

BOOK REVIEW

Privatization and the National Security Constitution *Review of The National Security Constitution in the 21st Century*, by Harold Hongju Koh

Laura A. Dickinson*

I. INTRODUCTION

In his seminal 1990 book, *The National Security Constitution*, Harold Hongju Koh, Sterling Professor of International law and former dean of the Yale Law School, derived from the structure of the U.S. Constitution a framework of “balanced institutional participation” among the three branches of government—executive, legislative, and judicial—in the national security realm.¹ Almost thirty-five years later, Koh has returned to the subject with an air of lament. He observes in the introduction to his new work, *The National Security Constitution in the 21st Century*, that “the past several decades have witnessed the steady erosion of . . . the ‘National Security Constitution,’ the substructure of U.S. constitutional norms that protects the operation of checks and balances in national security policy.”² Indeed, the balanced framework Koh championed has been substantially dismantled, replaced by a vision of “unchecked executive discretion” that has come to dominate U.S. national security legal and policy practice.³ In this vision, virtually the entire field of foreign affairs, which he argues has now been reframed in terms of national security, falls within an “exclusive constitutional domain where the president acts as ‘defender in chief,’ without the meaningful participation of either Congress or the courts.”⁴

In the new book, therefore, Koh charts both the original rise of the constitutional framework that he has espoused for decades, as well as its decline over the course of recent U.S. history. He suggests that institutional incentives embedded in the structure of U.S. government are largely responsible for the growth of unchecked presidential power. First, presidents across political parties “have institutional incentives to take the initiative in foreign affairs and have often done

* Lyle T. Alverson Professor of Law, The George Washington University School of Law. I would like to thank Tom Colby, William Dodge, Chris Havasy, Alan Morrison, Mary-Rose Papandrea, and Steve Schooner for their invaluable comments on drafts of this article. I would also like to thank Madeline Grobelny, Summer Hughes, and Enora Lauvau for their very helpful research assistance. © 2026, Laura A. Dickinson.

1. See generally HAROLD HONGJU KOH, *THE NATIONAL SECURITY CONSTITUTION, SHARING POWER AFTER THE IRAN-CONTRA AFFAIR* (1990).

2. HAROLD HONGJU KOH, *THE NATIONAL SECURITY CONSTITUTION IN THE 21ST CENTURY* 1 (2024).

3. *Id.* at 2.

4. *Id.*

so by construing laws that were enacted to constrain executive authority as authorizing executive action.”⁵ Second, Congress has “continually acquiesced in what presidents have done.”⁶ And third, the courts “have tolerated presidents’ acts . . . either by refusing to hear congressional or private challenges to presidential action or by hearing those challenges on the merits and ruling in the president’s favor.”⁷ External factors, Koh argues, have exacerbated these issues in the 21st century, including “forever wars” and other efforts to combat terrorism in the Middle East and beyond, the rise of climate change as a worldwide threat, and the politics of global pandemics.⁸ The magnitude of these various challenges, which presidents have often described as “existential,” have bolstered arguments for ever-broader unilateral presidential authority.

In addition to diagnosing the problem, Koh also prescribes possible solutions. Primarily, he seeks to strengthen Congress’s hand through the adoption of new congressional entities and reformed “framework” statutes to increase Congress’s incentives to engage in national security affairs and reassert its shared authority with the President.⁹ Koh also argues for executive branch “restructuring” to reform practices, procedures, and organizational incentives to provide more guardrails against abuses of power.¹⁰ Finally, he seeks to reinvigorate various judicial doctrines that have fallen into disuse, in order to restore the courts to their crucial role as a “counterweight” to the President.¹¹ “Only by so doing,” Koh contends, “can we fulfill the promise of the National Security Constitution: that America’s foreign affairs power is a power shared.”¹²

Koh’s book is masterful and prescient, both timeless and very much of the present moment, a must-read for any scholar or practitioner of national security or foreign relations law. His concept of the “National Security Constitution,” which he defines as stemming from constitutional text, principles, sub-constitutional norms, framework statutes, and institutional practice, has helped to shape an entire field. His tour through the history of U.S. national security law and policy is breathtaking. And his set of proposed reforms are thoughtful and pragmatic. Not only is the book informed by Koh’s deep knowledge as a scholar, but also his decades of government service in a variety of significant national security roles, including as a lawyer in the U.S. Department of Justice’s Office of Legal Counsel, as the Assistant Secretary of State for Democracy, Human Rights and Labor at the U.S. Department of State, and as the Legal Adviser to Secretary of State. In some respects, Koh resembles Justice Robert H. Jackson of the U.S. Supreme Court, whose concurrence in the landmark *Youngstown Steel Seizure*

5. *Id.* at 3; *see also id.* at 92–99.

6. *Id.* at 4; *see also id.* at 99–110.

7. *Id.*; *see also id.* at 110–23.

8. *See id.* at 3.

9. *See id.* at 275–85.

10. *See id.* at 267–75.

11. *See id.* at 286–95.

12. *Id.* at 6.

case¹³ is the embodiment of the “balanced institutional approach” to national security that Koh advocates. Like Koh, Justice Jackson served in leading roles within the U.S. executive branch. Notably, Justice Jackson served as U.S. Attorney General and had significant experience in international law and foreign affairs as well, having helped draft the London Charter establishing the Nuremberg war crimes tribunal after World War II and then taking a leave of absence from the U.S. Supreme Court to serve as its chief prosecutor.¹⁴ Both Koh and Justice Jackson offer a vision that is informed by profound respect for the need for presidential authority, as well as a clear-eyed understanding of the dangers of presidential overreach. This experience anchors the work and gives it heft.

Despite its tremendous significance, the book does have a few blind spots, which scholars have pointed out. For example, although Koh focuses on congressional unwillingness to act in the face of presidential assertions of authority, the reality is that often Congress and the President are enthusiastic partners in enlarging the scope of presidential power,¹⁵ likely because party allegiance has become a more powerful incentive than the desire to interpose institutional prerogatives. Koh also has been criticized for his role in the Obama administration making arguments that have actually expanded the President’s war powers.¹⁶ Finally, some foreign relations scholars take issue¹⁷ with Koh’s assertion that the “degree of congressional approval needed to exit from an international agreement mirrors the degree of congressional approval needed to enter into that agreement in the first place.”¹⁸

In this Article, however, I focus on a key driver of expanded presidential power that does not figure into Koh’s discussion: the growing privatization of U.S. national security functions. It is perhaps not surprising that Koh overlooks this dimension, as few scholars have highlighted the extent to which privatization enlarges presidential discretion.¹⁹ It is a largely untold story. Here, I argue that privatization is an essential component of the narrative of expanded executive power in the 21st century, and no analysis of executive foreign affairs power is complete without understanding the significant role privatization plays. Since the end of the Cold War, the United States has increasingly outsourced a huge swath

13. *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 634–55 (1952) (Jackson, J., concurring).

14. See generally G. EDWARD WHITE, ROBERT H. JACKSON, *A LIFE IN JUDGMENT* (forthcoming 2025).

15. Ashley Deeks & Kristen Eichensehr, *Frictionless Government and the National Security Constitution*, JUST SEC. (Oct. 28, 2024), <https://perma.cc/XL4X-4Y2H>.

16. See, e.g., Jack Goldsmith, *Presidential Unilateralism Is Bad. But Not for War Powers*, LAWFARE (Sep. 17, 2024), <https://perma.cc/85WX-2QBR>.

17. Sean Murphy & Edward Swaine, *Presidential Power to Exit Treaties: Reflecting on the Mirror Principle*, JUST SEC. (Nov. 1, 2024), <https://perma.cc/X9K5-ZHUR>.

18. KOH, *supra* note 2, at 311.

19. A notable exception is Jon Michaels, who has done important work showing that military privatization can undermine democratic accountability for the use of force and reduce the political costs of war, weakening Congress’s incentives to exercise its powers to authorize and fund war. See Jon D. Michaels, *An Enduring, Evolving Separation of Powers*, 82 WASH. U. L. Q. 1003, 1040–47 (2004); see generally JON D. MICHAELS, *CONSTITUTIONAL COUP: PRIVATIZATION’S THREAT TO THE AMERICAN REPUBLIC* 145–78 (2017) (arguing that privatization undermines democratic accountability and separation of powers).

of national security functions, including military, security, and foreign affairs operations overseas, as well as many domestic functions.²⁰ These operations continue to be funded by the state, but instead of being completed directly by government actors, they are awarded through grants and contracts to private companies. Privatization has fundamentally altered the way in which the United States conducts national security operations at home and abroad.²¹ It has also effectively expanded executive power because the legal frameworks under both international and domestic law that have historically established the outer boundaries on executive branch discretion and protected individual rights are not well designed to address operations conducted by private actors paid for by the state.²² As a consequence, this vast privatization from the end of the Cold War up through the end of 2024—which I call “phase one” of the national security privatization trend—has further unbalanced the equilibrium among the three branches of government even beyond the forces that Koh describes.

