supra* note 5, at 113 (argues against the "secret" successes claimed by the Reagan administration, stating that "the Reagan administration's approach has had no positive impact on the deterrence, prevention and suppression of international terrorism.").

failure actually represents triumph.<sup>11</sup>

This difference of opinion illustrates the way in which the goals sought through terrorism-related policy affect the subsequent analysis of any actions taken. This is not simply a truism. Even a successful antiterrorist action<sup>12</sup> may be challenged if disagreement exists over the goals sought by the overall policy. The programmatic implementation must be distinguished from the underlying policy concerns to fully appreciate the arguments justifying or condemning specific actions.<sup>13</sup>

The executive branch has favored an action-based approach to counter-terrorism programs. This "ends justifies the means" attitude leads the executive to proactive policies. President Reagan's statement, opening this Note, indicates the executive-branch motivations guiding the antiterrorism efforts of the past eight years. The goal of preempting the spread of terrorism leads to what this Note defines as "proactive"<sup>14</sup> policies. The stated purpose of proactive programs is to halt terrorism

---

11. An illustration of this point is provided by the statement that "one person's freedom fighter is another's terrorist." This phrase is used in the isolationist argument contesting United States interference in actions not directly affecting the nation or its citizens. Interestingly, this phrase was also used in a State Department publication. D. MARTIN & J. WALCOTT, *supra* note 4, at 53. In 1987 former Vice-President Bush stated: "Terrorists and their apologists frequently claim that they are merely 'soldiers' or 'guerrillas' or 'freedom fighters' in a struggle for national liberation. I reject this premise." 87 DEP'T ST. BULL. 4 (Apr. 1987). In November of 1988, President-elect Bush continued: "The difference between terrorists and freedom fighters is sometimes clouded. . . . The philosophical differences are stark and fundamental. . . . Terrorists deliberately target noncombatants for their own cynical purposes. . . . [F]reedom fighters, in contrast, seek to adhere to international law and civilized standards of conduct." Bush, prefatory letter, TERRORIST GROUP PROFILES, *supra* note 2, at iv.

12. A successful counter-terrorist action is one that alleviates the specific problem to be addressed. Examples include hostage rescue operations utilizing either military or less violent pressures, preemptive actions that halt the terrorism before its implementation, or even preventative military strikes on terrorist training camps while the act is in its training phase.

13. An illustration of such an action is a hostage rescue attempt, utilizing military force and resulting in the deaths of several innocent bystanders. The programmatic goal—rescue—is achieved. If the policy goals do not allow for harm to innocent parties, however, the action is also in some way a failure. Thus former Secretary of State George Shultz was forced to defend the April 15, 1986 raid on Libya in terms of its programmatic success. "[A]sked how the raid could be called a success when 'women and children were killed,' Shultz said: 'Sometimes, of course, when civilians put themselves in a military place, they open themselves to this kind of unfortunate byproduct.'" *U.S. Ties Soviet Inaction on Terror to Raid*, L.A. Times, Apr. 17, 1986, pt. 1, at 1, col. 4.

14. Proactive policies are those that would preempt terrorism through bilateral, multilateral, and unilateral actions against the terrorists. For existing terrorist organizations these programs would take the form of intelligence gathering and military action, both reactive and preemptive, utilizing existing antiterrorist strike forces. A definition that would support such legislation would have a broad, generic substantive description with a general intent element. Levitt, *supra* note 5, at 108. See *infra* notes 97-99 and accompanying text.

through preventative military and intelligence activities.<sup>15</sup> Proactive counter-terrorism policies will be systemically different from those ascribed to the reactive legislative branch.

Congress traditionally has directed its antiterrorism efforts toward "reactive"<sup>16</sup> programs. Legislative policy is designed to resolve terrorist incidents as they arise. Unlike their proactive counterparts, these programs attempt to halt the spread of terrorism through criminal sanctions derived from multilateral agreements and diplomatic discussions.

The relationship between proactive and reactive states of mind is at best a troubled one. Proactive "self-help" measures offend the reactive "wait and see" attitude. When the President attempts an affirmative action, this precludes the option of more diplomatic resolution. As Part IV discusses, the difference is not so much one of means as timing within a specific terrorist episode. Unquestionably, situations will arise when even a reactive Congress will say action is necessary, however this generally will serve as an effort of last resort for the legislature while remaining a continuing option in the executive arsenal.

This dysfunctional relationship between the legislative and the executive branches accounts for much of the confusion surrounding United States action, and inaction, regarding counter-terrorism in the 1980s. This proactive/reactive dichotomy is evidenced by the differences in executive and legislative branch definitions for terrorism. This Note must first address the underlying problem: how the separation-of-powers tension and the Court's response to ambiguous constitutional delegations of power has exacerbated this dichotomy.

## B. The Constitutional Underpinnings

In the foreign affairs arena the dichotomy arises by virtue of constitutional delegation. The political separation-of-powers tension was designed to prevent one political branch from holding too much federal power relative to the other branches. This subpart describes the classical arguments over the actual levels of powers granted by the Constitution. The next part will explain how this tension has been heightened through the Court's use of the political question, the nonjusticiability of issues, and the ambiguity of congressional intent doctrines.<sup>17</sup>

---

15. Such programs will not be limited to preemptive actions. Retroactive programs may be utilized as well, continuing the executive branch goal of deterring the onset of new acts of terrorism. See *infra* notes 144-148 and accompanying text.

16. Reactive policies are directed at halting specific categories of terrorist actions. A definition supporting reactive policy goals uses precise substantive language to describe the act, with a minimal level of necessary intent. See generally Paust, *supra* note 5; *infra* note 98 and accompanying text.

17. Specifically, the Court's use of the political question doctrine and other prudential readings of statutory construction will be presented. These define the parameters within which Presidents will place their options. For example, one commentator states that "[b]y use of the

Exactly who should wield the United State foreign affairs powers has been a subject of contention since the framing of the Constitution. Article II states that "[t]he executive power shall be vested in a President of the United States of America."<sup>18</sup> Article I states that "[a]ll legislative powers herein granted shall be vested in a Congress of the United States."<sup>19</sup> The lack of the limiting "herein granted" language on the executive power has fueled much of the dissension between those who would have the foreign affairs powers fall more to one political branch than to the other.

Advocates of a strong presidential power argue that the President "is permitted to exercise authority not specifically delineated in the Constitution"<sup>20</sup> to either the executive or the legislative branch. This Hamiltonian view contrasts with the Madisonian notion that the purpose of the limiting Article I language was only to "settle the question of whether the executive branch should be plural or singular and to give the Executive a title."<sup>21</sup> Wherever one falls along the strong/weak presidential power scale, the separation-of-powers tension will be felt most strongly in areas of weak constitutional authority, such as the foreign affairs power.

The maxim that "absolute power corrupts absolutely" takes on a secondary meaning in the context of foreign affairs and the separation of powers. Shared power, without limits imposed on the relative distribution of that power, will lead both sides to attempt to garner more than an equal or defined allocation. An example of Congress extending its explicitly granted foreign policy powers<sup>22</sup> is found in the legislative limits

---

[political question] doctrine, the Court leaves Congress and the executive in a perpetual state of tension over foreign affairs, with the power most frequently allowed to the executive when he chooses to exercise it. . . . A frequent result is that executive action goes unchallenged and remains unchallengeable . . . ." Comment, *The Supreme Court as Interpreter of Executive Foreign Affairs Powers*, 3 CONN. J. INT'L L. 161, 178 (1987).

18. U.S. CONST. art. II, § 1, cl. 1.

19. U.S. CONST. art. I, § 1.

20. Chemerinsky, *Controlling Inherent Presidential Power: Providing a Framework for Judicial Review*, 56 S. CAL. L. REV. 836, 868 (1983) (citing Alexander Hamilton: "The general doctrine of our Constitution . . . is, that the executive power of the nation is vested in the President; subject only to the exceptions and qualifications which are expressed in the instrument." Alexander Hamilton, *The First Letter of "Pacifus"* (June 29, 1793), reprinted in 1 W. GOLDSMITH, *THE GROWTH OF PRESIDENTIAL POWER: A DOCUMENTED HISTORY* 401 (1974)).

21. *Id.* (citing Corwin, *The Steel Seizure Case: A Judicial Brick Without Straw*, 53 COLUM. L. REV. 53, 53 (1953)).

22. The article I, section 8 congressional powers relating to the foreign affairs of the United States are set forth in a commentary on foreign relations:

"Congress shall have power to declare war, grant letters of Marque and Reprisal, and make Rules concerning Captures on Land and Water." Congress is endowed with the power to lay taxes "for the common Defence," to regulate commerce with foreign nations, to regulate the value of money, including that of foreign coin, to "Define and Punish Piracies and Felonies committed on the High Seas and Offenses against the

placed on executive branch authority to commit the United States unilaterally to a prolonged military engagement.<sup>23</sup> As described below, the history of the shared foreign affairs power has been fraught with less than cooperative acts by both Congress and the President.<sup>24</sup>

Congress argues that the Executive has only those powers granted by enabling legislation. The President, however, claims a range of implied powers derived from a combination of the "sole organ" doctrine<sup>25</sup> and through the lack of limiting constitutional language. Professor Chemerinsky divides the spectrum of presidential power into four categories.<sup>26</sup> His framework contains Madisonian,<sup>27</sup> interstitial,<sup>28</sup> legislative accountability,<sup>29</sup> and Hamiltonian<sup>30</sup> doctrines. The application of each of these doctrines profoundly affects the balance of power between Congress and the President. Complicating the matter, the Court has at different times endorsed each of these separate doctrines. The Court's inconsistent pronouncements regarding the foreign affairs power has muddied the waters, increasing the natural separation-of-powers tension.

---

Law of Nations," "to raise and support Armies," to "provide and maintain a Navy," "to provide for calling forth the Militia to execute the laws of the Union, suppress Insurrections and repel Invasions," as well as the power to make all laws necessary and proper to carry into execution those powers vested in Congress and in the other branches of the federal government.

Comment, *supra* note 17, at 164-65 (footnotes omitted).

23. While the power to declare war is mandated to Congress, U.S. CONST. art. I, § 8, the Executive may unilaterally commit the military forces for indeterminate periods of time. The War Powers Resolution, 50 U.S.C. § 1543 (1982), *see infra* notes 241-252 and accompanying text, was passed to address this issue.

24. *See infra* notes 31-73, 151-161 and accompanying text.

25. The sole organ doctrine is a common law interpretation of the President as the sovereign representative of the United States. *See infra* note 31 and accompanying text for the history of this doctrine.

26. Chemerinsky, *supra* note 20, at 871.

27. *Id.* Madisonian proponents subscribe to the theory that there is no inherent presidential power (as described in *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 585 (1952) ("The President's power, if any, to issue the [seizure] order must stem either from an act of Congress or from the Constitution itself.")).

28. *Id.* at 872. Interstitial power is described by a President who may "act so long as the prerogatives of another branch are not usurped" (as described in *United States v. Nixon*, 418 U.S. 683 (1973) (the President may claim an inherent executive power until infringing on the functions of another government branch)).

29. *Id.* This aspect is illustrated by *Goldwater v. Carter*, 444 U.S. 996 (1979) (the Court will not decide issues affecting the separation of powers until an actual conflict presents itself between the political branches).

30. Chemerinsky, *supra* note 20, at 878. The presidential power is broad, subject only to constitutional exclusions. Examples of Hamiltonian notions include *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304 (1936) (the foreign policy power is inherent to the presidential office) and *Dames & Moore v. Regan*, 453 U.S. 654 (1981) (congressional inaction in the face of continuous presidential action implies approval of those actions).

## II. The Foreign Affairs Power

### A. The Court: Muddy Waters, The Separation of Powers, and Congressional Foot-in-Mouth Disease

When John Marshall first coined the term "sole organ" to describe the presidential foreign affairs role, he began almost two hundred years of separation-of-powers controversy.<sup>31</sup> It is not surprising, given the competing power structure of the United States political system, that the legislative and executive branches have this long history of arguments over the limits to one another's authority. Surprisingly, the Court has played a role in this conflict as well. Marshall, speaking from the floor of the House of Representatives, established the sole organ precedent.<sup>32</sup> As Chief Justice Marshall, four years later, he limited this sovereign power when faced with President Adams's seizure and condemnation of certain vessels.<sup>33</sup> Commentators have found Justice Marshall's opinion "extraordinary . . . for what it does not say, on issues that might have provided Little with a plausible defense: nonjusticiability of political matters, ambiguity of Congressional intent, and infringement upon the President's 'sole organ' power."<sup>34</sup> Professor Glennon uses the word "extraordinary"<sup>35</sup> because, since *Little*, the Court has fairly consistently relied on these three factors to avoid interference in foreign policy questions.

The first factor, the political question doctrine,<sup>36</sup> has enabled the

---

31. See *supra* note 25. "The President is the sole organ of the nation in its external relations, and its sole representative with foreign nations." Glennon, *Two Views of Presidential Foreign Affairs Power: Little v. Barreme or Curtiss-Wright*, 13 YALE J. INT'L L. 5, 10 (1988) (citing to Marshall's speech in 6 ANNALS OF CONG. 613 (1800)). Glennon points to Justice Jackson's opinion of the sole organ precedent: "It lies about like a loaded weapon ready for the hand of any authority that can bring forward a plausible claim of an urgent need." *Id.* at 14 (citing *Korematsu v. United States*, 323 U.S. 214, 246 (1944) (Jackson, J., dissenting) *reh'g denied*, 324 U.S. 885 (1945)).

32. Glennon, *supra* note 31, at 10.

33. *Little v. Barreme*, 6 U.S. (2 Cranch) 170 (1804) (Little was the ship's captain who seized the *Flying Fish* pursuant to a presidential order which departed from the authority granted by Congress in the Non-Intercourse Act (1799) (expired 1800)). See Glennon, *supra* note 31, at 5-8.

34. Glennon, *supra* note 31, at 9 (footnotes omitted).

35. Linda Champlin and Alan Schwarz present this issue succinctly. "It seems incredible that after two hundred years of life under a written constitution which delineates governmental power and its allocation, and which creates a Supreme Court to definitively determine controversies about power and its allocation, the most basic questions concerning allocation of the foreign affairs power remain unanswered." Champlin & Schwarz, *Political Question Doctrine and Allocation of the Foreign Affairs Power*, 13 HOFSTRA L. REV. 215, 216 (1985). Senator Hatch would not find this so incredible: "The Framers of our Republic intended to create some friction between the branches. . . . [E]fficiency was readily sacrificed because it was considered likely to produce impassioned solutions that might endanger individual liberties." Hatch, *Avoidance of Constitutional Conflicts*, 48 U. PITT. L. REV. 1025, 1027-28 (1987).

36. Professors Champlin and Schwarz find that "[n]on-justiciability . . . exists separately from the political question doctrine. . . . In the political question context . . . the issue itself,



Court to avoid answering foreign affairs powers questions necessary to resolve the vague constitutional mandate. The Court has raised the doctrine in foreign affairs power conflicts for many reasons, only two of which have been "consistently and coherently articulated":<sup>37</sup> the "lack of clear standards for judicial determination and the need to attribute finality to coordinate branch decisions."<sup>38</sup>

Professor Glennon's second and third factors, ambiguous congressional intent and the "sole organ" power, have played a greater role in defining the scope of congressional foreign policy powers than has the political question doctrine. The political question doctrine may be used by the Court to avoid passing judgment altogether; findings of ambiguous congressional intent and a belief in an inherent presidential power serve to accentuate the allocation of power contest. The two criteria have become interwoven over time to provide the Court with a way to keep questions involving either or both of these attributes off the docket.<sup>39</sup> The effect of this has been to grant approval by default without ever discussing the questions raised by the political branch seeking resolution.

In foreign affairs matters, the Court will defer to the executive power in at least three situations. The first is when it appears that Con-

---

independent of the status of the parties, has been termed non-justiciable." Champlin & Schwarz, *supra* note 35, at 231-32. Glennon's terminology, "non-justiciability of political matters," eliminates this concern, *supra* note 33 and accompanying text.

37. Champlin & Schwarz, *supra* note 35, at 219. It is interesting to note that although *Baker v. Carr*, 369 U.S. 186 (1962), was a domestic case, it is often cited for its political question application in foreign affairs.

38. Champlin & Schwarz, *supra* note 35, at 219. These factors were laid out clearly in *Lowry v. Reagan*, 676 F. Supp. 333 (D.D.C. 1987), the most recent lower court decision addressing a foreign affairs power controversy. See *infra* notes 43-55 and accompanying text.