Addressing the destabilizing impact of this privatization requires responses that, while often mirroring the types of remedies that Koh outlines, may also go beyond them in ways that are specific to privatization. For example, the sorts of framework statutes that Koh proposes to reinforce congressional incentives to intervene in national security decision-making could also help address the excesses of executive power spawned by privatization.²³ Likewise, beefed up congressional institutions of the kind Koh identifies (as well as some that he does not specifically mention) are also important.²⁴ Thus, although responding to privatization requires a more specific legislative focus, certainly a revived approach to congressional oversight in general is essential. Many responses to the specific harms imposed by privatization, however, require a different approach altogether. For example, reforms can focus on the terms of the government contracts themselves.²⁵ Public-private accreditation regimes can also help establish limits on executive discretion and bolster individual rights.²⁶ As Koh highlights, judicial doctrines permitting courts to decide cases in the national security realm play a key role.²⁷ But due to privatization, many important legal doctrines specific to government contracts need reform as well.²⁸

20. See generally LAURA A. DICKINSON, *OUTSOURCING WAR AND PEACE: PRESERVING PUBLIC VALUES IN A WORLD OF PRIVATIZED FOREIGN AFFAIRS* (2011).

21. *Id.*

22. *Id.*; see also *Drones, Automated Weapons, and Private Military Contractors: Challenges to Domestic and International Legal Regimes Governing Armed Conflict*, in *NEW TECHNOLOGIES FOR HUMAN RIGHTS LAW AND PRACTICE* 93 (Molly K. Land & Jay D. Aronson, eds. 2018).

23. See, e.g., DICKINSON, *supra* note 20, at 242.

24. *Id.*; see also Laura A. Dickinson, *Outsourcing War and Security, Problems and Solutions*, *CONVERSATION* (Jan. 12, 2015), <https://perma.cc/F9HQ-PZDD> [hereinafter Dickinson, *Outsourcing War and Security*].

25. See, e.g., *id.*; see also DICKINSON, *supra* note 20, at 243.

26. See DICKINSON, *supra* note 20, at 14–15; Dickinson, *Outsourcing War and Security*, *supra* note 24; Laura A. Dickinson, *Regulating the Privatized Security Industry: The Promise of Public/Private Governance*, 63 *EMORY L. J.* 417, 437–38, 446–47 (2013).

27. KOH, *supra* note 2, at 285–95.

28. See DICKINSON, *supra* note 20, at 72–75.

Focusing on privatization is especially important given the even broader and more pernicious expansion of executive power we are now witnessing in the second Trump administration. As many scholars and commentators have observed, President Trump has pushed the boundaries of executive power to an arguably unprecedented degree, particularly in the realms of immigration,²⁹ tariffs,³⁰ and the domestic use of the military.³¹ The administration has sought to frame as many actions as possible as national security issues in order to take advantage of the broad powers the executive wields over national security. Trump has also sought to expand the specific power of the President within the executive branch under the theory of the unitary executive, for example by claiming authority to hire and fire statutorily protected agency leaders as well as civil service workers, and imposing policy litmus tests across the previously nonpartisan federal workforce. To its credit, Koh's book foreshadowed much of this power grab. Such power grabs, as Koh notes, are not necessarily specific to the Trump administration but are a risk for the presidency of any party.

But again, it is important to focus on the privatization piece. Indeed, we are now entering what I call a phase of "new national security privatization," a variant that is accompanying and accelerating a radical restructuring of federal government to increase presidential power. This new variant entails using artificial intelligence ("AI") to power rapid, massive, and often arbitrary cuts to contracts and grants, rather than simply a shift of functions from direct government actors to contractors. These radical cuts are then followed by the rapid award of new contracts and grants, presenting risks that the awards will be made to political donors and loyalists without procedural checks. In this new phase of privatization, outside corporate actors are taking on unconventional roles that are within the government but outside the normal bureaucratic hierarchy, and they are applying private sector models of corporate restructuring to the civil service system. Furthermore, litigation pathways to check executive power and vindicate individual rights, already circumscribed in the national security domain, face even steeper hurdles when the executive wields power to cut or suspend contracts and grants, hurdles that the U.S. Supreme Court has recently increased. Thus, even as it supposedly shrinks the size of the government bureaucracy, the new privatization radically expands executive power by increasing the President's direct control over all decision-making and empowers presidential appointees to sidestep the Senate confirmation process and wield unprecedented authority. It also expands executive power by limiting both congressional and executive branch oversight and transparency. And it tends to thwart some of the very reforms to the government contracting framework that were instituted in phase one. In this new era of national security privatization,

29. See, e.g., Alan Feuer, *Documents Cast Doubt on White House Claims About Deported Venezuelans*, N.Y. TIMES (July 7, 2025), <https://perma.cc/X53S-PPDD>.

30. See, e.g., Ana Swanson, *Threat of More Tariffs Hangs Over Countries Negotiating Trade Deals*, N.Y. TIMES (June 30, 2025), <https://perma.cc/554C-VEZQ>.

31. See, e.g., Scott R. Anderson, Laura A. Dickinson, Chris Mirasola, William Banks & Jen Patja, *Lawfare Daily: Troops on the Streets of Los Angeles*, LAWFARE (June 13, 2025), <https://perma.cc/RNB7-U3WQ>.

“balanced institutional participation” therefore requires even more creative strategies and approaches. Koh’s prescriptions are essential, but they do not address the full picture.

This Article explores the ways in which privatization is key to understanding the National Security Constitution in the 21st Century. Part II highlights Koh’s key arguments, summarizing his conception of the “National Security Constitution” and the balanced institutional participation ideal. It also discusses Koh’s diagnosis of the problem and his thoughtful prescriptions. Part III then shows how the growing phenomenon of privatization following the Cold War—what I term “phase one” of national security privatization—contributed to the dynamics that Koh outlines and was a key factor in vastly expanding executive power and upsetting the framework of balanced institutional participation. This Part also highlights reforms that helped restore some of this balance during this phase one period. Part IV begins to map out some of the elements that characterize the new “phase two” of national security privatization that has emerged at the beginning of the second Trump administration. This is a more radical phase that is fueled by AI and data. It is accelerating the expansion of executive power, and in particular presidential power, even further than anything Koh envisioned. In this new phase, additional reforms are needed.

II. KOH’S VISION OF THE NATIONAL SECURITY CONSTITUTION

Koh’s book is impressive in many ways. He successfully identifies what he calls the National Security Constitution and persuasively argues that it is rooted in principles of balanced institutional participation. He then charts the historical forces, both leading up to the 21st century and in the 21st century, that have put pressure on these principles and resulted in greater executive unilateralism. He offers a comprehensive, pragmatic set of reforms that could help reset the balance, both between the executive branch and Congress, and between the executive branch and the courts.

A. *The National Security Constitution and “Balanced Institutional Participation”*

At the outset of the book, Koh maps out what he means by the “National Security Constitution,” a concept he coined in his earlier book. Koh begins from the observation that the textual provisions of the Constitution that pertain specifically to national security are relatively sparse. Thus, he argues that there “lurks within our constitutional system . . . a normative vision of the foreign-policy-making process that emerges only partially from the text of the Constitution itself.”³² He locates this vision in a range of sources: not only the text and structure of the Constitution, but also what he calls the “subconstitutional law” of “framework statutes” that “govern[] the legal rights and duties of the three branches in national security decision-making,”³³ as well as the body of precedents from all three branches of government that he terms “quasi-constitutional custom.”³⁴

32. KOH, *supra* note 2, at 10.

33. *Id.* at 11.

34. *Id.* at 12.

At the core of the “National Security Constitution,” in Koh’s view, is a framework of balanced institutional participation among the executive, legislative, and judicial branches. He traces the roots of this vision to the earliest days of the American Republic and its development throughout U.S. history. Perhaps its most robust expression, he suggests, can be found in a U.S. Supreme Court decision issued after the expansion of the national security state following World War II, in the famous concurrence authored by Justice Robert H. Jackson in the U.S. Supreme Court’s 1952 landmark *Youngstown Steel Seizure* case.³⁵ In that decision, the Court rebuked President Truman for attempting to seize the steel mills when striking workers had shut them down during the Korean war.³⁶ Justice Jackson famously described the scope of presidential power as varying in relation to Congress’s actions and falling into three zones: in the first zone, when Congress has explicitly authorized the action in question, presidential power is at its zenith; in the second zone, when Congress is silent, the President’s power falls into a “zone of twilight” where the scope of power of each branch is often shared, though more ambiguous; and in the third zone, when Congress has explicitly restricted the President from taking action, presidential power is at its nadir.³⁷ In this third zone, the action in question is unlawful unless it falls within an exclusive domain of presidential authority.³⁸ Because Congress had required collective bargaining to resolve the strike at issue in *Youngstown*, the Court held that the President’s unilateral seizure of the mill was unlawful.³⁹ Justice Jackson reasoned that President Truman’s seizure of the steel mills fell into the most restricted third zone because Congress forbade the action; it was therefore unlawful because the President was not exercising an exclusive authority.⁴⁰

A core principle underlying Justice Jackson’s concurrence, as Koh describes it, is the idea that all three branches of government share power. The President does possess some “exclusive and preclusive powers,” which Justice Jackson argues should not be confined to a “rigid . . . textualism” but should be interpreted generously, with “scope and elasticity,” for pragmatic reasons.⁴¹ Yet, at the same time, Justice Jackson notes that the President’s power is not unlimited. As Koh points out, Justice Jackson admonished the executive branch in the litigation for using terms implying overbroad and amorphous presidential authority: terms such as “inherent” powers, “emergency” powers, “incidental” powers, “plenary powers,” and “war powers.”⁴² Indeed, as Koh observes, a broad view of presidential power would make the three zones of Justice Jackson’s analysis entirely superfluous.⁴³

35. *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 634–56 (1952) (Jackson, J., concurring).

36. *Id.* at 589 (majority opinion).

37. *Id.* at 635–38 (Jackson, J., concurring).

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

39. *Id.* at 589 (majority opinion).

40. *Id.* at 639–40 (Jackson, J., concurring).

41. *Id.* at 640 (Jackson, J., concurring).

42. KOH, *supra* note 2, at 54.

43. *Id.*

Rather, the three zones each emphasize Congress's role in national security affairs—as Koh explains, “Congress must have an opportunity to participate . . . , or else [key] objectives cannot genuinely be called policies of the *United States*.”⁴⁴ Koh also emphasizes the extent to which Justice Jackson's vision contemplates a central role for the courts “as arbiters” in “the national security process.”⁴⁵ And, Koh argues, Justice Jackson recognizes the role of “quasi-constitutional principles” of internal accountability and “due process”⁴⁶ within the executive branch, stemming in part from framework statutes such as the National Security Act of 1947, which defined the authority of key national security agencies like the Department of Defense and the Central Intelligence Agency. Koh also finds a principle of “public accountability” within Justice Jackson's opinion, which Koh argues forms a basis for transparency and legislative debate.⁴⁷

Ultimately, Koh offers a vision of how this model operates when it is functioning properly, one that derives from Jackson but extends beyond it:

In zones of concurrent constitutional authority, the president and Congress must transparently share information about and jointly agree on the broad foreign-policy objectives of the United States. The president must then coordinate full internal debate among the decision-formulating entities of the executive branch in order to propose particular policy initiatives to Congress to fulfill those broad objectives. When Congress has endorsed particular initiatives, the appropriate decision-executing agencies must execute them in accordance with the law, under direct presidential supervision, and subject to the watchful eyes of Congress, the public, and the courts.⁴⁸

Significantly, this is first a framework of shared and overlapping powers *among* the three branches; second, a vision of deliberative process *within* the executive branch; and third, a model for increased transparency and accountability.

B. The Unbalancing of Balanced Institutional Participation

“More than two decades after September 11, 2001, the National Security Constitution has taken on a strikingly unbalanced cast,” Koh writes.⁴⁹ By 2024, the year the book was published, Koh contends that a countervailing vision to the one he extols has come to dominate national security affairs. This countervailing vision is one in which the President wields unbridled “executive discretion.”⁵⁰ And, although this alternative vision has long lurked in the background as a counterpoint to the framework of balanced institutional

44. *Id.* at 52.

45. *Id.* at 53.

46. *Id.* at 54.

47. *Id.* at 55.

48. *Id.* at 56–57.

49. *Id.* at 263.

50. *Id.* at 2.

participation, it has ascended in prominence during the 21st century, particularly in recent years.

This countervailing vision finds perhaps its most notable expression in the 1936 U.S. Supreme Court decision in *Curtiss-Wright Export Corp.*, in which the Court famously stated that the President is the “sole organ” in foreign affairs.⁵¹ In that case, the Court upheld the President’s right to ban arms sales in Latin America. The decision, as Koh explains, helped consolidate President Franklin Delano Roosevelt’s “transformation of presidential authority in the realm of foreign affairs” during a period when the United States was gaining more power and influence globally.⁵² Koh emphasizes, however, that an expansive reading of *Curtiss-Wright* was not the dominant understanding of the case even at the time. Importantly, as other scholars have also recognized, the *Youngstown* Court explicitly repudiated a broad interpretation of *Curtiss-Wright*, and it must be noted that the presidential power authorized by the Court in *Curtiss-Wright* arose specifically from a joint resolution of Congress, thus placing the circumstances of the case squarely in zone one of Justice Jackson’s typology.⁵³ In other words, read in the context of its facts, *Curtiss-Wright* does not truly stand for the broad view of executive power that some language in the opinion appears to espouse. Although the executive branch often relies on *Curtiss-Wright* to assert expansive approaches to presidential power in the national security realm when it intersects with foreign affairs, the Supreme Court at least for a time kept the case somewhat in check.⁵⁴ In addition, neither executive branch practice in the 20th century nor the various sub-constitutional norms Koh draws upon fully conformed to a broad reading of *Curtiss-Wright*.⁵⁵

In the 21st century, however, Koh argues that both internal structural incentives within the U.S. system of governance and external forces have contributed to a trajectory that has seen the *Curtiss-Wright* vision of unrestrained executive discretion gain ever-greater prominence within the national security realm. Koh tells a compelling story that explains both why and how this has happened. When “national security threats arise,” presidents “have institutional incentives to monopolize the response; Congress has incentives to acquiesce; and courts have incentives to defer.”⁵⁶ In the 21st century, these threats have been grave and include the post 9-11 “era of unending threat and ‘forever war’” against terrorism,

51. *United States v. Curtiss-Wright Export Co.*, 299 U.S. 304, 319 (1936).

52. KOH, *supra* note 2, at 36.

53. *Id.* at 37–38, 53.

54. *Id.* at 57–58 (emphasizing that *Curtiss-Wright*’s assertion of plenary presidential foreign relations power is overbroad); see *Curtiss-Wright*, 299 U.S. at 311–13 (noting that the President was acting pursuant to a joint resolution of Congress); see also *Zivotofsky ex rel Zivotofsky v. Kerry*, 576 U.S. 1, 20 (2015) (noting that “*Curtiss-Wright* does not extend as far as the Secretary suggests”); Louis Fisher, *The Staying Power of Erroneous Dicta, From Curtiss-Wright to Zivotofsky*, 31 CONST. COMMENT 149, 150 (2016) (explaining that *Curtiss-Wright* “concerned legislative—not presidential authority”).

55. See, e.g., KOH, *supra* note 2, at 264–65 (noting that even after the Cold War, during the George H.W. Bush administration, the *Youngstown* vision of checks and balances still held sway).

56. *Id.* at 2; see also *id.* at 92–93.

climate change, global pandemics, and wars in the Middle East and Ukraine.⁵⁷ As these threats have arisen, they have catalyzed executive overreach, congressional silence, and judicial caution.

As Koh explains, these institutional incentives are strong and rooted in the role of each branch. The President is “institutionally best suited to initiate government action” and has gathered ever more resources to do so, including “a treasury assembled from a tax base; information—often classified; staff; various kinds of hard power, including weapons and troops; and soft power—a bully pulpit, public visibility, and moral standing.”⁵⁸ Congress’s incentives to acquiesce in the President’s broad exercise of power stem from its “legislative myopia, inadequate drafting, ineffective legislative tools, or lack of political will.”⁵⁹ Courts, in turn, have increasingly deferred to the executive branch in the national security domain, both on the merits but also, Koh observes, by carving out broad limits to justiciability in national security cases. Indeed, as I have argued elsewhere, even in litigation asserting First Amendment free speech and association rights—a realm in which the U.S. Supreme Court has construed individual rights quite broadly—the Court has sharply curtailed litigation when it has arisen in the national security realm, through highly restrictive interpretations of standing and the state secrets doctrine.⁶⁰

After illuminating these institutional incentives, Koh then shows how they have played out across the first quarter of the 21st century, as presidents of both parties have confronted a series of national security threats and challenges. At the end of the Cold War, even in the 1990s, President Clinton unilaterally approved the use of force to halt ethnic cleansing in Kosovo without clear congressional authorization domestically or U.N. Security Council authorization internationally.⁶¹ Then, after the attacks of September 11, 2001, President George W. Bush engaged in a series of legally problematic actions based on a broad view of executive discretion, from the use of torture in interrogation, to a claim of unilateral authority to conduct electronic surveillance, to the establishment of a terrorism detention program at Guantánamo Bay, while simultaneously contending that the detainees lacked the ability to challenge their detention in U.S. courts through habeas corpus petitions.⁶² Congress did assert itself to some degree: for example, when Congress learned of the torture, it imposed some legislative limits.⁶³ The courts also policed the outer bounds of executive discretion, concluding, for example, that the Guantánamo detainees could in fact bring their habeas claims in federal court.⁶⁴ But, Koh argues, in the two decades following these decisions, the “Court essentially withdrew from

57. *Id.* at 3.