Justice Brennan, in *Baker v. Carr*, 369 U.S. 186 (1962) (Tennessee voting apportionment case declared a political question), set out the standard list of factors used today in determining whether a case falls under the political question doctrine:

Prominent [factors include] a textually demonstrable constitutional commitment of the issue to a coordinate political department; or a lack of judicially discoverable and manageable standards for resolving it; or the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion; or the impossibility of a court's undertaking independent resolution without expressing lack of respect due coordinate branches of government; or an unusual need for unquestioning adherence to a political decision already made; or the potentiality of embarrassment from multifarious pronouncements by various departments on one question.

*Baker*, 369 U.S. at 221, also quoted in *Lowry*, 676 F. Supp. at 340. For a concise discussion of "What Makes a Question 'Political'?" see Champlin & Schwarz, *supra* note 35, at 220-24.

The most important of these considerations, for the purposes of this Note, is the potential embarrassment that would result if the Court, the Executive, and Congress were to present different counter-terrorism policy statements and commitments to the world. For example, if the President were to promise United States aid in the event of a terrorist incident to a foreign head of state, then when that aid was necessary, Congress refused to fund the program, backed by the Court, foreign nations would be ill impressed by future presidential commitments, even if supported by Congress.

39. See, e.g., *Lowry v. Reagan*, 676 F. Supp. 333 (D.D.C. 1987).

gress is unable to formulate a definitive policy.<sup>40</sup> The second is when a statute is open to an interpretation that would lead the President to act in a manner inconsistent with stated Congressional intent, but that would nonetheless be accepted by foreign nations.<sup>41</sup> The third situation arises when Congress does not act at all and the Executive is able to relate his or her behavior to some aspect of inherent or explicit constitutional authority.<sup>42</sup>

*Lowry v. Reagan*,<sup>43</sup> while not a Supreme Court case, provides a clear example of the use of the political question doctrine to throw an issue back to the political actors. Three Senators and over one hundred members of the House of Representatives joined together<sup>44</sup> to force President Reagan to comply with the reporting requirements of the War Powers Resolution.<sup>45</sup> The congresspersons claimed that the 1987 introduction of United States military forces into the Persian Gulf, and the hostilities that followed, triggered the President's obligation to file a written report with the heads of both Houses.<sup>46</sup> "The Court decline[d] to exercise jurisdiction over this case in light of prudential considerations associated with the exercise of equity jurisdiction and the constraints of the political question doctrine."<sup>47</sup>

The court followed the dismissal with a "remedial discretion"<sup>48</sup> discussion of why equity jurisdiction was declined and how the situation would have to change before "the Court would risk 'the potentiality of embarrassment [that would result] from multifarious pronouncements by various departments on one question.'"<sup>49</sup> The fact that "several bills to compel the President to invoke section 4(a)(1)"<sup>50</sup> and alternative bills to strengthen and repeal the War Powers Resolution<sup>51</sup> were introduced in Congress indicated to the court that the plaintiffs were looking to the judicial branch "to resolve a question that Congress seemed unwilling to decide."<sup>52</sup> Although the court declined to accept jurisdiction, it did indicate that a "true confrontation between the Executive and a unified Con-

---

40. *Id.* at 338-39.

41. *Weinberger v. Rossi*, 456 U.S. 25, 29 (1982).

42. "The Court has thus become an unacknowledged coparticipant in foreign affairs by endowing the executive with extra-constitutional authority derived from international law, notions of sovereignty, and congressional action or inaction." Comment, *supra* note 17, at 203.

43. 676 F. Supp. 333 (D.D.C. 1987). For a general analysis, see Comment, *Constitutional Law: Judicial Restraint and the War Powers Resolution—Lowry v. Reagan*, 11 HARV. J.L. & PUB. POL'Y 849 (1988).

44. *Lowry*, 676 F. Supp. at 337.

45. 50 U.S.C. § 1543(a)(1) (1982 & Supp. IV 1986).

46. *Lowry*, 676 F. Supp. at 334.

47. *Id.* at 337 (footnote omitted).

48. *Id.*

49. *Id.* at 340 (citing *Baker v. Carr*, 369 U.S. 186, 217 (1962)).

50. *Id.* at 338 (footnote omitted).

51. *Id.*

52. *Id.* (footnote omitted) (paraphrasing Sen. Brock Adams).

gress . . . would pose a question ripe for judicial review.”<sup>53</sup> Congressional inability to reach a consensus prevented the resolution of this dispute.<sup>54</sup> But even in those instances in which Congress does act as a unitary whole, as illustrated below, the foreign policy powers clash may still be resolved in favor of the Executive.<sup>55</sup>

The key Supreme Court rulings resolving foreign affairs power disputes in favor of the President may be roughly placed into the ambiguous congressional intent and inherent presidential power categories presented above.<sup>56</sup> *Weinberger v. Rossi*<sup>57</sup> proves an excellent example of the Court’s response to legislative drafting gone awry. *Dames & Moore v. Regan*,<sup>58</sup> *INS v. Chadha*,<sup>59</sup> and the ship seizure cases<sup>60</sup> are examples of judicial acquiescence to an inherent presidential power.

The Court has paid close attention to legislative drafting in disputes between the Legislature and the Executive over the foreign affairs power. An example that may prove important in the discussion of current United States antiterrorism policy involves the use of the overbroad term “international agreement” in lieu of the more specific “treaty.” *Rossi* provides that if Congress wants to authorize the President to seek treaty formulation, but still reserve approval and ratification power for itself, the use of the word “treaty” alone in the enabling legislation is not sufficient.<sup>61</sup> The Court will interpret such an ambiguous congressional expression to include the international understanding of a treaty: an international agreement made between sovereigns.<sup>62</sup> This point is relevant to the hypothetical scenario presented in subpart II(A), with partic-

---

53. *Id.* at 339 (footnote omitted) (for a true confrontation to arise, Congress must pass a joint resolution, which the President then refuses to honor).

54. The Court specifically did not pass on the constitutionality of the War Powers Resolution because the issue was not raised by the parties. *Id.* at 337. This issue is left unresolved and, as will be presented *infra* notes 303-307 and accompanying text, leaves open one of the last potential means of controlling the preemptive military strike scenario.

55. *See supra* note 25.

56. *See supra* note 34 and accompanying text.

57. 456 U.S. 25 (1982).

58. 453 U.S. 654, 661 (1981) (continued reliance on J. Sutherland’s contention that the presidential powers are inherent to the office).

59. 462 U.S. 919 (1983).

60. *Bas v. Tingy*, 4 U.S. (4 Dall.) 37 (1800); *Little v. Barreme*, 6 U.S. (2 Cranch) 170 (1804); *The Paquete Habana*, 175 U.S. 677 (1900).

61. The Court will “ascertain as best [it] can whether Congress intended the word ‘treaty’ to refer solely to Art. II, § 2, cl. 2 . . . or whether Congress intended ‘treaty’ to also include executive agreements . . . .” *Rossi*, 456 U.S. at 29.

62. *Id.* at 28-32. (“In the case of a statute . . . that does touch upon the United States’ foreign policy, there is even more reason to construe [the] use of ‘treaty’ to include international agreements . . . .” *Id.* at 31); *see also* Note, *Executive Agreements in the Aftermath of Weinberger v. Rossi: Undermining the Constitutional Treaty-Making Power*, 6 *FORDHAM INT’L L.J.* 636, 640 (1983) (The *Rossi* court relied on *Altman*, which had established that the word “[t]reaty” . . . included international agreements made by the President pursuant to congressional authorization”) (citing *B. Altman & Co. v. United States*, 224 U.S. 583, 601 (1912) (the

ular regard to the legislative draft to the President to seek international agreements on counter-terrorism issues.<sup>63</sup>

The Court will also support the Executive in certain situations where inherent presidential power may be found. The *Dames & Moore* and *Chadha* opinions illustrate this point. *Dames & Moore* evidenced a "willingness [by the Court] to bow to executive power where a more or less convincing argument for Congressional acquiescence can be made, especially during international crises, thereby effectively placing executive action beyond judicial review."<sup>64</sup> The executive orders complained of by *Dames and Moore* suspended all ongoing litigation between the United States and Iran, and established a Claims Tribunal to settle existing private claims through arbitration.<sup>65</sup> The Court interpreted the International Emergency Economic Powers Act to grant an implied presidential authority to suspend such claims.<sup>66</sup> As with the international agreement/treaty commonality principle described by the *Rossi* Court, presidential authority was extended for the purposes of granting sovereign consistency in the foreign relations arena.<sup>67</sup>

*INS v. Chadha*<sup>68</sup> struck down a congressional delegation to the executive branch because of its effect on the constitutional bicameralism requirement.<sup>69</sup> The one-House veto retained by the Legislature in the Immigration and Nationality Act,<sup>70</sup> although drafted to check the delegation to the Executive, did not meet the Court's requirement of careful and full consideration of the constitutional consequences.<sup>71</sup> This further illustrates the Court's influence on the foreign affairs interbranch power conflict.

Like *Rossi*, *Chadha* also serves as a judicial wrist slap for poor congressional drafting. The implications of this, when considered in conjunction with the ambiguous definitions of terrorism, are grave.<sup>72</sup> The

---

word "treaty" used in the Circuit Court of Appeals Act of 1891 included international agreements)).

63. See *infra* notes 231, 236, 292-293 and accompanying text.

64. Comment, *supra* note 17, at 196. Chemerinsky places the *Dames & Moore* opinion under the broadest, Hamiltonian view of inherent presidential authority. Chemerinsky, *supra* note 20, at 877.

65. *Dames & Moore*, 453 U.S. at 654.

66. *Id.* at 669-74.

67. *Id.* at 678.

68. 462 U.S. 919 (1983). This case arose when the House of Representatives passed a resolution invalidating the Attorney General's suspension of a deportation order. The deportee, *Chadha*, challenged the constitutionality of the congressional action.

69. U.S. CONST. art. I, §§ 1, 7.

70. 8 U.S.C. § 1254(c)(2) (1970).

71. "By providing that no law could take effect without the concurrence of the prescribed majority of the Members of both Houses, the Framers reemphasized their belief . . . that legislation should not be enacted unless it has been carefully and fully considered by the Nation's elected officials." *Chadha*, 462 U.S. at 948-49.

72. See *infra* notes 86-95 and accompanying text.

combination of the *Dames & Moore* implied presidential authority, the promise of further judicial “wrist slapping” for faulty drafting, and the “sole organ” doctrine of inherent presidential power provide a framework within which the executive branch is largely unconstrained in its counter-terrorism efforts. Chief Justice Marshall, speaking on the power of the Legislature in *M’Culloch v. Maryland*, stated: “[l]et the end be legitimate, let it be within the scope of the Constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consist [sic] with the letter and spirit of the Constitution, are constitutional.”<sup>73</sup> In the context of the above cases, this statement seems better applied today to the powers of the President than to Congress.

## B. Presidential Power and the Military “Solution” to Terrorism

The proactive/reactive dichotomy illuminates some of the reasons why political branch disagreements over the goals to be served in the fight against terrorism limit the effectiveness of national policy. The legislative branch has attempted to cure the problem, as perceived, through legislating protection for United States nationals<sup>74</sup> and through delegations of authority to the Executive.<sup>75</sup> The President thus has been left free to work toward proactive policy goals, paying slight attention to the reactive interests of Congress.

To illustrate this point, a hypothetical scenario is presented. This will test the limits of presidential power under current U.S. antiterrorism law and policy. This hypothetical situation is as follows:

President Bush launches a unilateral preemptive military strike at a terrorist training camp in the Middle East. In a message to Congress, the President lists several justifications for the military action. First, intelligence evidence had shed light on a terrorist attack in its planning and training stages. This attack was to have been directed against persons within the continental United States. Second, the decision to go ahead with a unilateral military action was made in the interests of timeliness and secrecy. In light of the initial failure of the European nations to believe United States evidence on the Libyan biochemical plant in 1989 and the difficulties presented in overflight authorizations necessary for the 1986 Libya raid,<sup>76</sup> the State Department decided to forgo a joint military action. In order to preserve secrecy, Congress was not consulted prior to this military strike.

---

73. *M’Culloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 421 (1819).

74. See *infra* notes 204-255 and accompanying text.

75. These delegations include a draft to seek multilateral cooperation in formulating international standards for antiterrorism programs. See *infra* notes 229-230, 236 and accompanying text.

76. See *infra* notes 304-306 and accompanying text.

This seemingly far-fetched scenario implicates many of the constitutional questions described in the beginning of this subpart.<sup>77</sup> Still, a complete analysis of the hypothetical situation requires a basic identification of the relevant variables necessary to an understanding of terrorism and the history of the United States response. Parts III through V of this Note will identify such issues. These variables will be defined through an examination of the following questions: are there any constitutional directives inhibiting presidential freedom of action in foreign affairs; are legislative or judicial structures in place to review and limit the presidential foreign affairs powers with regard to counter-terrorism; and, if so, are these structures functionally effective. The answers to these questions provide the framework within which the viability of the hypothetical scenario may be judged.

The preemptive strike scenario challenges the right of the Executive to commit United States military forces in a counter-terrorist action, absent a declaration of war.<sup>78</sup> This avenue of response is one of many available in the battle against terrorism.<sup>79</sup> The definitional problems addressed in the following part apply equally well to any counter-terrorism response. However, the proactive/reactive model<sup>80</sup> is most powerful when applied to illustrating the plausibility of military force in counter-terrorism operations.

Before discussing the remaining structure of this Note, it may be helpful to identify the critical points of the hypothetical scenario. The unilateral action of the executive branch is at odds with the reactive policy goal of international cooperation in counter-terrorism efforts. The secrecy and timeliness concerns raised by President Bush implicate the reporting requirements placed on the Executive by the War Powers Resolution.<sup>81</sup> Finally, the preemptive nature of the action must be addressed in light of the justifications historically raised for military antiterrorist

---

77. See *supra* notes 17-30 and accompanying text. Given the recent events in Panama and Colombia, the potential for the hypothetical scenario becomes less remote. See *infra* notes 314-336 and accompanying text.

78. Specifically, the concern is with the efficacy of the War Powers Resolution and the Omnibus Diplomatic Security and Antiterrorism Act of 1986, Pub. L. No. 99-399, U.S. CODE CONG. & ADMIN. NEWS: LAWS AND LEGISLATIVE HISTORY 1865 (1986) [hereinafter Omnibus Act] in limiting the available range of presidential actions.

79. Parts IV(A) and (B), *infra* notes 121-150 and accompanying text, briefly address other options as they have been discussed in recent legal commentary.

80. Any simple model is limited by its poor explanatory value regarding micro-activities. Even though the simple model may not predict well the actions of individuals within a political branch, a bureaucracy grows to have a "personality" of its own. Thus, the benefit of a simple model is found in its ability to predict policy trends for such macro-organisms.

81. 50 U.S.C. § 1541 (1982 & Supp. IV 1986). The issue raised is whether the War Powers Resolution reporting requirements apply to counter-terrorist situations, and if so, whether consultation or simple reporting is indicated. See *infra* notes 242-256 and accompanying text.

actions.<sup>82</sup> These issues are addressed in part VI of this Note.

Returning to the viability of such a scenario, the argument evolves in three parts. This section described the evolution of the separation-of-powers doctrine and how its effect on inherent presidential foreign affairs powers has defined the parameters of potential governmental antiterrorist policy.<sup>83</sup>

Part III examines the attempts made to define terrorism. This serves two purposes: first, to illustrate the proactive/reactive dichotomy; and second, to illustrate the way in which such definitions have been utilized by the political branches to further their divergent outcome-based philosophies. This dichotomous relationship between the policy goals of each political branch exacerbates an already artificially strained separation of foreign policy powers.<sup>84</sup> The final argument presented in Part III provides a definition of terrorism that may ease the overstrained tension in foreign affairs.

Parts IV and V will examine possible responses and the actual counter-terrorist legislation enacted and followed by the presidential response, in words and actions, to the legislative draft. Part VI then will analyze the hypothetical scenario in light of these two Parts and the overarching proactive/reactive dichotomy.<sup>85</sup>

### III. Terrorism—A Rebellion Without a Name

A useful definition of terrorism evolves through a three-stage process. First, this section presents the executive and legislative branch definitions as evidence of the proactive/reactive dichotomy. Next, an analysis of these definitions illustrates the way proactive and reactive goals may be served through more specific definitions of terrorism. Finally, a new definition is provided that meets the Madisonian fears of an overly powerful Executive. This definition illustrates one way to allow congressional input on policy design, freeing the President to engage in practical programmatic responses to terrorism.