58. *Id.* at 94.

59. *Id.* at 92.

60. Laura A. Dickinson, *Justice Breyer, the First Amendment, and National Security*, 21 *FIRST AMENDMENT L. REV.* 356 (2023).

61. KOH, *supra* note 2, 143–46.

62. *See id.* at 147–69.

63. *See, e.g., id.* at 160.

64. *See, e.g., id.* at 164–68.

deciding post-9/11 cases,” and has “repeatedly avoided opportunities to clarify detainees’ due-process and habeas rights.”⁶⁵ Thus, Koh observes, “the Bush 43 years marked a watershed” that began “what may be an irreversible pendulum swing toward the *Curtiss-Wright* vision of executive power.”⁶⁶

President Obama, in Koh’s view, was unwilling or unable to undo this pendulum swing and instead “undercorrected” for the shift as he faced both ongoing and new national security challenges.⁶⁷ President Obama did clearly repudiate torture and did not rely on claims of inherent Article II authority for counterterrorism operations, instead basing his authority on Authorizations to Use Military Force (“AUMFs”) that Congress passed in 2001 and 2002.⁶⁸ However, his administration interpreted those authorizations quite broadly, for example concluding that the 2001 AUMF applied to terrorist groups such as ISIS that did not even exist in 2001. The Obama administration also retreated from the stance that the United States was fighting a “global war on terror,” but nonetheless continued to take a broad view of the scope of the armed conflict as one that continued to be essentially global as applied to specific terrorist groups such as Al Qaeda.⁶⁹ Indeed, as I have argued elsewhere, rather than pulling back from a broad geographical view of the armed conflict against these groups and cabining the discretion that the international law of armed conflict provides for detention and use of force operations, the Obama administration instead sought to preserve that broad authority as a matter of law while layering over it a series of policies that limited discretion a bit more—but only as a matter of policy, not law.⁷⁰ In other areas, for example to confront the rising humanitarian catastrophe in Libya, Koh describes the approach that the Obama administration took in interpreting its ability to use force unilaterally under the U.S. Constitution and the War Powers Resolution, even without explicit congressional authorization.⁷¹ Koh believes these interpretations were justified, and indeed he played a key role in them as he was legal adviser to the U.S. State Department at the time; still, he acknowledges that they reflect an overbroad view of executive branch war powers that should, in general, be reined in.⁷² Finally, Koh notes that the Obama administration took an expansive approach to the President’s authority to enter into international agreements outside the treaty-making process. Again, Koh was part of the administration at the time and finds the decision defensible, but he acknowledges that it too reflects a broad approach to executive power.⁷³

65. *Id.* at 168.

66. *Id.* at 169.

67. *See id.* at 170–203.

68. *Id.* at 173–76.

69. *Id.* at 174.

70. *See generally* Laura A. Dickinson, *National Security Policymaking in the Shadow of International Law*, 2021 UTAH L. REV. 629 (2021).

71. KOH, *supra* note 2, at 179–93.

72. *Id.*

73. *Id.* at 193–203.

President Trump entered office in 2016 embracing an unabashedly open-ended view of his Article II powers as president, claiming that he could do “whatever I want.”⁷⁴ As Koh describes, when confronted with both ongoing counterterrorism threats, as well as new challenges related to the Covid-19 pandemic, global trade, foreign election interference, and immigration, the Trump administration asserted an expansive view of executive power at almost every turn. With respect to both immigration and trade, for example, Koh notes that President Trump “relied disproportionately on false linkages [with] national security,” shoehorning actions into preexisting emergency power statutes.⁷⁵ And President Trump repeatedly “broke” international agreements, withdrawing from numerous multilateral and bilateral treaties.⁷⁶ In domain after domain, Trump “claimed that all his actions were authorized and justified by his plenary constitutional authorities, which he claimed rendered his actions immune from inter-branch interference.”⁷⁷

President Biden, in Koh’s view, pulled back to some degree from the executive unilateralism of the first Trump administration but, similarly to President Obama, President Biden fell prey to the tendency to “undercorrect.”⁷⁸ Koh notes that President Biden re-engaged with multilateral institutions, reversed President Trump’s so-called “travel ban” that had limited immigration from a number of countries, terminated the emergency at the southern border that Trump had proclaimed in order to take advantage of emergency powers to build a wall there, and ended sanctions President Trump had imposed on officials working for the International Criminal Court.⁷⁹ But, on the other hand, Koh contends that President Biden’s “simultaneous response to the twin Ukraine and Covid-19 crises marked perhaps the most dramatic peacetime exercise of presidential power in four decades.”⁸⁰ Specifically, Koh faults President Biden for his wide use of economic sanctions under unprecedented interpretations of the International Emergency Economic Powers Act (“IEEPA”).⁸¹ It also bears noting that President Biden reinstated a declaration of emergency to allow U.S. armed forces to help protect the southern border, albeit on slightly different terms than the one that President Trump had asserted.⁸² Koh criticizes President Biden for essentially embracing President Trump’s view

74. *Id.* at 204.

75. *Id.* at 213.

76. *Id.* at 217–25.

77. *Id.* at 205.

78. *Id.* at 229–30.

79. *Id.* at 233–39.

80. *Id.* at 249.

81. *Id.* at 249–50.

82. President Biden declared a national emergency to address drug trafficking after determining that “international drug trafficking . . . constitutes an unusual and extraordinary threat to the national security, foreign policy, and economy of the United States.” Exec. Order No. 14,059, Imposing Sanctions on Foreign Persons Involved in the Global Illicit Drug Trade, 86 Fed. Reg. 75,549 (Dec. 15, 2021). He then authorized the deployment of the military at the southern border, invoking 10 U.S.C. § 12302, in response to that emergency. *See* Exec. Order No. 14,097, Authority to Order the Ready Reserve of the Armed Forces to Active Duty to Address International Drug Trafficking, 88 Fed. Reg. 26,471 (Apr. 27, 2023).

that non-citizens already on U.S. soil, as opposed to those at the border, are eligible for truncated, expedited removal procedures in U.S. courts.⁸³ Thus, Koh concludes that, at the end of the Biden administration, “the National Security Constitution hovers dangerously close to the precipice. It remains just one election away from constitutional calamity.”⁸⁴ With the election of President Trump in 2024, that calamity is now upon us.

C. Koh's Proposed Reforms

Koh, to his credit, does not simply end his book in a state of despair, but rather prescribes a series of pragmatic and thoughtful approaches to the current predicament. The “reform strategy” he outlines addresses all three branches. With respect to the executive branch, he calls for “restructuring,” including better organized and institutionalized legal advice, more protections for law enforcement independence, enhanced rules protecting against conflicts of interest, and self-restraint in “military adventurism” through new Department of Justice Office of Legal Counsel opinions articulating limits to the scope of executive discretion to deploy the military domestically.⁸⁵ With respect to Congress, he calls for new framework statutes and new institutions.⁸⁶ And with respect to the courts, he calls for a reinvigorated jurisprudence that expands justiciability and reduces deference in national security cases.⁸⁷ Elsewhere, I and others have called for similar reforms to bolster the guardrails on abuse of power by presidents in the national security domain.⁸⁸

Koh's prescriptions for Congress are particularly creative. For example, one key reform he proposes is a new role, a “congressional legal advisor,” who can offer a counterweight to the executive branch legal opinions that have come to dominate national security law, especially in the face of judicial deference and silence.⁸⁹ He also calls for revisions to framework statutes such as the War Powers Resolution, which was enacted after the Vietnam War to require formal presidential consultation with Congress and to prevent the introduction of “armed forces” into “hostilities” sixty days after that formal consultation without specific congressional authorization. Koh argues that key terms in the Resolution, such as

83. KOH, *supra* note 2, at 246–47.

84. *Id.* at 259.

85. *Id.* at 267–74.

86. *Id.* at 274–84.

87. *Id.* at 285–95.

88. See generally BOB BAUER & JACK GOLDSMITH, *AFTER TRUMP: REFORMING THE PRESIDENCY* (2020); Laura A. Dickinson, *Protecting the U.S. National Security State from a Rogue President*, 16 HARV. NAT'L SEC. L. J. 1 (2024).

89. KOH, *supra* note 2, at 278–80. Oona Hathaway has also called for this reform. See, e.g., Oona A. Hathaway, *National Security Lawyering in the Post-War Era: Can Law Constrain Power?*, 68 UCLA L. REV. 2, 82–99 (2021) (arguing that Congress should create a congressional office of legal counsel, empower committees to compel legal explanations from the executive branch in national security matters, and explicitly grant committees the right to sue to enforce national security statutes).

“armed forces” and “hostilities,” must be better defined.⁹⁰ But he also recommends procedural reforms that could better effectuate existing framework statutes and bolster congressional incentives to act. He proposes that Congress establish a “consultative group” for war powers and other national security decisions, beyond the relevant committee structure, to enable nimbler congressional response and input regarding use of force and other urgent national security actions contemplated by the White House.⁹¹ He also advocates greater use of a “fast-track” procedure, now used primarily in the trade area, that would force legislative up or down votes within particular time frames.⁹² He argues that these reforms could strengthen congressional notification and consultation requirements across a number of national security programs, which Koh criticizes as weak: presidents do not always follow them, and Congress has little recourse.⁹³ Koh further suggests that the fast-track process could be used in conjunction with appropriations: “if the [P]resident should seek to implement a program without satisfying a statutory requirement, such as notice or prior legislative consultation with Congress, these procedures could be used to temporarily block appropriations bills to fund the program.”⁹⁴ Koh contends that these reforms could help “alleviate Congress’s most intractable problem . . . political will.”⁹⁵

Koh’s book was published just before the 2024 election. Therefore, he does not address the excesses of the second Trump presidency, which go well beyond the broad assertions of presidential power we saw the first time around. Yet, his analysis clearly foreshadows the ever-greater expansion of executive power in general, and presidential power in particular, that was occurring even prior to January 2025. And although it seems highly unlikely that the reforms Koh advocates will take place during our current political moment, they do offer a clear roadmap for the future. Still, there is a crucial piece of the story about increasing presidential national security power that Koh does not tell: the growing privatization of U.S. military and national security functions.

III. INCREASED NATIONAL SECURITY PRIVATIZATION AND ITS IMPACT ON PRESIDENTIAL POWER: PHASE ONE (1989-2024)

Koh’s analysis of the U.S. national security state, though prescient and enduring, largely overlooks an important phenomenon: the growing privatization of national security and foreign affairs functions. Since the end of the Cold War, the United States has dramatically increased its use of military and security contractors to perform a broad range of functions from logistics to intelligence analysis

90. *Id.* at 279. He also argues that a revised War Powers Resolution (“WPR”) should expressly permit short-term military engagements for rescue, placing them in *Youngstown* category one, and also allow for limited operations to complete humanitarian intervention beyond the WPR time limits.

91. *Id.* at 275–79.

92. *Id.* at 281–85.

93. *Id.*

94. *Id.* at 282.

95. *Id.* at 284.

to security and interrogation.⁹⁶ This shift has had a significant impact on the inter-branch incentive structures that Koh describes. In many respects, it has exacerbated the expansion of executive power in relation to Congress, limited oversight and transparency, and threatened other core public values that existing legal frameworks had protected prior to this era of privatization. Thus, even as Koh does not address the phenomenon, the turn to increased privatization dovetails with the broader story he tells and indeed was a key element of the expansion of presidential power. Similarly, although Koh's prescriptions do not include remedies for the ills of privatization specifically, his proposed reforms would perhaps reduce the negative impact of privatization to some degree. Yet, by neglecting to consider the effects of privatization specifically, Koh does not consider some potential cures to the problems he identifies. Privatization, while detrimental in many respects, also offers new levers for protecting public values, for example through reforms to the government contracts themselves,⁹⁷ the development of public-private accreditation regimes,⁹⁸ and potentially increased possibilities for judicial oversight.⁹⁹ In short, any account of the breakdown of "balanced institutional participation" requires both a discussion of national security privatization and a set of strategies to address it.

A. *Post-Cold War Growth of National Security Privatization*

The end of the Cold War profoundly shifted the way that the United States conducts a vast array of national security and foreign affairs functions as the government significantly reduced the number of civilian and military employees in this domain and transferred a broad swath of activities to private contractors. To be sure, U.S. national security outsourcing was not a completely new phenomenon; throughout the twentieth century, the United States had engaged contractors to build weapons and other materials for the U.S. military, and to perform some services. But the scale of outsourcing during the period from 1990 to 2024 was arguably unprecedented.¹⁰⁰ At first, privatization was driven by the perception that the military could be downsized given the collapse of the Soviet Union.¹⁰¹ In addition, privatization was perceived by many as a way to increase efficiency and reduce bureaucracy.¹⁰² During the presidency of Bill Clinton, Vice President Al Gore led the "Reinventing Government" initiative,¹⁰³ which significantly reduced military

96. See, e.g., DICKINSON, *supra* note 20, at 1–39.

97. See *id.* at 69–101.

98. See Laura A. Dickinson, *Regulating the Privatized Security Industry: The Promise of Public/Private Governance*, 63 EMORY L. J. 417, 418–19 (2013).

99. See, e.g., DICKINSON, *supra* note 20, at 40–68.

100. See DICKINSON, *supra* note 20, at 23–39; see also COMM'N ON WARTIME CONTRACTING IN IRAQ & AFG., FINAL REPORT, TRANSFORMING WARTIME CONTRACTING: CONTROLLING COSTS, REDUCING RISK 16 (2011) [hereinafter FINAL REPORT].

101. See DICKINSON, *supra* note 20, at 31–32.

102. *Id.* at 30–31.

103. See, e.g., Jacob Bruggeman & Casey Eilbert, *Clinton and Gore's Attempts at Government Reform Highlight the Challenges Ahead for DOGE*, TIME (Mar. 3, 2025), <https://perma.cc/2ZYZ-72HG>.

forces and national security civilian employees.¹⁰⁴ This initiative followed, and was inspired in part by, the widespread domestic privatization of a broad array of government functions. A few years later, when the United States contributed peacekeepers in the former Yugoslavia, the Pentagon and the State Department filled the gaps with contractors.¹⁰⁵

After the terrorist attacks of September 11, 2001, the privatization trend accelerated exponentially. At war on multiple fronts in Afghanistan, Iraq, and beyond, the United States ramped up its use of contractors to provide an enormous range of services that its uniformed personnel and civilian employees were no longer performing overseas.¹⁰⁶ Contractors constructed military bases and provided services there, cooking meals and feeding troops in mess halls.¹⁰⁷ They conducted complex logistics operations.¹⁰⁸ They trained local militaries and other government personnel.¹⁰⁹ They cleared land mines.¹¹⁰ They provided security at military bases, guarded military convoys, and protected diplomats.¹¹¹ They analyzed intelligence feeds from unmanned aerial vehicles (“UAVs”), commonly known as drones.¹¹² They served as translators and conducted interrogations.¹¹³ At the high point of the conflicts in Iraq and Afghanistan, there were 260,000 contractors in theater, a ratio of contractors to armed forces that hovered at about one to one.¹¹⁴

The privatization push extended far beyond conflict zones. Contractors played key and increasing roles in space exploration and satellite technology.¹¹⁵ They provided extensive foreign aid, both in the form of urgent disaster relief and longer-term foreign assistance to populations in need, whether to shore up democracy or to establish health infrastructure.¹¹⁶ In the domestic context, perhaps the most significant shift occurred in the immigration enforcement arena. Since 2001, the U.S. government has increased its contracts with private companies to engage in immigration detention.¹¹⁷ Many of these same companies are now also providing

104. See DICKINSON, *supra* note 20, at 31–33.

105. *Id.* at 33–35.

106. *Id.* at 36–39.

107. *Id.*

108. *Id.*

109. *Id.*

110. *Id.*

111. *Id.*

112. See, e.g., Keric D. Clanahan, *Drone-Sourcing? United States Air Force Unmanned Aircraft Systems, Inherently Governmental Functions, and the Role of Contractors*, 22 FED. CIR. BAR J. 6 (2012); Abigail Fielding-Smith, Crofton Black, Alice Ross & James Ball, *Revealed: Private Firms at Heart of US Drone Warfare*, GUARDIAN (Feb. 12, 2015), <https://perma.cc/XG4Q-XVKL>; Abigail Fielding-Smith & Crofton Black, *Pentagon's 'Insatiable Demand' for Drone War Intelligence*, BUREAU OF INVESTIGATIVE JOURNALISM (July 30, 2015), <https://perma.cc/F95V-6SZZ>.

113. S. REP. NO. 113-288, at 11–12 (2014).

114. FINAL REPORT, *supra* note 100, at 2.

115. *Elon Musk's US Department of Defense Contracts*, REUTERS (Feb. 11, 2025), <https://perma.cc/QFV3-RY7P>.

116. See, e.g., DICKINSON, *supra* note 20, at 5; Laura A. Dickinson, *Public Law Values in a Privatized World*, 31 YALE J. INT'L L. 384, 385 (2006).