#### A. The Present Definitions of Terrorism: Evidence of the Dichotomy

The search for a definition of terrorism has been likened to “the quest for the Holy Grail: periodically eager souls set out, full of purpose,

---

82. Whether such justifications are self-defensive or retributive in nature is at issue. See *supra* note 7. In order to take advantage of a self-defense rationale, as was argued when the executive branch bombed Libyan and Lebanese targets, the action must fall under the authority of Article 51 of the United Nations Convention. See *infra* notes 165-177 and accompanying text; *Symposium: The Use of Force Against Terrorist Bases*, 11 HOUSTON J. INT'L L. 307 (1989).

83. See *supra* notes 17-73, *infra* notes 151-201 and accompanying text.

84. See *supra* notes 31-73 and accompanying text.

85. See *infra* notes 278-311 and accompanying text.

energy and self-confidence, to succeed where so many others before have tried and failed."<sup>86</sup> Executive branch efforts have produced many definitions that accentuate the proactive goal of attacking all forms of terrorism unconstrained by an overly specific categorization of a terrorist act.<sup>87</sup> George Bush, in his role as head of the Vice President's Task Force on Combatting Terrorism, defined terrorism in terms so broad that they included almost any political upheaval.<sup>88</sup> The State Department has described terrorism as "the threat or use of violence for political purposes by individuals or groups, whether acting for or in opposition to established governmental authorities, when such actions are intended to shock, stun or intimidate a target group wider than the immediate victims."<sup>89</sup> A recent Defense Department publication states even more broadly, "[t]errorism is premeditated, politically motivated violence perpetrated against noncombatant targets by subnational groups or clandestine state agents, usually to influence an audience."<sup>90</sup> The increasing generality of the terms utilized in these definitions serve proactive goals by allowing increased freedom of action in antiterrorism programming.

The United States statutory definition, codified in the Foreign Intelligence Surveillance Act of 1978,<sup>91</sup> has been characterized as "so [vague] as to leave the entire definition almost nebulous."<sup>92</sup> It provides that:

International terrorism means activities that—

- (1) involve violent acts or acts dangerous to human life that are a violation of the criminal laws of the United States or of any State, or that would be a criminal violation if committed within the jurisdiction of the United States or any State;

86. Levitt, *supra* note 5, at 97. Martin and Walcott state that "[o]ne research guide cited 109 different definitions of terrorism set forth between 1936 and 1981. The original CIA research paper in 1976 had stated that 'one man's terrorist is another man's freedom fighter.'" D. MARTIN & J. WALCOTT, *supra* note 4, at 53. This is an interesting point given the current executive branch response to this statement. See *supra* note 11.

87. See generally Baker, *The Western European Legal Response to Terrorism*, 13 BROOKLYN J. INT'L L. 1 (1987) (problems arising when a definition is too broad).

88. PUBLIC REPORT, *supra* note 10, at 1. (The report actually states that "[t]errorism is a phenomenon that is easier to describe than define. It is the unlawful use or threat of violence against persons or property to further political or social objectives. It is generally intended to intimidate or coerce a government, individuals or groups to modify their behavior or policies."). Under this definition, even the rebellion of the American colonies against England would fall under President Bush's classification of terrorism.

89. M. CELMER, *supra* note 5, at 5-6 (citing Lynch, *International Terrorism: The Search for a Policy*, 9 TERRORISM: AN INTERNATIONAL JOURNAL 8 (1987)). Celmer uses this definition to illustrate the State Department's "perception of terrorism as mainly a form of state behavior." *Id.* at 6.

90. TERRORIST GROUP PROFILES, *supra* note 2, at viii.

91. 50 U.S.C. § 1801 (1982 & Supp. IV 1986) [hereinafter FISA].

92. Levitt, *supra* note 5, at 104. Levitt reasons that this poor definition is acceptable because it was aimed only at providing grounds for electronic surveillance. "This consideration did not, however, inhibit legislative drafters from using the FISA definition as a model in later bills . . . intended to have penal or foreign policy significance . . ." *Id.* at 105.



(2) appear to be intended— (A) to intimidate or coerce a civilian population; (B) to influence the policy of a government by intimidation or coercion; or (C) to affect the conduct of a government by assassination or kidnapping; and

(3) occur totally outside the United States, or transcend national boundaries in terms of the means by which they are accomplished, the persons they appear intended to coerce or intimidate, or the locale in which their perpetrators operate or seek asylum.<sup>93</sup>

This definition combines reactive and proactive policy goals. The intent element is not quite as broad as a purely proactive definition would require. Nor are the terrorist acts specifically categorized to prevent proactive actions as a purely reactive definition would require. This inability to fit into the neat slots of the proactive/reactive model follows from the lack of unanimity within the legislative branch. Just as all executive branch officials may not be proactive, there are many members of the Legislature who are not reactive.<sup>94</sup>

These varied definitions have been promulgated on a common theme: terrorism must be stopped.<sup>95</sup> The variations may be accounted for by the differences in the specific goals that counter-terrorism programs are to serve. The way in which we define our terms provides a glimpse into our underlying motivations. The definitions presented above demonstrate the proactive/reactive dichotomy. At the same time, as explained in the following section, the definitions are tools by which adherents to one view or the other may implement their outcome-justified programs.

## **B. The Proactive/Reactive Dichotomy: Use of a Definition to Meet Policy Goals**

Professor Levitt provides two goal-based approaches to defining terrorism.<sup>96</sup> The first approach describes a broad substantive, general intent element combined with an analytical, generic type of definition.<sup>97</sup> Proactive goals fit naturally into the first framework, which allows for

---

93. FISA, *supra* note 91, § 1801(c).

94. Illustrating that not all members of Congress share reactive policy goals, Senator Orrin G. Hatch paints his definition of terrorism with the broadest brush yet, defining it as "barbarism pure and simple . . . wanton and willful criminal violence aimed primarily at innocent civilians or internationally protected persons." Hatch, *Fighting Back Against Terrorism: When, Where, and How?*, 13 OHIO N.U.L. REV. 5, 5 (1986).

95. Whether a common definition is possible remains unclear. At least one author has suggested that it may not be worth the effort to define the problem. Levitt, *supra* note 5, at 114-15.

96. *Id.* at 108-09. Levitt attaches the terms inductive and deductive to describe the two approaches. While his explanation of these terms is clearly stated, for the purposes of this Note, the more general terms—reactive and proactive—will continue to be used. Professor Levitt should not be held responsible for this author's extension of these terms.

97. *Id.*

programmatic policies and actions relatively unconstrained by a specific categorization of terrorist acts. The second approach utilizes a precise substantive element, omitting intent. A definition arising from this approach consists of narrow, isolated, self-contained categories tied together in a comprehensive framework.<sup>98</sup> The second framework is best suited to legislation that would limit the range of presidential action.

A clear categorization of specific terrorist acts would remove the Executive's ability to act upon its affinity for proactive programs. Before a specific counter-terrorist action may be pursued, the precipitous terrorist act must mature and fit within one of the described categories.<sup>99</sup> Complicating the counter-terrorism situation, the legislative definition cited above does not fit clearly within this second approach.

The Foreign Intelligence Surveillance Act (FISA) definition<sup>100</sup> combines the two approaches.<sup>101</sup> The Ninety-Ninth Congress reviewed twelve bills regarding terrorism alone.<sup>102</sup> The bill finally approved by both Houses, the Omnibus Act, "provides U.S. criminal jurisdiction over the killing of, or an act of physical violence with intent to cause serious bodily injury to or that results in such injury to, a U.S. national outside the United States."<sup>103</sup> The bill draws its intent element from the FISA.

The combined proactive/reactive approach creates greater confusion than would either method alone. A proactive definition provides for a better moral outcome as fewer terrorist acts are able to evade reaction.<sup>104</sup> A reactive definition provides better enforcement cri-

---

98. *Id.* at 109; see also Schachter, *The Extraterritorial Use of Force Against Terrorist Bases*, 11 HOUSTON J. INT'L L. 309, 310 (1989).

99. Congress would argue that the secrecy and speed requirements of successful counter-terrorist actions are met even with the congressional oversight. If the categories are present, then the executive branch would be free to act with all dispatch—the dialogue having taken place before the action was required.

100. See *supra* note 93 and accompanying text.

101. Levitt describes this definition as a mixture of the substantive, intent, and jurisdictional elements. Levitt, *supra* note 5, at 104.

102. *Id.* at 105-08.

103. *Id.* at 107 (footnote omitted) (citing Omnibus Act, *supra* note 78). It has been suggested that the actual drafting of the Omnibus Act leaves much to be desired. See generally Note, *The Omnibus Diplomatic Security and Antiterrorism Act of 1986: Faulty Drafting May Defeat Efforts to Bring Terrorists to Justice*, 21 CORNELL INT'L L.J. 127 (1988).

104. Levitt, *supra* note 5, at 112 (the inductive [reactive] approach does not provide generic acts which would warrant direct disapproval, thus it allows a greater number of terrorist actions to slip by its reach); see also Stephan, *Constitutional Limits on the Struggle Against International Terrorism: Revisiting the Rights of Overseas Aliens*, 19 CONN. L. REV. 831, 835 (1987) (taking the position that overseas aliens have no constitutional rights and thus the broadest definition possible should be attempted); Halberstam, *supra* note 5, at 12, 19-20 (terrorists should be declared *hostis humanis generis* (enemies of all mankind) in the same way pirates were, providing universal jurisdiction over them and their actions); see also Schachter, *supra* note 98, at 311 (piracy definition does not provide adequate justification for hostile counter-terrorism actions on foreign soil).

teria<sup>105</sup> and, it has been suggested, serves as a better deterrent than would a proactive definition.<sup>106</sup> The Omnibus Act does not provide a clear standard for the definitional goal it serves. In effect, the Act illustrates the congressional reaction to serving two masters—the legislative goal of controlling presidential action and the stated desire of the American public to see tangible results in the fight against terrorism.<sup>107</sup>

Professor Levitt does not provide a basis for choosing one approach over the other and indeed, such a choice may not be possible.<sup>108</sup> The congressional efforts, rather than defining terrorism to yield the best reactive policy-effect, waver somewhere along a middle ground. The non-legislative definitions cited above exhibit no such indecision, directing attention to clearly proactive goals.<sup>109</sup> Some definition of terrorism is necessary before effective enabling legislation can be developed. The present definitions do little to relieve the proactive/reactive dichotomy.

Professor Paust presents a process approach to defining terrorism. This approach would provide a definition that

recognize[s] that "terrorism" involves the intentional use of violence, or the threat of violence, by a precipitator (the accused) against an instrumental target in order to communicate to a primary target a threat of future violence, so as to coerce the primary target through intense fear or anxiety in connection with a demanded political outcome.<sup>110</sup>

This framework falls short of fully correcting the inadequacies of standard definitions. The "instrumental target" must be qualified as one

---

105. With a reactive definition, extradition treaties may be more easily directed to the offense.

106. Levitt, *supra* note 5, at 112 (suggesting that specifying the act and its consequences is of more deterrent value than would be a general statement about a generic category of actions).

107. A November 1985 poll stated the following regarding public opinion on the issue of terrorism:

The President is seen as ultimately responsible for fighting terrorism, although the group polled recognizes that government agencies are also involved . . . .

With regard to policy on terrorism, most responded that there was no cohesive policy, but said that there should be one . . . .

Under the umbrella of such a policy, Americans would still welcome actions against terrorists that are swift, forceful and even aggressive. There is growing evidence the American people support timely, well-conceived, well-executed operations . . . even if inadvertent casualties result.

PUBLIC REPORT, *supra* note 10, at 17-18.

108. Thus the title for Levitt's article: "Is *Terrorism* Worth Defining?". *Contra* Quigley, *supra* note 5, at 57 ("Some authors deny that the causes of terrorism are discernible and on that basis argue for the preventative-punitive approach. But the causes of terrorism can readily be determined.").

109. See *supra* notes 86-89 and accompanying text.

110. Paust, *supra* note 5, at 701.

outside the role of a political actor. It is the innocent victim<sup>111</sup> who has been left relatively unprotected by existing law.<sup>112</sup> The international community has always preserved the safety of diplomatic and governmental representatives.<sup>113</sup> Professor Paust recognizes the poor choices provided by the current United States statutory description<sup>114</sup> and his process analysis serves as a useful means of arriving at a new definition.

### C. The Process Approach to a Better Definition

A definition of terrorism would ideally be of wide acceptance, "descriptive and neutral,"<sup>115</sup> and at the same time, comport with established law and structure of the Constitution.<sup>116</sup> Moreover, Professor Paust suggests, "[i]f a proffered definition does not realistically mirror the process of terrorism, it is likely to be overly broad, functionally unwise, and even constitutionally unsound."<sup>117</sup> A process-oriented definition might read:

Terrorism is an intentional act of physical violence toward innocent parties, manifested through kidnapping, physical injury, or recurring terror, designed to present a grievance to a target audience greater than the political group with whom the actor disagrees. The terrorist is a politically disaffected individual who views him or herself without recourse to normal political process or access to the population subject to that political process.

This definition allows the President to engage proactive programs constrained by limited legislative control over reactive policy goals. The process element, a volitional act of violence designed to present a griev-

---

111. A nonexhaustive list of innocent victims includes visitors to the country in which the attack takes place, those disassociated from the policies at issue, and those who happen only to be members of a society or country which influences the perceived problems of the terrorist.

112. Professor Paust recognizes that the United States statutory definition fails to "cover all primary targets, such as individual civilians or groups of civilians, and [that] it needlessly restricts types of conduct used to terrorize official elites." Paust, *supra* note 5, at 705.

113. Here the argument that one person's freedom fighter is another person's terrorist comes into play. The statement is usually made to illustrate the role nonintervention should play in United States politics. This begs the issue. The better analysis would state that so long as the freedom fighter has chosen to attack only the political military structure of a government, there is no innocent under fire. See *supra* note 11.

114. Paust, *supra* note 5, at 705.

115. *Id.* at 700-01.

116. The Stephan article, as noted above, states that the United States is not bound to treat foreign nationals abroad with constitutional due process guarantees. Stephan, *supra* note 104, at 835. This idea, combined with a *hostis humanis generis* treatment of terrorists, serves to remove this last requirement. See Halberstam, *supra* note 5, at 15. *Contra*, Paust, *supra* note 5, at 721-35. Specifically, Paust worries that Stephan's guidelines would legitimize torture and that a president operating under such a belief would subvert the spirit of the Constitution "under the guise of 'national security,' 'foreign affairs,' or anti-terrorism." *Id.* at 728. *Contra*, Schachter, *supra* note 98, at 311 ("states have no right to enter another state's territory to seize suspected pirates. The analogy to piracy does not help to answer the problem of extraterritorial enforcement measures against suspected terrorists.").

117. Paust, *supra* note 5, at 703.

ance to a wide audience, captures the essence of terrorist behavior for proactive purposes without limiting terrorist acts to a few, carefully defined categories. The "recurring terror" clause, appended to the standard categories of kidnapping and physical injury, makes it possible to justify counter-terrorism actions in terms of self-defense.<sup>118</sup>

The two parts of this definition—terrorism and terrorist—address the reactive desire to limit antiterrorism programs to narrow categorizations of terrorist acts. Both the terrorist and the act must be described in the defined terms before action may be taken. Thus Congress is free to describe certain groups or individuals as nonterrorist to constrain future presidential action. The legislative input is relegated to setting policy, leaving the programmatic implementation to the executive branch counter-terrorism bureaucracy.<sup>119</sup>

A better definition provides only one half of the solution. The definition must also be incorporated into counter-terrorism legislation. The Omnibus Act fails to limit Executive freedom of action by leaving open the task of seeking an internationally accepted definition of terrorism to the President.<sup>120</sup> This inability to define terrorism in a manner that allows congressional control of counter-terrorism policy is exacerbated by the traditional separation of foreign affairs power arguments. Part IV presents a framework that may be used to analyze different counter-terrorism responses in light of the separation-of-powers tension. Following the general framework, a brief review of the literature will set the scene for the hypothetical scenario.

#### IV. Potential Responses To Terrorism

##### A. A Temporal Framework for Response

The proactive/reactive dichotomy bears out well in the area of United States counter-terrorism actions. Presidents Reagan and Carter took many controversial steps in their attempts to resolve specific acts of terrorism.<sup>121</sup> These acts shared a commonality of action over diplomacy.

---

118. A state of continuing terror arises from a string of terrorist actions. After the West Berlin discotheque bombing in 1986, the Shultz justification for the Libya strike was that the terrorist bombing was just one in the long history, past and future, of Libyan involvement with terrorism. See *infra* note 177 (President Reagan's self-defense justification).

119. This last point will be described more fully in the recommendations discussion of Part VI. See *infra* notes 308-311 and accompanying text.

120. Omnibus Act, *supra* note 78, § 701(b). In an example of how this definition has been interpreted by the executive branch, Former Ambassador Oakley describes international terrorism as "the premeditated use of violence against noncombatant targets for political purposes, involving citizens or territory of more than one country." Oakley, *International Terrorism*, 65 FOREIGN AFFAIRS 611, 611 n.1 (1986-1987).

121. These actions include President Carter's ill-fated hostage rescue attempt in 1980 and President Reagan's shelling of Lebanon in 1983, bombing of Libya in 1986, show of force in the Persian Gulf, and the Iran-Contra affair.

The legislative history over the same period, however, is rife with examples of cooperative action on programs accentuating a moderate approach of words over action.<sup>122</sup> It appears that so long as the executive branch acts with congressional approval<sup>123</sup> or within the limits of standard diplomatic or economic sanctions, Congress will grudgingly allow the President freedom of action. Through classifying the responses into a common framework, actual and potential counter-terrorism actions may be compared to one another.

The temporal setting under which responses to terrorism may occur is key to a policy analysis. The responses may be roughly divided into those addressing terrorism before, during, and after a specific action takes place. For analytical purposes the preterrorist act responses will be further divided into systemic and preventative responses.<sup>124</sup> These first two response categories revolve around programs implemented before any specific act of aggression can occur.

The systemic response attempts a solution to the problems underlying terrorist activity.<sup>125</sup> Rather than treating the outward manifestations of terrorism, this approach works to cure the underlying disease, halting terrorism that would otherwise occur.

The second response option, preventative acts to terminate the potential for terrorism, uses existing and novel intelligence gathering organizations to halt terrorist actions at inception, or at the latest, at the point of staging.<sup>126</sup> Military actions are not necessarily the only options in this response category. The legislative exercises in this area have emphasized diplomatic and economic sanctions over direct military involvement.<sup>127</sup> Even so, the hypothetical scenario presented for analysis is the

---

122. Several examples include the Economic Summit Meeting Conference statements, the drafting of the legislative enactments, and the increasing use of economic sanctions.

123. Regarding potential legislation, Bush states that “[o]ne area in which there is concern both in Congress and the Executive Branch is the issue of Congressional oversight of proposed counterterrorist operations. It may be appropriate to pursue informal discussions . . . to clarify reporting and oversight requirements in this area. . . . [N]o set of specific procedures would be appropriate in all cases.” PUBLIC REPORT, *supra* note 10, at 16.

124. *Id.* at 8-10 (President Bush presents three responses to terrorism: “Managing terrorist Incidents,” long term measures of “coping with the threat,” and “Alleviating the Causes of Terrorism.”) *Id.* The four categories used in this Note are derived through attaching a temporal aspect to these responses.

125. See generally Quigley, *supra* note 5.

126. This idea has been presented by the executive branch on many occasions. President Reagan’s speech set forth at the outset of this Note set the framework publicly for what had already been presented secretly in National Security Decision Directive 138, see *infra* notes 178-187 and accompanying text. The Vice President’s Task Force makes essentially the same recommendations: “[a] successful deterrent strategy may require judicious employment of military force to resolve an incident.” PUBLIC REPORT, *supra* note 10, at 9.

127. The idea, a variant of Professor Quigley’s theory, see *supra* note 122, is that by refusing economic interaction with states that sponsor terrorist groups, the local population will be

logical extreme of executive branch proactive policies favoring the control of terrorist incidents prior to their actualization.

The third potential response takes place in concurrence with the terrorist incident. This option stresses the resolution of an incident without bending to the terrorist will. Examples include hostage negotiation,<sup>128</sup> delaying tactics,<sup>129</sup> third-party arrangements,<sup>130</sup> and denying the terrorists the media response they seek.<sup>131</sup>

The fourth potential avenue of response is directed, temporally, after the terrorist action has occurred. This is the option most often utilized in legislative circles. The goal is to prevent terrorists from seeking state-supported asylum. This implementation most often takes the form of international extradition treaties,<sup>132</sup> economic sanctions on countries that aid or actively sponsor terrorism,<sup>133</sup> and multilateral agreements condemning terrorism.<sup>134</sup>

Much commentary has evolved around the first, third, and fourth responses described above. This Note focuses on the military aspects of the second option because it provides a meaningful transition into the proactive/reactive dichotomy.

---

driven to oust the terrorists. George Shultz, stating that it was due to Soviet inaction that the United States bombed Libyan targets in 1986, *see supra* note 13, took this theory a step further.

128. This option is limited by United States policy concerns. "The U.S. Government will make no concessions to terrorists. It will not pay ransoms, release prisoners, change its policies or agree to other acts that might encourage additional terrorism." PUBLIC REPORT, *supra* note 10, at 7. *But see Bush Redefines Hostage Policy—Ready to Deal*, San Francisco Chron., Aug. 10, 1989, at A1, col. 1.

129. PUBLIC REPORT, *supra* note 10, at 9 ("Delaying tactics are used during a terrorist incident in order to stall for time to position forces, keep the terrorists off balance, or develop other responses . . . when time is important to secure international cooperation in order to apply economic, diplomatic, legal or military pressures.").

130. *Id.* ("When incidents occur overseas the host country has primary responsibility for managing the situation.").

131. The idea is to formulate policy restricting direct press access to an ongoing terrorist incident. The State Department has outlined possible media responses. Brenner, *Terrorism and the Media*, 87 DEP'T ST. BULL. 72, 73 (Sept. 1987) ("After considerable reflection, I believe that U.S. law and custom, our country's profound commitment to freedom of the press, and the individual circumstances of each terrorist incident make it impractical to develop universally accepted guidelines on media's response to terrorism." The article continues, suggesting that the media develop their own guidelines.). The *Public Report* suggests that the "media act as their own watchdog." PUBLIC REPORT, *supra* note 10, at 19. Still, the potential for limitations on press access should not be discounted too lightly. *See supra* note 4; *infra* note 143.

132. "The United States pursues international cooperation through bilateral or multilateral agreements with like-minded nations." PUBLIC REPORT, *supra* note 10, at 12.

133. *See infra* notes 138, 226-227 and accompanying text. It is interesting to note that even with the heavy emphasis on economic sanctions, one of President Reagan's last acts was to ease the restrictions on Libya. *Reagan Allows Oil Firms to Return to Libya*, San Francisco Chron., Jan. 20, 1989, at A1, col. 1.

134. "International cooperation alone cannot eliminate terrorism, but it can complicate the terrorists' tasks, deter their efforts and save lives." PUBLIC REPORT, *supra* note 10, at 12.

## B. A Brief Look at the Literature and an Introduction to the Military Response<sup>135</sup>

Curing the systemic problems underlying terrorism is probably the most difficult of the four responses to implement.<sup>136</sup> It involves the highly problematic decision to impose the United States political system on problems specific to another country. The United States must justify the normative claim that there is a greater moral imperative to solving others' problems than allowing nature to take its course.<sup>137</sup> These policy issues are beyond the scope of this Note. Of greater interest is the notion that structures exist that would allow Executive intervention without the knowledge, blessing, or refutation of the legislative branch.<sup>138</sup>

The dangers of pursuing policy goals that impress the United States political system onto another are manifest in the counter-terrorism area. United States legislation presupposes the tie between state sponsorship and terrorist activities.<sup>139</sup> The practicalities involved in modern terrorism demand a place to plan, train, and stage the action. If the past eight years are any indication, the problem lies not only with the terrorists, but with the nations that provide them with all of the above factors as well as

---

135. For structural purposes, the options presented in subpart A, see *supra* notes 121-134 and accompanying text, will be taken out of sequence.

136. See PUBLIC REPORT, *supra* note 10, at 10 ("Terrorism is motivated by a range of real and perceived injustices that span virtually every facet of human activity. . . . The issues are complex, highly emotional and seldom amenable to outside solutions.").

137. If our political system is to be presented as the best there is, there should be some questioning involved before imposing this system rather than blindly assuming that the natural course of events will lead others to assume its attributes. Beyond this, there still exists the issue of foreign populations who may not want United States intervention in their domestic problems. A better argument could be made that when these local problems erupt into terrorist actions affecting United States citizens and property, there is a greater justification for intervention of some sort or another.

138. The military action scenario is only one facet of this greater issue. One commentator, Professor Paul Quigley, argues for a noninterventionist response approach, utilizing indirect, economic sanctions to take the place of direct intervention. Professor Quigley's argument concludes that the refusal of previously granted aid is as effective as never having granted the economic aid at all. Quigley, *supra* note 5, at 69.

Professor Quigley limits his "law and justice" approach to terrorism that is not state-sponsored. Professor Quigley defines terrorism as "the direction of violence by non-state groups at non-military targets." *Id.* at 48. Tying terrorism to a lack of self-determination, he concludes that the United States should cease economic support of Israel because economic sanctions against South Africa "contributed to [a] reduction of terrorism." *Id.* at 69.

139. All official United States definitions are limited to state sponsorship as a requirement of the self-defense justification. See *infra* notes 165-177 and accompanying text. George Bush, discussing the different types of terrorists, dismisses non-state-sponsored terrorists as beyond the reach of intelligence efforts. ("Terrorists lacking state sponsorship, aid or safehaven tend to be extremely security conscious, keeping their numbers small to avoid penetration efforts." PUBLIC REPORT, *supra* note 10, at 2).



with safe haven.<sup>140</sup>

The next option, creating programs to deal with terrorist incidents as they occur, is a necessary component of a comprehensive counter-terrorism policy.<sup>141</sup> These programs would ideally be flexible strategies based on an established, widely publicized policy statement. Because the proactive/reactive dichotomy does not play a strategic role in such planning, an extended discussion of this area is unnecessary for the purposes of this Note.<sup>142</sup> The controversial constitutional issue for the future is what role the media will play in ongoing terrorist incidents.<sup>143</sup>

The fourth option, leaving terrorists no place to hide after the attack, is primarily the subject of research studying international agreements and extradition treaties. Like the previous response, these are necessary components of a comprehensive counter-terrorism strategy. However effective the preventative programs might be, some terrorist actions likely will slip through. This point has been the subject of much commentary and the proactive/reactive dichotomy would add little to the discussion.<sup>144</sup>

The second temporal response, halting specific terrorists before their operations may be launched, describes in theoretical terms the hypothetical first strike scenario. As stated earlier, a variety of programs could be undertaken to achieve this policy goal.<sup>145</sup> Programs advocating the use of military force on terrorist camps best illustrate the proactive/reactive dichotomy.<sup>146</sup>

---

140. In this light, any time a nation provides any level of support to terrorists, that action could be seen as state-supported. *See generally* Reisman, *No Man's Land: International Legal Regulation of Coercive Responses to Protracted and Low Level Conflict*, 11 HOUSTON J. INT'L L. 317 (1989).

141. Whether one holds proactive or reactive policy goals, a comprehensive counter-terrorism policy must have a structure capable of dealing with all stages of a terrorist action. Thus, even if the goal is to reduce terrorism through preventative programs, programs designed to resolve ongoing acts of terrorism, such as hostage situations, must also be included.

142. Once hostages have been taken, the options are limited to negotiation, diplomatic pressures, or rescue. The operational differences will revolve by necessity around the options of talking or acting.

143. Placing restrictions on the media, such as limiting the direct access to ongoing terrorist situations, is a possibility. *See, e.g.,* Williamson, *Cutting Off the IRA's "Oxygen" - Publicity: Attacking Civil Liberties, or Terrorism*, 101 L.A. Daily Journal, Dec. 14, 1988, at 6, col. 5 (England using the Official Secrets Act to restrict direct media reporting of Irish Republican Army members); see also sources cited *supra* note 4 for wartime press restrictions in the United States (although to declare a state of war would implicate the War Powers Resolution).

144. Part V will describe the major legislative and executive efforts made along this line of inquiry. *See infra* notes 202-276 and accompanying text.

145. *See supra* notes 121-134 and accompanying text.

146. One of the greatest concerns with this type of program is that bombing camps located outside population centers will force the terrorists to shift operations into urban areas. This concern has not been addressed in the executive branch literature except in a passing reference that those who live next door to terrorists should expect to get hurt. *See supra* note 13.

During the Reagan years, advocates of proactive policies made clear, through statement and action, that bilateral and unilateral military programs are viable, if remote, options in the fight against terrorism.<sup>147</sup> The importance of such beliefs lies in their unlikelihood to engender direct challenge from the Court or Congress until such actions have taken place.<sup>148</sup> Much debate has occurred,<sup>149</sup> yet the Legislature has placed neither words of limitation nor approval in statutory form. This inaction could be the deciding factor validating future presidential actions if brought before the Supreme Court.<sup>150</sup> Thus, the dichotomous views on the goals to be served by counter-terrorism policy and the muddled concept of which political branch holds the foreign affairs power combine, determining the potential for unilateral military action. Part V will establish the legislative framework within which the hypothetical scenario may take place.

### C. Foreign Policy by Force: The Shultz Doctrine and Preemptive Self-Defense

The President may exercise the foreign affairs power of the United States in several different ways. These include the negotiation of trea-

---

147. See *supra* note 126; *infra* notes 161, 175. Governor Dukakis, in a campaign debate, stated, "We've got to be tough on terrorism . . . . We have to be prepared to use military force against terrorist base camps . . . . [W]e can give no quarter when it comes to breaking the back of international terrorism." *The Presidential Debate*, N.Y. Times, Sept. 26, 1988, at A16, col.1. This statement resolves, to some extent, the argument that the proactive point of view is a manifestation of the Republican tenure. To the contrary, political science research tends to show an ever-growing lack of party identification on the part of the American electorate. Thus the candidates and parties tailor their platforms and campaigns to the lowest common denominator. Discussing this centrist trend, Neuman states:

[T]he research so far raises the strong possibility that electoral decisionmaking for many typical voters represents essentially issueless politics. . . .

Evaluations of the candidates' policy positions clearly do not dominate the public's thinking [ ]. About 68 percent of the population can articulate a general issue position of at least one candidate which might influence their vote decision.

W.R. NEUMAN, *THE PARADOX OF MASS POLITICS: KNOWLEDGE AND OPINION IN THE AMERICAN ELECTORATE*, 25 (1986). S.M. Lipset states:

[John Clayton Thomas] finds that for nine out of ten industrialized nations (the single exception is the United States), the average difference in party positions on socioeconomic issues has declined . . . . Thomas suggests that the American exception . . . may reflect the "weakness of American parties in implementing their policy positions."

S.M. LIPSET, *POLITICAL MAN: THE SOCIAL BASES OF POLITICS* 561 (1984); see also Lipset's discussion of John Kenneth Galbraith, *id.* at 563 ("the agreement among the major political parties as involving an acceptance of a 'broad macroeconomic, public-service and social-welfare commitment,' planning, welfare and regulatory policies forming a 'consensus . . . of great importance for those of lowest income'").

148. *Lowry v Reagan*, 676 F. Supp. 333 (D.D.C. 1987), is the only time such a presidential action has been challenged.

149. See *infra* note 253 and accompanying text.

150. See *supra* notes 54-72; *infra* notes 151-160 and accompanying text.

ties,<sup>151</sup> formulation of international executive agreements,<sup>152</sup> and finally, a concept of more recent identification, foreign policy by force.<sup>153</sup> The implementation of any exercise of this power is authorized through executive orders,<sup>154</sup> National Security Decision Directives,<sup>155</sup> general policy statements,<sup>156</sup> and oral or written orders by the President to members of the executive branch.<sup>157</sup>

The Executive historically has based foreign affairs decisions on authority described by the three-part test set by Justice Jackson in *Youngstown*.<sup>158</sup> *Youngstown* involved the seizure of steel mills by President

151. See discussion *supra* notes 61-63 and accompanying text.

152. See discussion *supra* notes 64-67 and accompanying text.

153. This concept ties in with what Professor Paust terms the Shultz doctrine. With regard to counter-terrorism, the doctrine is described as "a highly controversial position advocating the use of military force not only against terrorists, but also against states that support, train or harbor terrorists." Paust, *Responding Lawfully to International Terrorism: The Use of Force Abroad*, 8 WHITTIER L. REV. 711, 711 (1986) (footnote omitted); see also *Symposium: The Use of Force Against Terrorist Bases*, 11 HOUSTON J. INT'L L. 307 (1989).

154. Executive orders draw no authority from the Constitution. "An executive order is, therefore, basically a document that the President issues and so designates." Noyes, *Executive Orders, Presidential Intent, and Private Rights of Action*, 59 TEX. L. REV. 837, 839 (1981) (footnote omitted). "Like a federal statute, a 'proper' executive order has the force and effect of law." *Id.* at 841 (footnote omitted).

155. National Security Decision Directives are documents drafted by the State Department (National Security Counsel) and signed by the President authorizing executive branch policies and programs.