117. See, e.g., Brandon Galli-Graves, *Rights Without a Remedy: Detained Immigrants and Unlawful Conditions of Confinement*, 48 BYU L. REV. 1015, 1020–21 (2023); Danielle C. Jefferis,

electronic surveillance services as an alternative to immigration detention.¹¹⁸ Meanwhile, the executive branch has increasingly outsourced various other aspects of surveillance as well, for example by entering into agreements with brokers to purchase data that is then used in national security investigations.¹¹⁹

Although advocates of privatization usually tout its increased efficiencies and cost savings, the overall size of government employment did not really shrink, if the government contracts are included in the tally.¹²⁰ To be sure, private firms operating under contract with the government provided measurable efficiencies in some areas.¹²¹ Outsourcing also gave the government more flexibility to increase and decrease services without running afoul of rules limiting cuts to civilian employee workforces.¹²² And by hiring contractors rather than government employees, the government could avoid paying pensions or providing health care coverage.¹²³ There was little proof, however, that widespread outsourcing actually saved the government money in the aggregate.¹²⁴ Indeed, contractors were sometimes *more* expensive than civilian employees.¹²⁵ And lack of oversight, particularly in conflict zones, led to billions of dollars lost in waste, fraud, and abuse.¹²⁶ Politically, though, it was easier for the executive branch to obtain funding from Congress to spend on contractors than to increase the number of full-time civilian employees.¹²⁷ Thus, the privatization trend has continued to the present.

B. Privatization's Impact on Executive Power, Oversight, and Legal Accountability

Growing military and national security privatization expanded executive power both directly and indirectly. In some domains, such as war powers, the growing use of military and security contractors made it easier for executive branch officials to deploy legal arguments making the case for unilateral executive authority. In addition, the growth in privatization reduced transparency and oversight of executive branch action. And, in many contexts, the use of contractors reduced the availability of accountability mechanisms, including litigation in courts, to protect against executive action that infringed on individual rights and

Constitutionally Unaccountable: Privatized Immigration Detention, 95 IND. L. J. 145, 160–61 (2020); see also Douglas MacMillan, *ICE Prepares Detention Blitz with \$45 Billion in Funding*, WASH. POST (July 4, 2025), <https://perma.cc/SRK3-NXBY>.

118. See, e.g., Johana Bhuiyan, *Ice Contractor Plans for Surveillance Boom Under Trump Migrant Crackdown*, GUARDIAN (Feb. 27, 2025), <https://perma.cc/LEC4-9G8K>.

119. See, e.g., Aaron X. Sobel, *End-Running Warrants: Purchasing Data Under the Fourth Amendment and the State Action Problem*, 42 YALE L. & POL'Y REV. 176, 178 (2023).

120. See PAUL C. LIGHT, *THE TRUE SIZE OF GOVERNMENT* 1–2 (1999); DICKINSON, *supra* note 20, at 30–33.

121. See DICKINSON, *supra* note 20, at 30–31; Laura A. Dickinson, *Public Values/Private Contract*, in *GOVERNMENT BY CONTRACT* 335, 341–344 (Jody Freeman & Martha Minow eds., 2008).

122. See DICKINSON, *supra* note 20, at 30–31.

123. *Id.*

124. *Id.*

125. *Id.*

126. FINAL REPORT, *supra* note 100, at 5.

127. DICKINSON, *supra* note 20, at 34–35.

human dignity. To put it another way, the core public values of transparency, oversight, accountability, and respect for human dignity were deeply embedded in the legal regimes governing the operations of military and civilian governmental personnel in the realm of national security for many decades. But when the U.S. executive branch shifted military and national security functions to private contractors, those legal frameworks were not as clearly applicable to contractor operations or as easily enforceable in the event of abuse.

1. Expansion of Executive Power

Military and national security privatization after the Cold War aided the expansion of executive power that Koh documents. The realm of war powers provides a key example. The U.S. Constitution provides that Congress has the power to declare war,¹²⁸ while the President is the commander-in-chief of the armed forces.¹²⁹ This arrangement ensures that the two branches share power in making decisions about the use of force overseas. Over time, however, as Koh explains, the U.S. executive branch has claimed more unilateral authority in this realm, and Congress has often acquiesced. Indeed, the Department of Justice Office of Legal Counsel (“OLC”) has maintained in a series of legal opinions that extraterritorial use-of-force operations fall outside the scope of Congress’s war powers entirely if the operations serve the U.S. national interest and are of anticipated “limited nature, scope, and duration.”¹³⁰ On this basis, OLC argued that U.S. military operations in Libya in 2011, which Congress had not authorized, were limited and therefore could be conducted unilaterally.¹³¹

But it was precisely the turn to military and security contractors that helped enable the U.S. executive branch to claim that military operations fell within this zone of unilateral executive branch power. That is because, under the standard articulated by OLC, a key to determining whether an operation is “limited” is whether there is a risk of harm to U.S. armed forces. But contractors are not technically U.S. armed forces. So, by outsourcing functions to contractors, the government reduced the risk to armed forces and therefore transformed an operation that might otherwise have fallen within Congress’s war powers into one the executive could argue did not count as war for constitutional purposes. Indeed, both with regard to Libya and earlier unilateral use-of-force operations, such as the intervention in Kosovo in 1999, a large number of contractors provided logistical and other support in the operations, reducing the footprint of the uniformed armed forces and making the argument for unilateral action more plausible.¹³²

Further, privatizing national security operations may have had a large, albeit indirect, impact on public opinion about such operations because official U.S.

128. U.S. CONST. art. I, § 8.

129. U.S. CONST. art. II, § 2.

130. Authority to Use Military Force in Libya, 35 Op. O.L.C. 1, 6 (2011).

131. *Id.*

132. See Laura A. Dickinson, *Drones, Automated Weapons, and Private Military Contractors: Challenges to Domestic and International Legal Regimes Governing Armed Conflict*, in *NEW TECHNOLOGIES FOR HUMAN RIGHTS LAW AND PRACTICE* 93–123 (Molly K. Land & Jay D. Aronson eds., 2018) [hereinafter Dickinson, *Drones*].

military casualty totals do not include contractor deaths or injuries, which are instead counted separately in statistics gathered by the Department of Labor and are rarely discussed in media casualty reports.¹³³ Thus, the U.S. public is likely less informed regarding either the harm suffered by contractors in war zones or the harm they might inflict on foreign populations. This lack of awareness, in turn, expands executive power by reducing the political cost of unilateral military action. More recently, new technologies, such as the growing use of UAVs, have exacerbated this effect. As with the growing use of contractors, the ability to deploy remotely-piloted UAVs to conduct surveillance and drop bombs in conflict zones reduces the need for armed forces on the ground even as it increases the role of private contractors in operating the UAVs and processing the data they generate.¹³⁴ From analyzing surveillance feeds, to storing the data that is generated, to conducting maintenance, contractors perform a variety of roles in the operation of UAVs.¹³⁵ It is therefore not surprising that the technology has been popular with presidents across the political spectrum: the combination of privatization and UAVs tends to dampen public concern over the use of U.S. military force abroad, while allowing for legal arguments that drone attacks do not count as war and reducing Congress's inclination to conduct oversight or otherwise attempt to limit military action.¹³⁶ All of these factors effectively expand the zone of executive branch discretion.

2. Reduced Oversight and Transparency

Outsourcing also makes oversight of executive branch action far more difficult. In the early years of the conflicts in Afghanistan and Iraq, for example, the presence of military and security contractors repeatedly caused chaos on the ground because contractors operated outside the chain of command and military control, leading to enormous oversight gaps.¹³⁷ Military commanders often reported that they had no way of knowing when private security contractors were entering a particular area and had no clear means to direct their behavior.¹³⁸ Instead, formal oversight of government contracts lay with contracting officers; yet those officers were often in extraordinarily short supply and had little knowledge or experience in overseeing the kinds of services, such as private security, that these contractors were performing.¹³⁹ In addition, the contracts themselves were drafted quickly, outside of normal procedures, and offered little specificity or guidance related to the services actually being performed.¹⁴⁰ Finally, private security contracts often lacked guidance on rules regarding the use of force, and the contractors received little training in those rules.¹⁴¹

133. Steven L. Schooner & Collin D. Swan, *Contractors and the Ultimate Sacrifice*, SERV. CONTRACTOR, Sep. 2010, at 16, 16–18, <https://perma.cc/95YT-99SP>.

134. See Clanahan, *supra* note 112.

135. *Id.*

136. See Dickinson, *Drones*, *supra* note 132.

137. See, e.g., Laura A. Dickinson, *Military Lawyers on the Battlefield, An Empirical Account of International Law Compliance*, 104 AM. J. INT'L L. 1, 19–20 (2010).

138. *Id.*

139. DICKINSON, *supra* note 20, at 82–86.

140. *Id.* at 75–76.

141. *Id.* at 76–81, 178.

Privatization also reduced the ability of Congress to conduct its usual oversight of military operations. Congressional committees with jurisdiction over military funding and operations did not have experience scrutinizing private contractors performing new roles. And initially there was no clear reporting mechanism to enable Congress to ascertain even the numbers of contractors, let alone their roles, or to obtain information regarding problems and abuses. Gaps in the Freedom of Information Act (“FOIA”),¹⁴² which is designed to provide transparency to aid lawmakers and the public, and weaknesses in whistleblower protections exacerbated the problem, as did the fragmentation of responsibility over contractors among multiple agencies, and the fact that many of those harmed by contractors were overseas.¹⁴³ The multiple layers of subcontractors further reduced prospects for transparency. Eventually, when several extreme and horrific contractor abuses finally made it into the media, generating public outcry, lawmakers and the public took notice.¹⁴⁴ But the core point is that rapid privatization tends to hide executive branch national security actions from view, reducing the usual oversight mechanisms wielded both within the military chain of command, in the executive branch more broadly, and in Congress.