156. The general category of presidential statements include a new form of executive communication—presidential signing statements. These are used by the President to incorporate the presidential view of congressional intent into the official record. See generally Cross, *The Constitutional Legitimacy and Significance of Presidential "Signing Statements"*, 40 ADMIN. L. REV. 209 (1988); Note, *Let Me Tell You What You Mean: An Analysis of Presidential Signing Statements*, 21 GA. L. REV. 755 (1987).

157. These last three authorization expressions are perhaps the most complicated in terms of review or checks on presidential authority. An example of this is the difficulties encountered in the attempt to establish a paper trail of authority in the Iran-Contra affair. Another illustration may be found through a comparison of Executive Order No. 12,333 (publicly stating that the CIA (Central Intelligence Agency) and other intelligence agencies may not engage in assassination), with NSDD 138 (secretly establishing the formation of CIA strike teams as part of the overall counter-terrorism effort). See *infra* notes 178-186 and accompanying text for a discussion of these two documents; Exec. Order No. 12,333 update, *infra* notes 316-321 and accompanying text.

158. 343 U.S. 579 (1952) (Jackson, J., concurring). The three criteria are:

[W]hen the President acts pursuant to an express or implied authorization from Congress, his authority is at its maximum . . . .

When the President acts in absence of either a congressional grant or denial of authority, he can only rely upon his own independent powers . . . [t]herefore congressional inertia, indifference or quiescence may sometimes . . . enable, if not invite, measures on independent presidential responsibility . . . .

When the President takes measures incompatible with the expressed or implied will of Congress, his power is at its lowest ebb, for then he can rely only upon his own constitutional powers minus any constitutional powers of Congress over the matter.

*Id.* at 635-37.

Truman. Truman feared that a strike anywhere in the steel industry would halt production necessary to support the Korean war effort. Drawing authority from past seizure cases, the Court refused to uphold this exercise of the presidential power.<sup>159</sup>

Such a common-law history does not exist in the counter-terrorism area. Thus, the lack of readily discernible constitutional authority leaves foreign policy decisions in the second, "zone of twilight" category of Justice Jackson's three-part test.<sup>160</sup> This occurs when congressional inaction, passive or active, leaves the President without a legislative policy direction in his programmatic efforts.

The President is free, in the circumstances outlined above, to act with dispatch so long as Congress and the Constitution do not forbid the action. In the area of counter-terrorism specifically, and any other exercise of the foreign affairs power generally, the proactive/reactive dichotomy is heightened by the executive branch desire to exert power over new foreign affairs areas before congressional preemption may take place.<sup>161</sup>

Whether or not an effective counter-terrorism policy demands a strong presidential authority, Congress has the ability to place restrictions on this executive power if it so chooses.<sup>162</sup> Unfortunately, the reactive constraints on legislative decision making have prevented such action. The constitutionality of such restrictions would be a question ripe for judicial review if challenged by the President and then presented to the judicial branch by a unified Congress.<sup>163</sup> Members of the legislative branch have raised objections to most active antiterrorism measures taken by the President.<sup>164</sup> They have not, however, done so in a fashion that would establish precedent for judicial review of presidential military counter-terrorism efforts.

The Schultz doctrine,<sup>165</sup> termed here foreign policy by force, may be associated with proactive power grabs in United States foreign affairs. In

---

159. *Id.* at 585.

160. *Id.* at 637.

161. It must be noted that Congress is not always so quick to usurp presidential authority in antiterrorism policies. *See* S. 2335, 99th Cong., 2d Sess. (1986), copresented by Senators Denton and Dole, Anti-Terrorism Act of 1986, which defined "terrorism as an act of aggression against the United States which triggers the President's authority to pursue terrorists with deadly force, if necessary." Denton, *The Role of the Senate Subcommittee on Security and Terrorism in the Development of U.S. Policy Against Terrorism*, 13 OHIO N.U.L. REV. 19, 24 (1986); *see also*, Proposed House Bill 4611, *War Powers Hearing*, *supra* note 6, at 219 (granting essentially the same authorization).

162. *See Lowry*, 676 F. Supp. at 339; *see also* discussion of the War Powers Resolution, *infra* notes 241-252 and accompanying text.

163. *Lowry*, 676 F. Supp. at 339.

164. *See supra* notes 30-72, 151-160 and accompanying text.

165. The Shultz doctrine was first presented on January 15, 1986. Faust, *supra* note 153, at 711.

a speech at the National Defense University, former Secretary of State George Shultz stated that “[i]t is absurd to argue that international law prohibits us from capturing terrorists in international waters or airspace, from attacking them on the soil of other nations even for the purpose of rescuing hostages, or from using force against states that support, train and harbor terrorists or guerrillas.”<sup>166</sup> Shultz, following the Reagan administration agenda, justified this statement with a self-defense rationale.<sup>167</sup>

The international justification for military strikes in response to terrorism is found in Article 51 of the United Nations Charter.<sup>168</sup> This provides a self-defense exception to the general prohibitions against the use of force.<sup>169</sup> Whether the international community will accept such a defense is not clear. It is argued that the use of force in counter-terrorist situations is unlawful both because the Shultz doctrine is too broad<sup>170</sup> and because it lacks the imminent harm element usually required in pleading a self-defense justification.<sup>171</sup>

The probable executive branch response to the first issue is that to be effective, “proactive” measures require general policy statements in the same way a general definition for terrorism is necessary.<sup>172</sup> The second argument is not so easily dismissed.

In many ways a self-defense rationale for actions that precede or follow a terrorist action is not unlike the claims made by proponents of the Battered Woman Syndrome defense.<sup>173</sup> Shultz, in essence, argues

---

166. *Id.* (citing 25 I.L.M. 204, 206 (Jan. 1986)).

167. *Id.* at 730 nn. 66-67. For political reasons, all such actions will be justified in terms of self-defense. Retaliation solely for the sake of revenge is too difficult a concept to justify under any interpretation of international law. However, the *hostis humani generis* argument, see *infra* note 301 and accompanying text, may make such justifications unnecessary. See also Schachter, *supra* note 98, at 311.

168. U.N. CHARTER art. 51 (“Nothing in the present Charter shall impair the inherent right of individual or collective self-defence if an armed attack occurs against a Member of the United Nations.”). For an extended discussion of Article 51, see Reisman, *supra* note 140, at 319.

169. Paust, *supra* note 153, at 716. See also Hatch, *supra* note 94, at 12-13; D. MARTIN & J. WALCOTT, *supra* note 4, at 290.

170. “It is clear that the ‘Shultz doctrine’ is too broad to the extent that the Secretary has advocated an unqualified use of force against terrorists on ‘the soil of other nations.’” Paust, *supra* note 153, at 723 (footnote omitted); see also Schachter, *supra* note 98, at 311-15 (basic requirements that must be met before engaging military forces).

171. Paust, *supra* note 153, at 730. The four elements of a self-defense claim are a belief of imminent danger of unlawful bodily harm, the use of a reasonable amount of force in countering the threat, that the actor was not the initial aggressor, and sometimes, that there was no available avenue of retreat. W. LAFAVE & A. SCOTT, HANDBOOK ON CRIMINAL LAW 391-95 (1972).

172. See *supra* notes 14, 96, 104 and accompanying text.

173. See generally L. WALKER, THE BATTERED WOMAN SYNDROME (1984). But see Note, *The Battered Woman Syndrome and Self-Defense: A Legal and Empirical Dissent*, 72 VA. L. REV. 619 (1986).

that even though time may elapse between the triggering action and the future acts of terrorism, the United States is subjected to continuing terror, thus fulfilling the imminent harm requirement.<sup>174</sup> There is a long record of executive branch statements justifying preemptive or retaliatory strikes on continuous states of terror.<sup>175</sup> A combination of these statements and certain, now public, evidence<sup>176</sup> indicates that the State Department is willing to take proactive measures with or without an effective claim of self-defense.<sup>177</sup>

174. See *infra* note 195 (Shultz' statement alluding to the continuous nature of Libya's acts justifying the response). Whether such a counter-terrorism defense is internationally acceptable is debatable:

[N]ew corollaries have established an asymmetrical regime in which certain uses of force by certain groups for certain purposes are legitimate even though they involve use of coercion against the territorial integrity or political independence of another targeted state. Conversely, coercive responses which were formally considered self-defense are now characterized by this law-making process [United Nations Charter] as themselves unlawful uses of force.

Reisman, *supra* note 140, at 322.

Still, Israel long has used such a justification for preemptive attacks. On the subject of Israel and retaliatory attacks, see *id.* at 317, 328; Schachter, *supra* note 98, at 312, 314.

175. By this logic, the President may claim that the object of the strike had forewarning. Examples of such proactive pronouncements include: a Carter memo stating the "need . . . for a responsive, but extremely flexible, antiterrorism program . . . that would take into account both the contemporary nature of the terrorist threat and the wide range of federal resources that would have to be marshalled . . ." M. CELMER, *supra* note 5, at 19. Senator Denton, speaking of subcommittee hearings over a six year period that "have yielded abundant and conclusive evidence of a network, a global unity in the sources of support, strategy, tactics, and goals of international terrorists. . . [This unity, tied to Libya, is] corroborated by the events leading up to the April 15 airstrike." Denton, *supra* note 161, at 19-20. Senator Hatch states that "[i]f we as a nation cannot act multilaterally, if we cannot act bilaterally, then we must—and we will—act unilaterally." Hatch, *supra* note 94, at 13; Reagan—Public Statements, 22 WEEKLY COMP. PRES. DOC. 22, 24, 41, 44, 177, 444-45, 464, 494 (Jan. 7 and 17, Feb. 6, Apr. 5, 9, and 15, 1986). Ambassador Oakley declared the "need for more offensive, active measures if the spread of terrorism is to be stopped." Oakley, 86 DEP'T ST. BULL. 7 (Aug. 1986). Most recently, President Bush states: "We will [exert], if necessary, military pressure on states which sponsor terrorism . . . . Terrorism, as common street crime, may never be totally eradicated, but we can reduce it to a more tolerable level." Bush, TERRORIST GROUP PROFILES, *supra* note 2, at iii-iv.

176. See discussion of National Security Decision Directive 138, *infra* notes 178-187 and accompanying text.

177. Whether the claim of self-defense is proper, the Executive will be likely to attempt at least this level of justification. President Reagan, for example, made the self-defense justification for the Libya bombing quite clear:

These strikes were conducted in the exercise of our right of self-defense under Article 51 of the United Nations Charter . . . .

Should Libyan-sponsored terrorist attacks against the United States not cease, we will take appropriate measures necessary to protect United States citizens in the exercise of our right to self-defense.

In accordance with my desire that Congress be informed on this matter, and consistent with the War Powers Resolution, I am providing this report on the employment of the United States Armed Forces. These self-defense measures were undertaken pursuant to my authority under the Constitution, including my authority as Commander in Chief of the United States Armed Forces.

National Security Decision Directive 138 (NSDD 138) was signed by President Reagan on April 3, 1984.<sup>178</sup> The directive called for increased covert activities and counterintelligence operations to be planned by newly established military and CIA strike teams.<sup>179</sup> The document states that “the United States government considers the practice of terrorism by any person or group in any cause a threat to our national security.”<sup>180</sup> The next day, President Reagan commented obliquely on the new policy, stating only “I don’t think . . . that we’re going to get more militant or anything.”<sup>181</sup> A few weeks after President Reagan’s statement, administration officials leaked the news that “one of the key elements of the policy [NSDD 138] is an effort to switch from defensive to offensive action.”<sup>182</sup> These officials were careful to state that the prohibition that Executive Order Number 12,333<sup>183</sup> had placed on United States sponsored assassinations had not been lifted.<sup>184</sup> Political rhetoric aside, NSDD 138 is evidence of the proactive executive branch attitude toward terrorists: to at least have the capability to engage in military counter-terrorism actions.

The evolution of NSDD 138 is a study in the move “from the reactive mode to recognition that proactive steps [were] needed.”<sup>185</sup> The Reagan years have thus been typified by the watchwords—“swift and

---

Letter to the Speaker of the House and the President Pro Tempore of the Senate, 22 WEEKLY COMP. PRES. DOC. 499-500 (Apr. 16, 1986). For a discussion of the aftermath of the Libya bombing, see *infra* note 196 and accompanying text.

178. M. CELMER, *supra* note 5, at 3.

179. *Id.*

180. D. MARTIN & J. WALCOTT, *supra* note 4, at 157 (the preamble states that national security emergency powers will support the presidential exercise); see also Exec. Order No. 12,636, Assignment of Emergency Preparedness Responsibilities, § 101(a) (national security emergency policy established by the President through the National Security Council), 24 WEEKLY COMP. PRES. DOC. 1523 (1988).

181. *News Conference of April 4, 1984*, 84 DEP’T ST. BULL. 8 (May 1984) (President Reagan was questioned on the new policy after Secretary of State Shultz alluded to the possibility of increased military action).

182. N.Y. Times, Apr. 17, 1984, at A3, col. 1; Christian Science Monitor, Apr. 18, 1984, (News in Brief) at 2, col. 2.

183. Exec. Order No. 12,333, 3 C.F.R. 200 (1982).

184. Commentators also are careful to distinguish that the NSDD 138 authorization does not permit killings. Perhaps euphemistically, the language utilized was in terms of “neutralization.” M. CELMER, *supra* note 5, at 87; D. MARTIN & J. WALCOTT, *supra* note 4, at 156-157. Exec. Order No. 12,333, restructuring the functions of the intelligence community, prohibits assassination by “any person employed by or acting on the behalf of the United States Government.” Exec. Order No. 12,333, 3 C.F.R. 200, 213 (1982); see update on Exec. Order No. 12,333, *infra* notes 317-321 and accompanying text.

185. Washington Post, Apr. 16, 1984, at A19, col. 4 (interview with former Assistant Secretary of Defense, Noel C. Koch).

effective retribution.”<sup>186</sup> The directive has never been utilized,<sup>187</sup> but it is important to keep in mind the lengths to which the proactive policy search has gone. The issue has been raised that so long as the United States plays by legal rules, she cannot win a battle fought with those not so constrained.<sup>188</sup> The doctrine of foreign policy by force is not one borne of necessity so much as created out of frustration with the rules of the game. For this reason it is important to have a measure of congressional control over counter-terrorism policy.

Congressional reaction to the Shultz doctrine has been mixed.<sup>189</sup> As stated above,<sup>190</sup> it has been the lack of congressional unity that has prevented any adjudication of this aspect of the separation of powers allocation.<sup>191</sup> Foreign policy by force has not been fully accepted by all members of the executive branch either. President Bush, former Secretary of Defense Weinberger, and President Reagan are on record reserving opinion on military actions as a first line of counter-terrorism defense.<sup>192</sup> Yet, the executive branch has not drawn the distinction on whether a situation dictates such action, but rather, whether the chances of immediate success justify the risk of possible embarrassment arising from an unsuccessful military engagement.<sup>193</sup>

Military actions against terrorist training camps and staging areas are predicated on a clear targeting strategy.<sup>194</sup> For example, the shelling

---

186. President Reagan first used this phrase on the White House lawn on January 27, 1981: “Let terrorists beware that when the rules of international behavior are violated, our policy will be one of swift and effective retribution.” D. MARTIN & J. WALCOTT, *supra* note 4, at 43.

187. *Id.* at 157.

188. *Id.* at 124-28.

189. *See supra* notes 153-175 and accompanying text.

190. *See supra* notes 43-54 and accompanying text.

191. *Lowry*, 676 F. Supp. 333, 339 (D.D.C. 1987).

192. Celmer states that both Bush and Weinberger were opposed to the implementation of the Schultz doctrine. M. CELMER, *supra* note 5, at 68. President Reagan announced a similar view at a Veteran’s Day Address on November 11, 1988. 24 WEEKLY COMP. PRES. DOC. 1483 (1988) (“we can all agree that we’ve learned one lesson: that young Americans must never again be sent to fight and die unless we are prepared to win”).

193. PUBLIC REPORT, *supra* note 10, at 13 (“Use of our . . . military forces offers an excellent chance of success if a military option can be implemented . . . depend[ing] on timely and refined intelligence and prompt positioning of forces . . . operations which can have a severe impact on U.S. prestige if they fail.”). This leads to a secondary level concern—the potential that even successful military counter-terrorism actions on foreign soil could lead to terrorist activities within the continental United States. This line of reasoning follows the adage that violence breeds violence. Without a real measure of the deterrent value of military antiterrorist actions, this reasoning cannot be debated. *See, e.g.*, L.A. Times, Apr. 17, 1986, pt. 1, at 23, col. 2 (George Shultz, when asked “if he was not concerned that Kadafi would launch” renewed terrorist actions in retaliation for the April 14, 1986 bombing of Libya, replied, “[w]hat he’s now doing is a continuation of what he has been doing.”).