Although this rapid privatization of extraterritorial military and security functions posed particularly severe oversight and transparency problems, the growing privatization of domestic national security functions also generated significant challenges. The immigration context provides a notable example. Laws designed to provide transparency regarding government action, such as state and local FOIA provisions, do not clearly apply to private companies running immigration detention sites or deploying immigrant surveillance technologies like ankle monitors.¹⁴⁵ Indeed, the Department of Homeland Security itself has acknowledged that Immigration and Customs Enforcement (“ICE”) lacks the ability to independently monitor or oversee private immigration detention facilities; the contracts often provide that the monitoring of these contracted facilities is also performed by contractors.¹⁴⁶ Furthermore, even when companies fail to meet their contractual obligations to provide adequate conditions for detainees, ICE often fails to initiate contract termination procedures because of the cumbersome nature of such procedures.¹⁴⁷ Thus, both abroad and domestically, privatization of national security functions decreases oversight.

142. 5 U.S.C. § 552.

143. DICKINSON, *supra* note 20, at 107–17.

144. Perhaps the most notable incident occurred in 2007, when security contractors working for the company Blackwater, which was under contract to the U.S. Department of State to guard diplomats, fired into a crowd in Baghdad’s Nisour Square and killed 17 people. James Glanz & Alyssa J. Rubin, *From Errand to Fatal Shot to Hail of Fire to 17 Deaths*, N.Y. TIMES (Oct. 3, 2007), <https://perma.cc/H8XE-K6VM>.

145. See, e.g., Jennifer Chacon, *Privatized Immigration Enforcement*, 52 HARV. C.R.-C.L. L. REV. 1, 39 (2017); see also MARIE GOTTSCHALK, *CAUGHT: THE PRISON STATE AND THE LOCKDOWN OF AMERICAN POLITICS* 72 (2015).

146. See Chacon, *supra* note 145, at 40; see also DORA SCHRIRO, *IMMIGRATION DETENTION OVERVIEW AND RECOMMENDATIONS* 15–19 (2009), <https://perma.cc/VH44-LLV2>.

147. SCHRIRO, *supra* note 146, at 23.

3. Reduced Accountability Under International and Domestic Law

Privatization also reduces potential legal accountability under either international or domestic law because most potentially applicable legal regimes focus on governmental action rather than on private actors. Delegating national security functions to private actors, therefore, expands executive power by moving the function outside the scope of various legal limitations that might otherwise apply.

Turning to international law first, international human rights law prohibits states from engaging in torture, summary execution, arbitrary arrest, unfair trials, discrimination, and other actions that infringe on fundamental rights.¹⁴⁸ Meanwhile, international humanitarian law (“IHL”) applies within conflict zones and imposes obligations on states to safeguard civilians, both in use-of-force and detention operations.¹⁴⁹

For contractors operating abroad, however, international human rights law rules may not apply because those rules most clearly govern state actions.¹⁵⁰ To be sure, an argument could be made that a non-state actor paid by the state who detains someone and commits abuses is acting sufficiently within the control of the state that prohibitions on governmental torture or arbitrary arrest would apply.¹⁵¹ Still, it requires additional argumentation that leaves the scope of protection at best uncertain.

Within conflict zones, when IHL applies, there is no “state action” problem because the IHL rules, including those protecting civilians, govern all actors, including contractors.¹⁵² The accountability mechanisms that enforce those norms, however, were not primarily designed with contractors in mind. When U.S. armed forces violate IHL, for example, they are subject to military investigation, prosecution, and discipline under the Uniform Code of Military Justice, which essentially implements IHL rules.¹⁵³ But in the early phase of the conflicts in Iraq and Afghanistan, military justice mechanisms did not encompass contractor misconduct.¹⁵⁴ The scope of extraterritorial civilian criminal justice enforcement was also uncertain, as the jurisdiction of U.S. courts did not clearly extend to contractors working for all government agencies, and it was difficult for U.S. civilian law enforcement agencies to conduct investigations.¹⁵⁵

With regard to U.S. domestic law, the Constitution’s Bill of Rights protects fundamental rights such as free speech and association, the right to be free from unreasonable searches and seizures, due process, fair trial, and nondiscrimination.¹⁵⁶

148. For an overview of IHRL obligations, see Dickinson, *supra* note 70, at 642–49.

149. For an overview of IHL obligations, see *id.* at 649–51.

150. See *id.* at 642–49. The United States also does not recognize international human rights law obligations as applying universally to extraterritorial actions, although other states and international organizations view the extraterritorial reach of human rights law to governmental action much more broadly. See *id.* at 646–49.

151. See *id.* at 647–49.

152. For an extensive discussion of this issue, see DICKINSON, *supra* note 20, at 44–46.

153. See *id.* at 50–51.

154. *Id.*

155. *Id.*

156. U.S. CONST. amend. I–X.

Statutory frameworks implement and expand these protections.¹⁵⁷ Yet, these constitutional and statutory provisions are usually framed as rights against government, rather than private, misconduct. As such, they require those pursuing legal claims to show a sufficient connection to “state action” in order to be successful, and it is surprisingly difficult to establish that government contractors are sufficiently tied to the government that their actions qualify as state action.¹⁵⁸ As a result, litigation attempting to enforce the protection of individuals’ constitutional rights against contractors faces considerable hurdles.¹⁵⁹

In order to see the impact of privatization on domestic law regulation, we can examine how the Fourth Amendment prohibition against unreasonable searches applies to different types of national security-related surveillance operations. The U.S. Supreme Court has long interpreted the Fourth Amendment to protect against government intrusions on reasonable expectations of privacy.¹⁶⁰ However, when the government collects or uses data in the national security context, it is unclear whether the full scope of Fourth Amendment privacy protections apply. For example, in *U.S. v. District Court*, the U.S. Supreme Court ruled that in criminal prosecutions involving purely domestic national security, the Fourth Amendment requires law enforcement to obtain a warrant, but the Court left open the possibility that Congress could relax the standards for obtaining a warrant due to the national security context.¹⁶¹ More recently, in *U.S. v. Carpenter*, the Supreme Court held that the Fourth Amendment requires the government to obtain a warrant before obtaining cell site location information from service providers, but specifically exempted national security investigations from its conclusion.¹⁶² And some lower courts have ruled that the Fourth Amendment protections of individual privacy are reduced when the executive branch is conducting surveillance to collect foreign intelligence information for national security purposes.¹⁶³ In the Foreign Intelligence Surveillance Act (“FISA”), Congress essentially codified this lesser standard of privacy in the national security context by allowing the executive branch to conduct surveillance of those believed to be agents of a foreign power, including terrorist organizations, after seeking a special warrant from the Foreign Intelligence Surveillance Court, a group of specially designated Article III judges.¹⁶⁴ The standard for obtaining a “FISA warrant” is therefore lower than for obtaining a warrant in an ordinary criminal justice

157. See, e.g., 42 U.S.C. § 1983.

158. See, e.g., Gillian E. Metzger, *Privatization as Delegation*, 103 COLUM. L. REV. 1367, 1415 (2003).

159. See *id.* Nevertheless, it is worth noting that non-constitutional tort claims can sometimes be successfully brought against private contractors. See *infra* text accompanying notes 198 and 199. In addition, some claims under the Alien Tort Statute for international law violations requiring a link to official conduct have managed to proceed because the contractors were deemed to have sufficient relationship to the state. See *infra* text accompanying notes 200–202.

160. See, e.g., *Carpenter v. United States*, 585 U.S. 296, 310 (2018).

161. 407 U.S. 297, 321 (1972).

162. *Carpenter*, 585 U.S. at 310.

163. In re Directives to Yahoo Pursuant to Section 105b of the Foreign Intelligence Surveillance Act, 551 F.3d 1004 (F.I.S.C.R. 2008).

164. 50 U.S.C. §§ 1801–1813, 1821–1829, 1841–1846, 1861–1864, 1881–1881h.

investigation, and the proceedings are mostly *ex parte*. Koh cites executive branch efforts to push the boundaries of FISA surveillance as an example of expanding executive power after 9-11.