194. D. MARTIN & J. WALCOTT, *supra* note 4, at 286; Also, President Reagan, addressing Congress after the Libya strike, stated: “These targets were carefully chosen, both for their direct linkage to Libyan support of terrorist activities and for the purpose of minimizing collat-



of Lebanon, arguably to strike back at terrorists, was completed with a minimum of efficacy and a maximum of damage and injury to the civilian population.<sup>195</sup> The use of urban settings to shelter the terrorists in Lebanon made clear targeting an impossibility. Any time civilians are killed, the retaliatory or preemptive arguments for military strikes are lessened. Moreover, there is the danger that out of the death of innocents will come a new cadre of disaffected civilians with a legitimate grievance against United States policies.<sup>196</sup>

Another example of the limiting nature of proactive programs is the lack of consideration given by the executive branch to the effect that counter-terrorist programs may have on potential acts of domestic terrorism. The United States has the largest open border in the world.<sup>197</sup> Add to this the easy access to electrical power grid lines and oil and chemical production and storage facilities,<sup>198</sup> and the concern about domestic terrorism takes on a new specter. Assuming, for the sake of argument, that the Federal Bureau of Investigation (FBI) and other intelligence agencies could stop all incoming terrorist groups,<sup>199</sup> there remains the possibility that United States nationals will offer their services as "terrorists for hire."<sup>200</sup> Domestic terrorism resulting from military action is raised only implicitly in the *Public Report*. Concern with the

---

eral damage and injury to innocent civilians." 22 Weekly Comp. Pres. Doc. 499 (Apr. 16, 1986).

195. D. MARTIN & J. WALCOTT, *supra* note 4, at 151-52.

196. For example, Celmer suggests that Khaddafi actually may have been strengthened by the 1986 United States attack as a result of popular outrage over the *direct* attempt on his life. M. CELMER, *supra* note 5, at 66 (emphasis added). *Contra* President Reagan, "Sometimes it is said that by imposing sanctions against Colonel Qadhafi or by striking at his terrorist installations we only magnify the man's importance . . . I do not agree." 22 Weekly Comp. Pres. Doc. 491 (Apr. 14, 1986).

197. Senator Hatch provides the following statistics about the ease with which aliens can gain illegal access to the United States. "For fiscal year 1985, the Immigration and Naturalization Service (INS) Border Patrol apprehended the startling number of 1,262,435 illegal aliens, 94 percent of whom were encountered on the Mexican border, which is 1,950 miles long. In the first four months of fiscal year 1986, apprehensions of illegal aliens increased more than 43 percent . . ." Hatch, *supra* note 94, at 9. Hatch continues, providing the statistic that for every person apprehended, at least one more evades the Border Patrol. *Id.* at 9-10.

198. "Our [domestic] vulnerability lies, ironically in the strength of our open society and highly sophisticated infrastructure. Transportation, energy, communications, finance, industry . . . rely on intricate interrelated networks." PUBLIC REPORT, *supra* note 10, at 6; *see also* *Hearing of the Senate Governmental Affairs Committee: Responses to Terrorism*, 101st Cong., 1st Sess. (1989) (referring to hearings earlier in the year "on our government's efforts to protect our domestic infrastructure—electric utility systems, power systems, informational systems from terrorist attack").

199. President Bush states that 23 attempts at domestic terrorism were thwarted by the FBI in 1985. PUBLIC REPORT, *supra* note 10, at 5.

200. A Chicago drug gang that offered its services to Libya is presently in federal prison. Liddy, *Terrorists in America: An Insider's Memo to the President*, 11 OMNI MAGAZINE 42, 44 (Jan. 1989).

military response is the possibility of a "severe negative impact on United States prestige if [it] fail[s]."201

Three points must be emphasized at the conclusion of this discussion of the foreign affairs power and counter-terrorism activities. First, the Court's use of inconsistent notions of presidential power has added to the separation-of-powers tension designed into the political system. Second, the cases cited above, *Rossi*, *Dames & Moore*, and *Chadha*, when considered alongside the poor legislative definition of terrorism and the uncertain political consequences of counter-terrorism policy, tend to give the Executive greater latitude than he or she might otherwise seek. Finally, the evolution of the Shultz doctrine makes the hypothetical scenario presented in Part II that much less abstract. Specific statutes and executive counter-terrorism efforts are presented in Part V to establish the framework of analysis for the preemptive strike scenario.

## V. United States Antiterrorism Policy: The Band-Aid Approach

### A. Legislative Action

The legislative history of antiterrorism policy reflects noble efforts hampered by at least four separate problems.<sup>202</sup> It is no wonder, faced with the difficulties encountered in providing a definition,<sup>203</sup> the political realities,<sup>204</sup> the Court-imposed need to preempt as much foreign policy power as possible before the Executive may usurp the chance, and the operational tenterhooks engendered by American citizens still held hostage, that Congress has adopted such a tentative and inconsistent program. A House sponsored report lists twenty-eight separate pieces of legislation relating to the control of terrorism.<sup>205</sup> As stated earlier, the Ninety-Ninth Congress alone faced twelve separate counter-terrorism bills.<sup>206</sup> These proposals varied from strengthening the War Powers Res-

---

201. *Id.* More recently, President Bush has followed the Shultz lead regarding the loss of innocent lives: "In our fight against terrorism, we are going to suffer casualties. And, as in any conflict, the innocent suffer. Our aim is to minimize the price the American People and other innocents pay." TERRORIST GROUP PROFILES, *supra* note 2, at iv.

202. Senator Hatch relates an anecdote about the efficacy of congressional efforts with a comment by Edward Hale, longtime Chaplain for the Senate. "At one point, someone asked him, 'Do you pray for the Senators, Dr. Hale?' 'No,' he replied, 'I look at the Senators and pray for the country.'" Hatch, *supra* note 35, at 1025.

203. See *supra* notes 86-95 and accompanying text.

204. See *supra* note 107 and accompanying text.

205. HOUSE REPORT, *supra* note 6, at XI-XII (not including the many multilateral and bilateral agreements in force).

206. See *supra* note 102.

olution<sup>207</sup> to delegating the President free reign in terrorism-related issues.<sup>208</sup> This section will present the legislation specific to counterterrorism and the executive powers granted or subsumed by Congress. These statutes then will be applied in Part VI to the hypothetical scenario to test the legality of preemptive military action.

The *House Report* divides the terrorism-related legislation into five categories,<sup>209</sup> each of which falls within the parameters of reactive policies.<sup>210</sup> The foreign assistance, trade and financial, and treaty-implementing sections are geared to address the easily recognizable manifestations of state-supported terrorism.<sup>211</sup> The State Department legislation creates and delegates authority to a bureaucracy responsible for hostage relief,<sup>212</sup> trade sanctions,<sup>213</sup> and the ratification of international conventions and agreements.<sup>214</sup> Some proactive legislative policies are found in the conventions on preventing aircraft seizures and protecting nuclear material.<sup>215</sup> Still, only two of the twenty-eight listed Acts direct terrorism-specific punishments.<sup>216</sup> This morass of legislation illustrates that Congress is generally responsive to two factors—presidential mandates<sup>217</sup> and the placement of issues on the political agenda by non-governmental factors.<sup>218</sup> Three specific antiterrorism acts highlight the

---

207. S.J. Res. 340, to amend the War Powers Resolution to establish a permanent body for the purposes of consultation as required in section 3 under the resolution, *War Powers Hearing*, *supra* note 6, at 216.

208. Text of H.R. 4611, to protect United States citizens from terrorism, *id.* at 219; *see also* Denton, *supra* note 161, at 24 (S. 2335—"[i]n order to clarify the President's authority to take action to prevent or punish terrorists").

209. HOUSE REPORT, *supra* note 6, at XI-XII. These categories include foreign assistance and related legislation, legislation granting authority to the Department of State, trade and financial legislation, treaty-implementing legislation, and other legislation.

210. *See supra* notes 97-98 and accompanying text.

211. *See supra* note 93 for this definition.

212. This includes educational assistance to the families of hostages (Omnibus Act, *supra* note 78) and providing funds for hostage crisis and intelligence activities (Security & Development Act, Pub. L. No. 99-83, 99 Stat. 219 (1985) [hereinafter Sec. & Dev. Act]).

213. These laws authorize the President to declare economic sanctions. *See, e.g., National Emergency With Respect to Libya, Message From the President of the United States*, HOUSE REPORT, *supra* note 6, at 762 (letter to Congress explaining Exec. Order No. 12,543, pursuant to 50 U.S.C. 1703 (Supp. 1990) and to Sec. & Dev. Act, *supra* note 212, § 505(c)).

214. HOUSE REPORT, *supra* note 6, at 125-52.

215. *Id.*

216. *See* Pub. L. No. 94-467, 90 Stat. 1997 (1976), internationally protected persons, and Pub. L. No. 99-177, 99 Stat. 1037 (1985), specific to the Achille Lauro hijackers.

217. The President attempts to guide the congressional agenda in at least two counterterrorism situations: directing the political agenda toward a show of force, and requesting appropriations. It is difficult for Congress to ignore either plea if that President has the ear of the populace. *See, e.g., President Proposes Legislation to Counter Terrorism*, 84 DEP'T ST. BULL. 65-66 (Apr. 1984).

218. Examples of this would include the public response to the Achille Lauro piracy, the many airplane hijackings, and the embassy bombings.

legislative responsiveness as it impacts the congressional ability to oversee executive action.

The Foreign Assistance Act of 1961<sup>219</sup> is the starting point for most analyses of counter-terrorism legislation. Part Two of this Act, entitled the International Peace and Security Act of 1961, sets forth this original congressional intent:

In enacting this legislation, it is therefore the intention of the Congress to promote the peace of the world and the foreign policy, security, and general welfare of the United States by fostering an improved climate of political independence and individual liberty, improving the ability of friendly countries and international organizations to deter, or if necessary, defeat Communist or Communist-supported aggression . . . .<sup>220</sup>

Congress has amended this Act every year since its codification. These amendments have run the foreign affairs spectrum, including such divergent concerns as the rise of nonpeaceful uses of atomic energy<sup>221</sup> and the specific coordination of United States antiterrorism assistance to foreign countries.<sup>222</sup> The Security and Development Act of 1985 amended the Foreign Assistance Act, adding, among other sections, Title V—International Terrorism and Foreign Airport Security.<sup>223</sup>

The 1985 Act served the following functions: granting appropriations for the new assistance program;<sup>224</sup> making the Secretary of State “responsible for coordinating all antiterrorism assistance”;<sup>225</sup> granting the presidential authority to deny economic assistance and import allowances to countries supporting terrorism;<sup>226</sup> singling out Libya with a ban on imports and exports;<sup>227</sup> and calling on all civilized nations to condemn state terrorism.<sup>228</sup>

Along with these administrative functions, the 1985 Act granted the President the authority to “seek the establishment of an international committee . . . to focus the attention and secure the cooperation of the governments and the public of the participating countries . . . on the problems and responses to international terrorism.”<sup>229</sup> Section 507 directed the President to seek a process to reach international agreement

219. 22 U.S.C. §§ 2151-2429 (1982 & Supp. IV 1986).

220. § 502, 107 CONG. REC. 17,832 (Aug. 31, 1961). This point of view may not have changed so greatly over the years. See statement of Sen. Denton, *supra* note 161.

221. 108 CONG. REC. 13,439 (amending Part I, § 101).

222. 22 U.S.C. § 2349aa-7 (Supp. IV 1986).

223. Codified as Part VIII, Anti-Terrorism Assistance, 22 U.S.C. §§ 2349aa-2349aa-9 (Supp. IV 1986) [hereinafter 1985 Act].

224. *Id.* § 2349aa-4.

225. *Id.* § 2349aa-7.

226. *Id.* §§ 2349aa-9, 2371.

227. *Id.* § 2349aa-8.

228. 1985 U.S. CODE CONG. & ADMIN. NEWS: LAWS (99 Stat.) 222.

229. *Id.*

on a treaty which would "prevent and respond to terrorist acts."<sup>230</sup>

The Foreign Assistance Act and its progeny were implemented through a series of Executive Orders culminating in Executive Order Number 12,608.<sup>231</sup> A glimpse at the number of implementing orders since 1961 provides insight into the congressional desire to create an omnibus act to simplify the administration of the counter-terrorism laws.

The Diplomatic Security section of the Omnibus Act (Title I) is designed "as a response to the new and profoundly difficult security-related challenges confronting United States Government personnel and missions abroad."<sup>232</sup> Title V is "intended to enhance the Department of State's ability to deal with the growing threat of international terrorism."<sup>233</sup> These provisions establish such things as an international terrorists most wanted list<sup>234</sup> and a reward authorization for information on terrorists and international drug traffickers.<sup>235</sup> Title VII reinforces the language in the 1985 Act, delegating the search for an international agreement on counter-terrorism to the President.<sup>236</sup> The omnibus style of the Act is admirable but, at the same time, it has been suggested that the drafting efforts actually leave much to be desired.<sup>237</sup> The combination of new and old antiterrorism programs<sup>238</sup> did little to correct the ambiguous delegations and lack of any functional definition.<sup>239</sup> There is also little oversight legislation directed at limiting the President's ability

---

230. *Id.* These last two points will become crucial in the analysis of the hypothetical situation as evidence of congressional over-delegation. *See infra* notes 286-289 and accompanying text.

231. 52 Fed. Reg. 34,617 (Sept. 14, 1987).

232. 1986 U.S. CODE CONG. & ADMIN. NEWS: LEGISLATIVE HISTORY 1872. A better statement, given the twelve bills presented for consideration that session, would claim that the one thing Congress could agree on was that the embassy bombings indicated the need for greater security measures.

233. *Id.* at 1886. This statement illustrates the congressional willingness to delegate working control to the executive branch.

234. *Id.*; *see, e.g.*, TERRORIST GROUP PROFILES, *supra* note 2.

235. 1986 U.S. CODE CONG. & ADMIN. NEWS: LAWS (100 Stat.) 869.

236. *Id.* at 878.

237. Note, *supra* note 103, at 145 ("the Antiterrorism Act as enacted probably will not succeed in obtaining the extradition and prosecution of terrorists who attack U.S. nationals abroad").

238. These include cash benefits for hostages and their families, increased maritime and nuclear security, a fellowship program to increase the number of individuals able to understand Eastern European and Soviet culture and language, and even a request that the United Nations deny former Secretary General Waldheim his pension. 1986 U.S. CODE CONG. & ADMIN. NEWS: LAWS (100 Stat.) 801-08, 901-13, 1001-5, 1303.

239. The Omnibus Act, *supra* note 78, renews the congressional call for the encouragement of a criminal punishment convention to provide "an explicit definition of conduct constituting terrorism." 1986 U.S. CODE CONG. & ADMIN. NEWS: LAWS (100 Stat.) 895-96. The United Nations has approved several definitions of terrorism over the years, but the United States has yet to agree. Levitt, *International Counterterrorism Cooperation: The Summit Seven and Air Terrorism*, 20 VAND. J. TRANSNAT'L L. 259 (1987).

to launch proactive programs such as that suggested by the preemptive strike hypothetical scenario. Some argue that the War Powers Resolution inserts such congressional input and guarantees eventual control over exercises of presidential power. Given the Resolution and the lessons learned from *Lowry v. Reagan*,<sup>240</sup> this point is subject to a great deal of debate.

The War Powers Resolution Act of 1973, passed in response to the Vietnam War and Watergate scandal,<sup>241</sup> intended to limit the power of the Executive to engage United States forces in prolonged military conflicts.<sup>242</sup> Section Three "require[s] the President to consult Congress in every possible instance before engaging in hostilities, actual or potential."<sup>243</sup> This consultation provision, along with the ninety day time limit after which congressional authorization becomes mandatory,<sup>244</sup> is in direct conflict with any implied power of the Executive to commit United States forces.<sup>245</sup> Although the War Powers Resolution was directed toward conventional warfare, the Chairman of the House Committee of Foreign Affairs "rejected the idea that it somehow fell outside the law or obviated the need to consult with Congress as the policymaking branch of the Federal Government" in counter-terrorism situations.<sup>246</sup>

Since its passage, every president has criticized the War Powers Resolution on constitutional grounds.<sup>247</sup> Abraham Sofaer, State Department legal advisor, claimed that "the manner of complying with the [consultation] requirement [is] largely to be determined by the President."<sup>248</sup> He continued, "the threat of a possible hostile response is not sufficient to trigger the consultation requirement . . ."<sup>249</sup> The executive branch does not view preemptive military counter-terrorism actions as falling under the purview of either Congress or the War Powers Resolu-

240. 676 F. Supp. 333 (D.D.C. 1987).

241. 50 U.S.C. § 1541 (1982 & Supp. IV 1986); *War Powers Hearing*, *supra* note 6, at 96.

242. *War Powers Hearing*, *supra* note 6, at 94-95.

243. *Id.* at 155 (summary statement of Archibald Cox).

244. 50 U.S.C. § 1543(c) (1982 & Supp. IV 1986).

245. Abraham D. Sofaer, legal advisor, Department of State, notes that "the President has independent powers in the area [of engagement in hostilities] . . . supplemented by statutory grants of authority such as a provision in the 1986 DOD [Department of Defense] Authorization Act that states the Government's duty to safeguard U.S. citizens against terrorism." *War Powers Hearing*, *supra* note 6, at 98. Note the distinction between DOD powers and CIA powers made in the reinterpretation of Exec. Order No. 12,333, *infra* notes 317-321 and accompanying text.

246. *War Powers Hearing*, *supra* note 6, at 94. J. Brian Atwood noted that "members of Congress . . . have infinitely more experience in dealing with military and foreign affairs than White House functionaries." *Id.* at 102.

247. *Lowry v. Reagan*, 676 F. Supp. at 336 n.20.

248. *War Powers Hearing*, *supra* note 6, at 95-96. ("Moreover, since the law called for consultation 'in every possible instance . . . consultation in a particular case will depend on the prevailing circumstances.'" *Id.* at 96 (emphasis added)).

249. *Id.* at 97.

tion.<sup>250</sup> Thus, even though there has been congressional discussion and action over this facet of the battle of the foreign affairs power, the issue is far from settled.<sup>251</sup> As presented in the Part IV, if Congress is to test the constitutionality of the Resolution, it must do so by joint action requiring presidential compliance.<sup>252</sup>

It is important to note the chronology of the *War Powers Hearings* cited above to the passage of the Omnibus Act. The hearings took place in April and May of 1986, arising out of the Libya bombing of April 14. Yet, although both Houses passed the Omnibus Act on August 12, 1986,<sup>253</sup> there is no mention of a heightened reporting standard for military counter-terrorism actions. Title III establishes a performance and accountability review board, but this functions primarily to review security failures at diplomatic missions.<sup>254</sup> The Omnibus Act includes several reporting requirements, but these are designed more to give Congress an update on the implementation of the Act than to review or limit the authorities granted the President.<sup>255</sup>

## B. The Executive Record

The foreign affairs section presented the administrative options for executive action, both through legislative mandate and inherent presidential authority.<sup>256</sup> The *House Report* lists fifteen separate executive branch documents implementing antiterrorism legislation from 1977 to 1986.<sup>257</sup> Another facet of executive branch activity is the Economic Summit Conference Statements.<sup>258</sup> These conferences began as an attempt to further economic cooperation between the several countries,<sup>259</sup> but soon evolved into "a tradition of gathering every year to discuss issues of mutual concern."<sup>260</sup> The first joint statement on international terrorism was issued on July 17, 1978, at the Bonn Summit.<sup>261</sup> Each succeeding summit conference has issued some sort of continuing message on the original Bonn

---

250. The War Powers Resolution has never been officially invoked by joint resolution of Congress. Had it been, there is the possibility the judicial branch would have been involved and much of this discussion would be moot.

251. Sofaer "questioned the application of the War Powers Resolution to . . . self-defense activities to preempt and deter unlawful aggression by means of state-sponsored terrorism." *War Powers Hearing, supra* note 6, at 98.

252. *Lowry*, 676 F. Supp. at 339.

253. 1986 U.S. CODE CONG. & ADMIN NEWS: LEGISLATIVE HISTORY 1865.

254. 22 U.S.C. § 4831 (Supp. IV 1986).

255. *Id.* at §§ 705, 913, 1103.

256. *See supra* notes 158-164 and accompanying text.

257. HOUSE REPORT, *supra* note 6, at XII.

258. *Id.* at 199-207.

259. Participants include Canada, the Federal Republic of Germany, France, Italy, Japan, the United Kingdom, and the United States.

260. Levitt, *supra* note 239, at 264.

261. *International Terrorism*, 78 DEP'T ST. BULL. 2018, at 5 (1978).

Declaration.<sup>262</sup> One commentator summarized the effect of the Summit Statements as follows: "the real world is probably not going to fit very comfortably into the simple model of 'refus[ing] extradition or prosecution' envisioned in the words of the Bonn Declaration. . . [T]o implement it meaningfully, a decision-making process capable of assessing complex legal and factual variables . . . and acting on them, must exist."<sup>263</sup>

The *House Report* also lists bilateral agreements on aviation security to which the United States is a party.<sup>264</sup> Yet the most crucial element of presidential counter-terrorism programs is not the authorization and development of policy, but the implementation process itself. Because the NSC and CIA lead the present bureaucracy, there is virtually no nonexecutive branch representation in the decision making and policy guidance of day-to-day United States antiterrorism efforts.<sup>265</sup> This results from a series of executive steps delimiting a working task force to design counter-terrorism policy and programs.

On October 2, 1972, the Nixon/Ford Cabinet Committee to Combat Terrorism met for the first and last time.<sup>266</sup> The committee's stated purpose was "to prevent and respond swiftly to international terrorism."<sup>267</sup> After this date, a small working group performed the tasks of the larger organization. The lack of any interdepartmental intelligence cooperation and an equal lack of cooperation between the members themselves complicated the group's efforts.<sup>268</sup> President Carter restructured the anti-terrorist bureaucracy<sup>269</sup> under the auspices of the National Security Council in September 1977.<sup>270</sup> Carter hoped to avoid the problems that faced the predecessor committee by keeping the decision making functions at the highest committee level.

The inability of these top officials to understand the degree of fanaticism underlying terrorist actions led President Reagan to once again alter the bureaucratic structure.<sup>271</sup> The Interdepartmental Group on

262. Levitt, *supra* note 239, at 265-71.

263. *Id.* at 287. On the matter of such conventions, Ambassador Oakley stated: "[They] are important because of the moral force they offer. Their effectiveness is limited, however, by the willingness or ability of states to enforce them. . . . [O]btaining a country's ratification of a convention or treaty is one thing. Obtaining adherence is something else." M. CELMER, *supra* note 5, at 105-06 (citing Oakley, Subcomm. on Int'l Operations of the Comm. on Foreign Affairs, *Aftermath of the Achille Lauro Incident* 17 (Oct. 30, 1985)).

264. HOUSE REPORT, *supra* note 6, at XII-XIII (the comparable multilateral treaties are also presented).

265. M. CELMER, *supra* note 5, at 17-62.

266. *Id.* at 17.

267. *Id.* (citing 67 DEP'T ST. BULL. 475-80 (Oct. 23, 1972)).

268. *Id.* at 18.

269. *Id.* at 19 (Carter Memo).

270. The Special Coordination Committee was formed, chaired by the National Security Adviser and staffed by the Vice President, Secretary of State, Secretary of Defense, the Director of the C.I.A., and the Chair of the Joint Chiefs of Staff. M. CELMER, *supra* note 5, at 19.

271. *Id.* at 114.



Terrorism was streamlined to facilitate the new proactive policies.<sup>272</sup> The changes kept identical feedback mechanisms in place, but instead of filtering through the Cabinet Committee, information travels directly to the President through the National Security Council and the Secretary of State.<sup>273</sup> Finally, NSDD 207, in January 1986, authorized the Operations Sub-Group, prepositioning troops in Europe to cut down on counter-terrorist response time.<sup>274</sup> This directive grants State Department authority over all counter-terrorism efforts overseas.<sup>275</sup>

These legislative and executive branch actions define the parameters of potential action. When viewed in the context of the general foreign affairs powers,<sup>276</sup> these separate processes combine to create the framework for an analysis of the potential reach of presidential counter-terrorism powers.

## VI. The Preemptive Military Strike Scenario<sup>277</sup>

### A. Is Foreign Policy by Force a Counter-Terrorism Option?

The proactive/reactive dichotomy is the logical outcome of the history of antiterrorism efforts,<sup>278</sup> the political demands for a success,<sup>279</sup> and the conflicting ideas of who should hold the reins of such policies.<sup>280</sup> This dichotomous relationship is borne out through the definitions presented by both the executive and the legislative branches.<sup>281</sup> The lack of constitutional direction on the foreign affairs power exacerbates the normal, healthy tensions imposed on the United States government by the separation-of-powers doctrine.<sup>282</sup> Absent unambiguous congressional language, the Court will allow the executive branch to seize and hold the counter-terrorism aspect of this power.<sup>283</sup> The legislative history presented suggests that the political realities oppose the united front

---

272. *Id.* at 23 (NSDD 30 was the instrument of this change).

273. *See generally id.* at 29-61 for a description of the Reagan antiterrorism bureaucracy. The impact of this restructuring was felt most strongly in the Iran-Contra affair. *See supra* note 164.

274. D. MARTIN & J. WALCOTT, *supra* note 4, at 322. This tends to cast doubt on the claim that NSDD 138 will never be implemented. *See also* Marlowe, *U.S., French Navies Practice Hostage Rescue*, San Francisco Chron., Feb. 13, 1989, at A13, col. 2.

275. D. MARTIN & J. WALCOTT, *supra* note 4, at 322.

276. As they have been described by constitutional provision and Supreme Court precedent, *see supra* notes 17-72 and accompanying text.

277. The reader will benefit by referring to the hypothetical scenario on this point, *supra* note 76 and accompanying text.

278. *See supra* notes 96-114, 203-256 and accompanying text.

279. *See supra* note 107 and accompanying text.

280. *See supra* notes 17-22 and accompanying text.

281. *See supra* notes 86-95 and accompanying text.

282. *See supra* notes 17-29 and accompanying text.

283. *See supra* notes 30-72, 151-160 and accompanying text.

that the Court would demand before accepting jurisdiction.<sup>284</sup> And finally, recent executive branch actions lead to the conclusion that unchecked, the Shultz doctrine, modified by a cost/benefit analysis of the potential for embarrassment, is becoming a more viable option.<sup>285</sup>

### B. How Viable Is the Scenario?

Unilateral military action is most viable under a state of constant terror. The level of terrorist activities aimed at United States citizens has decreased on a percentage basis over the past few years.<sup>286</sup> Any single incident, however, may engender higher levels of concern than might be expected from the isolated severity of that case. Indeed, once the decision has been made that military action is viable, the level of terror may be artificially manipulated through a skillful use of the media and political processes.<sup>287</sup>

The Executive's desire to pursue the use of force has already been presented.<sup>288</sup> There are three ingredients necessary to a successful military action. The first is a good source of intelligence data to track terrorist movements, gather evidence of upcoming or prior terrorist actions, and finally, to stage and carry off the counter-terrorist engagement. Secrecy at this point is of preeminent importance to preserving the safety and reliability of these information sources. Secondly, it requires a strike force pre-positioned, trained, and equipped to carry out the action. Last, the cooperation of allies in the common goal of eliminating this aspect of the international problem is necessary.<sup>289</sup>

### C. Discussion

The hypothetical scenario presented in Part II raises three issues for discussion and analysis. The first is whether the President's message to Congress serves as notification or consultation as required in the War Powers Resolution.<sup>290</sup> This implicates a related issue—whether the con-

---

284. This is not to suggest that the Court is the proper forum for the resolution of such questions. If the argument presented in this Note is to be consistent, it is through a strong presidential power of action, constrained by congressional policy control, that such disputes will be avoided. The judicial option should be withheld as an option of last resort.

285. See *supra* notes 192-193 and accompanying text.

286. "From 1986-1987, the number of anti-U.S. terrorist attacks dropped 25 percent. International terrorist operations in Western Europe over the past 2 years decreased 31 percent, and last year in Latin America dropped by 32 percent." TERRORIST GROUP PROFILES, *supra* note 2, at iii.

287. President Reagan used such a strategy in early 1984 by declaring a State of Emergency, *supra* notes 175, 194, then utilizing a series of speeches and press conferences to point the finger at Libya for the acts of terrorism preliminary to the U.S. airstrike on April 14.

288. See *supra* notes 175, 178-188, 201, 206 and accompanying text.

289. See generally NSDD 207, *supra* note 274 and accompanying text for these three points.

290. See *supra* note 177 (Reagan's statement on the scope of the reporting requirement).

sultation provision governs such actions. The second issue is whether a self-defense justification for the exercise may be deduced from President Bush's fear of an imminent attack on United States soil. The third issue involves the unilateral nature of the military action. The preceding discussion serves to enhance the analysis of these issues.

Before the reporting requirements of the War Powers Resolution may be called into play, it must be demonstrated that there is more supporting a military counter-terrorism response than inherent presidential power.<sup>291</sup> The legislative record regarding antiterrorism is one of abstract delegation. Commentators state that an effective policy requires a better definition of terms. Yet Congress, rather than defining terrorism in terms that would effectuate a better United States antiterrorism policy, has granted a broad mandate to the President to seek out a process by which an internationally accepted definition could be reached.<sup>292</sup> Of perhaps more importance to the delegation issue, Congress also has authorized the President "to strengthen, where necessary, through bilateral and multi-lateral efforts, the effectiveness of such sanctions [for the seizure of maritime vessels by terrorists]."<sup>293</sup>

Since Congress has not limited the presidential mandate to seek a definition for terrorism, the Executive is left free to posit a *hostis humani generis* definition,<sup>294</sup> then to extend this piracy-limited delegation to all acts of terrorism. While perhaps broader than the congressional intent, the increased delegation is well within the standards set by the Court for legislative interpretation.<sup>295</sup> Thus, the last possible avenue of legislative control over executive action must lie with an expansive reading of the War Powers Resolution.

Assuming the War Powers Resolution is to be called into play, it must be decided whether the reporting requirements are triggered by an isolated engagement<sup>296</sup> and whether the Resolution applies at all to situations of self-defense.<sup>297</sup>

Exactly when the reporting requirements of the War Powers Resolution are triggered, and by what type of action, are issues that Congress will have to determine by joint resolution before it may again be brought

---

291. See *supra* note 245 (generally, the action must be described as more than naked self-defense before the executive branch will find the War Powers Resolution Act reporting requirements triggered.).

292. Sec. & Dev. Act, *supra* note 212; Omnibus Act, *supra* note 78.

293. 1986 U.S. CODE CONG. & ADMIN. NEWS: LAWS (100 Stat.) 892.

294. See *supra* notes 104, 116 and accompanying text.

295. See *supra* notes 64-72 and accompanying text (ambiguous delegations will be given their broadest meaning to avoid international confusion). There is no evidence of the intent underlying this section in the legislative history. The section was drafted in response to the Achille Lauro piracy, thus the case could be made that the delegation is meant to include all such "terrorist" situations.

296. *Id.*

297. *War Powers Hearing*, *supra* note 6, at 98 (statement of Mr. Sofaer).

before the judicial branch.<sup>298</sup> A presidential decision to treat the Resolution as requiring simple "reporting" and not consultation may be based on either the self-defense doctrine or emergency powers. Given that it has been over one hundred years since the Court has restrained "the conduct of presidentially authorized military activities,"<sup>299</sup> even if Congress were to show unanimity in applying the War Powers Resolution, it is not clear on which side the Court would resolve the issue.<sup>300</sup>

The second concern raised is the self-defense justification. This brings the provisions of the United Nations Charter under consideration. If the imminent danger argument<sup>301</sup> is utilized, the Article 51 language suggests that such military actions are not to be considered "against the territorial integrity or the political independence of any State."<sup>302</sup> An action of self-defense, if "swift and effective" in its implementation, does not seem to fall within the concerns which led to the War Powers Resolution.<sup>303</sup> This last issue also is likely to be raised in justification for pursuing unilateral action, rather than a joint effort.

In the hypothetical scenario, President Bush sets forth two reasons for pursuing the military option alone. In the Libya raid, the United States European allies were given more notice of the planned operation than was Congress.<sup>304</sup> Yet, only the United Kingdom would give the necessary landing and refueling permission to stage the bombing.<sup>305</sup> The second example concerns the United States belief in early 1989 that the Libyans were in the last stages of constructing a chemical weapons plant. The European response to this, specifically at the Paris Conference on Chemical Weapons, ran anywhere from disbelief to ridicule.<sup>306</sup> The ex-

---

298. See *Lowry*, 676 F. Supp. at 339.

299. Comment, *supra* note 17, at 193 (footnote omitted). The last time the Court restrained such presidential action was in *The Prize Cases*, 67 U.S. (2 Black) 635 (1863).

300. Indeed, given the abstract and ambiguous delegations in counter-terrorism legislation, it is likely that the Court would support the executive actions over congressional disapproval. See *supra* note 23 and accompanying text.

301. See *supra* notes 170-174 and accompanying text.

302. Halberstam, *supra* note 5, at 17 (quoting U.N. CHARTER art. 2(4)); the article 51 provision states "[n]othing in the present Charter shall impair the inherent right of individual or collective self-defense if an armed attack occurs." *Id.* (quoting U.N. CHARTER art. 51). See also Reisman, *supra* note 140, at 319.

303. The history of the War Powers Resolution dealt with prolonged military engagements without congressional oversight. See *supra* note 242 and accompanying text.

304. *War Powers Hearing*, *supra* note 6, at 101 (Statement of Mr. Atwood).

305. D. MARTIN & J. WALCOTT, *supra* note 4, at 312 ("Not only had she [Margaret Thatcher] not given a blank check, she had quietly told the Reagan administration not to ask again.").

306. The story of the Libyan chemical weapons plant is an interesting one. Secretary of State Shultz arrived at the Paris conference with evidence of the Libyan plant in hand. Although Britain, Canada, Egypt, and France initially agreed that the plant "could" be used to produce chemical weapons, they withheld support on the actual claim. West Germany, accused of supplying equipment and expertise, flatly denied the United States allegations. Telephone intercepts, which had led the United States to suspect the purposes to which the plant

ecutive branch argument would be that the consultation necessary to launch successful counter-terrorism military actions, whether consulting with Congress or United States allies, is only as good as the actions which stand behind the words of the agreement.<sup>307</sup>

This discussion illustrates that the President's powers in the area of counter-terrorism arguably include the ability to engage in a preemptive military action without the advice or consent of Congress. Such proactive programs, regardless of their efficacy, may be a danger to both the separation-of-powers and to the general public interest. The final question is how to design a system which allows for proactive programs which meet the more reactive and reflective policy concerns of the Legislature.

#### D. Recommendations

The claim presented at the outset of this Note was that the President should control the administration of counter-terrorism policy. The speed and secrecy requirements of effective antiterrorism programs, whether proactive or reactive, demand a sole representative of the United States sovereignty. The counter-terrorist bureaucracy, controlled by the National Security Council, is an administrative group, which is better overseen by a single individual. Congress, like a corporate board of directors, should be responsible for the development of policy, addressing the long-range concerns of the general polity. The President, as chief executive officer, should be responsible for the implementation of those policy goals. Rather than concentrating on the War Powers Resolution's consultation requirement,<sup>308</sup> Congress could better spend its time seeking a definition of terrorism that would allow a more limited proactive policy than that presented by the executive branch.<sup>309</sup>

---

would be put, were then supplied to the West German authorities. Within a week, the first arrest, of a Belgian shipping agent, was made. *See* Chicago Tribune, Jan. 8, 1989, at C21, col. 1; N.Y. Times, Jan. 8, 1989, § 4, at 1, col. 1; N.Y. Times, Jan. 10, 1989, at A1, col. 1; N.Y. Times, Jan. 13, 1989, at A1, col. 1.

307. Discussing the Summit Conference Statements, Professor Levitt states "when it comes to a problem as sensitive and complex as international counterterrorism—making declarations is one thing; carrying them out is a far more difficult matter." Levitt, *supra* note 239, at 287. Earlier he states, "[y]et behind all the rhetoric, the actual record of attempts to give substance to the ideal of international cooperation against terrorism is, as even a casual observer will readily apprehend, rather dismal." *Id.* at 261. On the related issue of consultation with Congress, Mr. Atwood raised three factors "to motivate administrations to avoid consultation and reporting." First, "fear that presidential powers would be lost." Second, "a threat to a 'careful balancing of competing options.'" And third, "widening to a dangerous extent the number of people who know about a sensitive operation." *War Powers Hearing, supra* note 6, at 101.

308. *See supra* notes 243-252 and accompanying text.

309. The definition presented in Part III serves this purpose. *See supra* notes 115-120 and accompanying text.

Congress should take a more active role in overseeing the counter-terrorism bureaucracy. The time and secrecy constraints on successful antiterrorism actions present a lesser concern in the planning and development phases. It is here that a small congressional working team, composed of members of both Houses, could make the greatest practical difference if limiting proactive policies is to be the substantive goal. The implementation authority should be left to the President and the Secretary of State.<sup>310</sup> The new congressional team ideally would be added to the Interdepartmental Group on Terrorism.<sup>311</sup> This would allow for the rapid implementation of counter-terrorism programs, designed by both the unofficial congressional representatives and the existing executive branch bureaucracy.

The hypothetical scenario was presented to illustrate the dangers inherent to the current state of the foreign affairs power. The Court is correct to force the two political branches to work out their relative shares of this power. However, the separation-of-powers tension is now in an unnatural state of unrest. The Court's inconsistent applications of theories of presidential power have served as a catalyst for the change from a basic difference in policy goals to the present proactive/reactive dichotomy.

## VII. Conclusion

The proactive/reactive dichotomy implies a tension greater than the normal political process envisioned by the Framers. This seemingly insolvable state of affairs arose partly out of the separation-of-powers in foreign affairs and partly out of Court pronouncements stretching the tenuous band bridging that vacuum. This dichotomy has so separated executive and legislative policy goals, that, at least with respect to counter-terrorism policy, the foreign affairs power is up for grabs. The question, then, is how to remove these impediments and return to the healthy tension envisioned to check the powers of the political branches.

The easy answer to this quandary is for Congress to pass laws restricting presidential authority. If then challenged by an executive act, the issue would be ripe for review. Yet it is the nature of terrorism that a single representative is more likely to be heard than an amorphous group. The more difficult option was presented at the conclusion of Part

---

310. *See supra* note 123 (President Bush's statement on the subject of congressional oversight).

311. *See supra* note 273. It is important to note that the legislative members of the committee would be limited in their ability to halt actions they found improper. The only way to make the position less than that of a figurehead is to assure that the President and Secretary of State would be constrained by the paper record of such a committee. If action contrary to the advice of the working group were to be taken, this would have to be justified at a later date and alone should serve to restrain the executive behavior.

VI. The insertion of an unofficial congressional working group into the executive branch antiterrorism bureaucracy would go a long way toward balancing the consultation interests of Congress with the programmatic power concerns of the executive branch.

As with every simple solution to a complex question, this one is fraught with pitfalls. President Bush has made clear his opposition to the broad consultation requirements of Congress,<sup>312</sup> and the members of Congress have made clear their intentions to press the issue whenever it arises.<sup>313</sup> It will always be the case that the President is held responsible, even if hobbled by restrictive legislation. The fact that a preemptive counter-terrorist strike is posed as a viable option suggests that perhaps these pitfalls should not be made into insurmountable obstacles.

To return to the elephant and the flea metaphor, discretion and timing will determine the efficacy of a given use of power. With Congress serving to preserve discretion and the President executing timing, raw abuses of power may be better avoided.

### VIII. Addendum: The Bush Presidency—A New Chapter

In the brief period between this Note's drafting and its publication, several applications of the Shultz doctrine have arisen. The purpose of this Part is to update the reader on the executive trend. For this reason, these examples will be raised by way of comment rather than intensive interpretation.

The doctrine of foreign policy by force was limited to the form of terrorism defined in subpart III(C).<sup>314</sup> Over the past year, the antiterrorism powers of the Executive have been extended in a novel fashion. The worldwide drug problem has been defined in terms of narco-terrorism<sup>315</sup> and the Bush administration has extended the counter-terrorism battle in three directions. First, the ban on intelligence agency assassination assistance has been called into question. Second, United States military aid has been extended in the transformation of political systems into United States-type systems under the guise of narco-terrorism-related aid. And finally, the use of force has been posited to aid in the deterrence of drug trafficking.

Executive Order Number 12,333 limits the ability of the United States intelligence agencies to aid in political actions that may result in the assassination of foreign political leaders.<sup>316</sup> In the wake of the failed Panamanian coup of October 3, 1989, the Department of Defense called

---

312. *See supra* note 123.

313. *See supra* notes 242-243, 246 and accompanying text.

314. *See supra* note 76 and accompanying text.

315. The extension of drug trafficking to terrorism was codified in the Omnibus Act, *supra* note 78, §§ 502, 503; *see supra* note 235 and accompanying text.

316. *See supra* notes 157, 178-186 and accompanying text.

for a reinterpretation of the executive order.<sup>317</sup> The Bush administration stated that “[t]here are interpretations and discussions and understandings . . . with the Hill that should be reconsidered in light of their impact on coup activities. . . . We do not plan to revise the prohibition on assassination.”<sup>318</sup> Then, providing a mixed message on October 30, 1989, the Pentagon was “expected to approve a definition . . . permit[ting] military special forces units to kill terrorists,”<sup>319</sup> and on November 29, William Webster, CIA director, stated “[t]he agency has no desire to see that prohibition on assassination changed, rescinded or modified . . . we intend to comply with it.”<sup>320</sup> Apparently, the intelligence community will continue to be restricted while the defense community may not. Given the language of NSDD 138,<sup>321</sup> this seems at first glance to support the potential for increased covert military action in antiterrorism programs.

The second evolution in foreign policy by force falls into the category of antiterrorism efforts through direct military intervention. The United States aid to the successful Panamanian coup on December 20, 1989, is relevant to this discussion in three ways. First, the reasons given for the military action itself fall into the foreign policy by force discussion presented above. Second, the proactive/reactive dichotomy is evidenced through the congressional reaction. And third, the action itself may be tied to potential antiterrorism activities reflected in the hypothetical scenario.

The reasons provided for the invasion by Secretary of State Baker, were “that the United States incursion had been made to assist a democratically elected government,” and that “[President] Bush had acted to

---

317. See Sen. Williams, *Defense Briefing*, DEPARTMENT OF DEFENSE (Oct. 17, 1989) (Williams, in the briefing, states that the Army is attempting “to define the term ‘assassination’ . . . primarily for use in the planned 1991 republication of the Army ‘Law of War Field Manual.’”). Note that on September 18, 1989, an opinion piece in the *Los Angeles Times*, written by Senator J. Lieberman, called for a rescission of the Executive Order itself. Lieberman, *Reissue a License to Kill; In this War, Lives of Narco-Terrorists Must be at Stake, Too*, L.A. Times, Sept. 18, 1989, pt. 2, at 5, col. 3.

318. Gertz, *Bush Seeks to Ease Restrictions on CIA*, Washington Times, Oct. 18, 1989, at A6, col. 1.

319. Gertz, *Interpretation of Assassination Ban Under Study*, Washington Times, Oct. 30, 1989, at A3, col. 1. Gertz also states:

Mr. Bush told a group of Republican Senators two weeks ago that restrictions on assassinations agreed to by the Reagan administration and left unchanged by the Bush administration hamper U.S. foreign policy because they would have forced the United States to warn Gen. Noriega of the coup or even protect him from being overthrown.

*Id.*

320. Webster, *National Press Club Luncheon Speaker*, National Press Club Ballroom (Nov. 29, 1989).

321. See *supra* notes 178-188 and accompanying text; see also NSDD 207, *supra* notes 274-275 (granting State Department control over all counter-terrorism efforts overseas).



restore democracy.”<sup>322</sup> However, there exists evidence that there were other reasons for the United States intervention.<sup>323</sup> Given the history of Noriega’s purported involvement with the drug trade, supported by the federal charges for his arrest, a major reason may be tied to the issue of narco-terrorism. Also to be noted is that President Bush has held true to his statements regarding the use of force; that it is not the success or failure of the effort so much as the potential for embarrassment that will guide his actions.<sup>324</sup>

The congressional reaction to the intervention follows the same basic pattern as that following the bombing of Libya.<sup>325</sup> At first, the reaction was guarded, but with the rapid pace of events toward a quick resolution and the surge in popular support, Congress showed an overwhelming approval of the invasion.<sup>326</sup> Rather than illustrating a trend toward a more proactive legislature, this approval appears to be evidence of the general centrist trend in United States politics.<sup>327</sup>

Finally, the invasion provides empirical support for the hypothetical scenario analyzed in this Note.<sup>328</sup> Granted the extension from the definition of terrorist<sup>329</sup> to narco-terrorist activities, the next logical step is to use the counter-terrorist bureaucracy to remedy the drug problem.<sup>330</sup> The invasion may be seen as an example of the paternalistic concerns raised by the United States imposing its political system onto that of

---

322. Apple, *Bush’s Turn to Wield the Big Stick*, San Francisco Chron., Dec. 21, 1989, at A14, col. 1.

323. *Id.* (pointing out that “there has not been a democratic government in Panama, and Endara had not functioned for a single hour as the country’s head of state”); see also Viviano, *U.S. Policymakers Split on Noriega For Many Years*, San Francisco Chron., Dec. 22, 1989, at A18, col. 1.

324. See, e.g., Nelson, *Bush Insisted on Full-Scale Battle Plan*, San Francisco Chron., Dec. 21, 1989, at A1, col. 4.

325. See *supra* notes 6-7 and accompanying text.

326. See, e.g., Liebert, *Congress Quickly Falls in Behind Bush on Panama Decision*, San Francisco Chron., Dec. 21, 1989, at A11, col. 1 (statements of congressional leaders in support and opposition).

327. See *supra* note 147. But see Liebert, *Congress Quickly Falls in Behind Bush on Panama Decision*, San Francisco Chron., Dec. 21, 1989, at A11, col. 1 (suggesting that the reason for the support was simple embarrassment, Dole states, “Remember, he [Bush] was called ‘timid’—he didn’t do what he should have done, he didn’t go after Noriega [on Oct. 3], . . . and it’s going to be hard for those Democrats, whose quotes are available, now to say anything but, ‘The President’s done the right thing.’”).

328. See also Reisman, *supra* note 140, at 321 (“Developments in communications and transportation have enhanced the possibilities of infiltration and subversion, of protracted low-level conflict by well-supplied proxies, of preprogrammed ‘popular’ uprisings, followed by ‘invitations’ from local inhabitants and so on.”). *Id.* at 330 (“Thus, even revisions of law that are believed to redound to the benefit of the United States will leave . . . United States supported actions in Central America readily available for moral judgments.”).

329. See *supra* note 76 and accompanying text.

330. Thus, United States Army Rangers were utilized in the Panamanian invasion. See Picture, San Francisco Chron., Dec. 22, 1989, at A14.

other countries.<sup>331</sup> The counter-terrorism bureaucracy has thus been used to aid foreign policy goals more general than simply halting the spread of terrorism.

The last example of the Shultz doctrine in application falls under the narco-terrorism label as well. In early January 1990, Colombia stated its consternation at the rumor that the United States was sending a naval task force to block ocean and air shipping from the Colombian coast. The Bush administration flatly denied the blockade plan,<sup>332</sup> then conceded the next day that the plan had existed but was aborted in the wake of the "political firestorm in Colombia."<sup>333</sup> The novel use of warships to preemptively halt shipping off a foreign coast in the name of narco-terrorism prevention is more interesting than the inability of the executive branch to present a united front.<sup>334</sup> Given the use of United States naval aircraft to force down the airliner carrying the *Achille Lauro* pirates,<sup>335</sup> no great stretch of the imagination is required to classify the two actions as parallel uses of the antiterrorism bureaucracy described by NSDD 138.<sup>336</sup>

These three examples are presented to alert the reader to these developing tools in the counter-terrorist arsenal and may aid future discussion in this area of study.

*By Peter Richman\**

---

331. See *supra* note 137 and accompanying text.

332. *White House Denies Plans for Blockade Off Colombia*, N.Y. Times, Jan. 9, 1990, at A14, col.2 ("The administration was considering use of the Navy, but . . . a blockade was not among the options.").

333. Friedman, *Drug War Move Irks U.S. Allies*, Newsday, Jan. 10, 1990, at 7 (though a State Department Spokeswoman continued to deny the blockade plans, Marlin Fitzwater, White House Spokesman, "indicated last week that the United States had already made the decision [to use the Navy]. And Larry Birns . . . said the Pentagon had all but decided weeks ago . . . to divert ships on routine duty in the Atlantic to the Caribbean to stand watch for drug smugglers.").

334. "U.S. officials vigorously denied [the blockade] and said the ships [an aircraft carrier, a nuclear-powered cruiser, and their support group] would merely monitor and 'interdict' aircraft and boats suspected of carrying drugs." *Id.*

335. Reisman, *supra* note 140, at 329.

336. See *supra* notes 178-188 and accompanying text.

\* B.A., University of California, Santa Barbara, 1983; M.B.A., University of Southern California, 1985; J.D., Hastings College of the Law, 1990. The author would like to thank Mary F. Mannes Gould for her support over these many years of college and Professor David L. Faigman for his critical readings of this Note. All errors are of course the author's own.