Privatization has, however, further increased the scope of executive power over national security surveillance, severely infringing on privacy rights and reducing the ability to seek redress for privacy violations in U.S. courts. For example, when the U.S. government purchases data from private “data brokers” who have paid private companies to collect data, Fourth Amendment privacy protections might not apply at all.¹⁶⁵ After all, private actors who collect data do not directly infringe on individuals’ constitutional privacy rights because there is no “state action.” And U.S. courts have long held, under the “third party” doctrine, that the executive branch need not seek a warrant to obtain data collected by private actors even when it *compels* those actors to provide that data—thereby constituting state action—in part because individuals have already consented to provide this data to the private actors.¹⁶⁶ In the *Carpenter* decision, the U.S. Supreme Court did somewhat narrow the “third party” doctrine by concluding that private companies’ collection of cell site location data is so intrusive to an individual’s reasonable expectation of privacy that the government must obtain a warrant before compelling even a third party to provide that information in a criminal investigation.¹⁶⁷ Yet, the Court’s decision did not address data *purchased* by the government from data brokers under data broker contracts. And it is not at all clear whether such purchases constitute state action. Numerous privacy advocates have called on Congress to close the data broker “loophole” with legislation.¹⁶⁸ But absent such legislative reform, it is at best an open question whether government collection and use of such data would be subject to the Fourth Amendment. Thus, we see how privatization weakens rights protections and expands executive branch power in the national security realm.

C. Reforms to Address Privatization’s Impact

As discussed above, privatization has played a key role in expanding executive power and undermining the ideal of balanced institutional participation. Yet, in response to this first phase of national security privatization, Congress and the executive branch have to some degree implemented reforms to limit executive branch overreach and better apply public law values to private actors. In addition, U.S. courts have proved to be a place where some accountability has been possible – perhaps to a greater extent than in other national security domains. Most of these reforms apply only to private military and security contractors (“PMSCs”) operating overseas. Although these reforms are therefore limited in the types of contractors they cover, they have to some extent helped check executive power

165. See Sobel, *supra* note 119, at 191–93.

166. See, e.g., *Smith v. Maryland*, 442 U.S. 735, 744–46 (1979).

167. *Carpenter*, 585 U.S. at 310.

168. Emile Ayoub & Elizabeth Goitein, *Closing the Data Broker Loophole*, BRENNAN CTR. FOR JUST. (Feb. 13, 2024), <https://perma.cc/FQ26-J6QR>.

and protect public values. Accordingly, they are a useful part of the story of how to restore more balanced institutional participation in the national security arena.

1. Applying International and Domestic Law to Private Actors

The most obvious way to reestablish the applicability of legal norms in response to growing privatization is to explicitly amend those legal rules. That is, of course, easier said than done, both with regard to international and domestic law. At the international level, foundational treaties such as the Geneva Conventions are difficult to amend. Instead, the International Committee of the Red Cross, along with a coalition of states, including the United States, launched a series of meetings that culminated in the drafting of the Montreux Document, which seeks to establish that the rules of IHL apply to governments that enter into contracts with PMSCs operating in a variety of contexts, as well as the PMSCs themselves. The Document specifies precisely how IHL obligations operate with regard to states that employ PMSCs, states where PMSCs operate, and states that serve as recruitment sites for PMSCs.¹⁶⁹ The Document also sets forth various “good practices” that extend beyond the formal legal obligations.

A parallel international effort, which directly included PMSCs and civil society groups along with states, involved the drafting of a code of conduct for contractors.¹⁷⁰ Under the code, PMSCs agree to follow not only the norms of IHL but also those of international human rights law (“IHRL”), thereby solving the challenge noted above that IHRL obligations do not clearly bind private actors. Thus, PMSCs agree to observe IHRL rules that limit the use of force, protect human dignity in detention, prohibit torture, cruel, inhuman, and degrading treatment, and ban sexual exploitation, child labor, forced labor, and discrimination.¹⁷¹ An association, which includes PMSCs, states, and civil society groups on its board, then certifies PMSCs and monitors compliance.¹⁷² To date, 160 PMSCs, fifty-nine civil society organizations, and eight states are members.¹⁷³

With regard to domestic law, the United States executive branch reformed the government contracting process for PMSCs to ensure that specific rules implementing public values were included in the terms of the military and security contracts themselves. Such rules included explicit restrictions on the use of force and prohibitions on human trafficking.¹⁷⁴ These new contractual requirements also mandated that contractors receive appropriate training. For example, if a contractor is authorized to use force, the reformed contracts provide that employees must

169. See generally Int’l Comm. of the Red Cross & Switz. Fed. Dep’t of Foreign Affs., *The Montreux Document: On Pertinent International Legal Obligations and Good Practices for States Related to Operations of Private Military and Security Companies During Armed Conflict* (Sep. 17, 2008).

170. See generally *International Code of Conduct for Private Security Service Providers*, INT’L CODE OF CONDUCT ASS’N (Nov. 9, 2010), <https://perma.cc/9M2H-5HBJ>.

171. See *id.* at 9–11.

172. *What We Do*, INT’L CODE OF CONDUCT ASS’N, <https://perma.cc/ED74-GTAF>.

173. *Members*, INT’L CODE OF CONDUCT ASS’N, <https://perma.cc/E228-22EP>.

174. See Dickinson, *Outsourcing War and Security*, *supra* note 24.

receive detailed, specific training, including training in all the applicable use-of-force rules that would apply to military personnel.¹⁷⁵ New rules also prescribed training for individual contractor employees in order to guard against schemes in which contractors might either perpetrate or become victims of human trafficking.¹⁷⁶ Finally, the contracts required that firms vet their personnel—many of whom might not be U.S. nationals—for criminal records and past human rights abuses.¹⁷⁷ And in some areas, such as interrogation, where the risk of abuse proved to be extremely high, agencies largely prohibited the use of contractors altogether.¹⁷⁸

2. Creating Public-Private Accreditation Regimes

Once new substantive standards for PMSCs were developed, it was necessary also to establish an accreditation regime to differentiate compliant from non-compliant firms. Significantly, the PMSCs themselves largely supported these reforms and collaborated in public-private initiatives to require accreditation of firms bidding on government contracts. Indeed, business management standards have long set best practices within different industries, and many PMSC firms embraced accreditation as a way to distinguish themselves from rogue outfits. Thus, U.S. government officials and private industry representatives worked to develop what became known as new business management rule PSC.1, which set forth best practices for security firms operating under contract with the government.¹⁷⁹ The rule included extensive detailed normative requirements, as well as standards for effective training and vetting of employees. Finally, PSC.1 mandated that firms establish processes for reporting and investigating abuses and imposing sanctions.¹⁸⁰ Government agencies now require that PMSC firms receive accreditation under this rule as a precondition to receiving contracts.¹⁸¹

3. Increasing Oversight and Transparency

Reforms also increased oversight of PMSCs and provided additional transparency regarding privatized operations. Within the executive branch, agencies increased the number of contract monitors, incentivized them to serve in conflict zones, and required that those monitors receive training and experience in overseeing private security contracts.¹⁸² Agencies also launched processes for tracking the number of

175. *See id.*

176. *See id.*

177. *See id.*

178. *See* Policy Letter 11-01, Performance of Inherently Governmental and Critical Functions, 77 Fed. Reg. 7609 (Feb. 13, 2012) [hereinafter OFPP Letter]; National Defense Authorization Act for Fiscal Year 2010, Pub. L. No. 111-84, § 1038, 123 Stat. 2190, 2451–52 (2009) (prohibiting DoD interrogation contractors in most circumstances). *See also* U.S. DEP'T OF DEF., DIRECTIVE 3115.09, DoD INTELLIGENCE INTERROGATIONS, DETAINEE DEBRIEFINGS, AND TACTICAL QUESTIONING 18 (Oct. 11, 2012, incorporating Change 3, effective Oct. 29, 2020).

179. U.S. DEP'T OF DEFENSE, CONTRACTOR SUPPORT OF U.S. OPERATIONS IN THE USCENCOM AREA OF RESPONSIBILITY 4 (July 2019).

180. *See id.*

181. *See id.*

182. Dickinson, *Outsourcing War and Security*, *supra* note 24.

security contractors operating in conflict zones, ensuring coordination between uniformed military units and security contractors, and investigating reports of abuses.¹⁸³

Congress also expanded its oversight. Multiple congressional committees conducted numerous hearings to assess the scope and impact of national security privatization across a variety of domains.¹⁸⁴ The Government Accountability Office, an independent agency reporting to Congress, initiated extensive investigations and issued multiple reports.¹⁸⁵ The potential for abuse presented by the extensive outsourcing of military and security functions in conflict zones eventually galvanized such significant public outcry that Congress created the Commission on Wartime Contracting to study the problem and recommend solutions.¹⁸⁶ Congress also established special Inspectors General for both Afghanistan¹⁸⁷ and Iraq¹⁸⁸ reconstruction. These Inspectors General were empowered to conduct investigations on the ground in each country, in order to identify and suggest remedies for “waste, fraud, and abuse.”

In addition, Congress mandated transparency through legislation in a number of domains. For example, Congress required the Department of Defense (“DoD”) to issue a quarterly report on the number and types of contractors operating in the area controlled by U.S. Central Command.¹⁸⁹ This legislation also provided that DoD must report to Congress on a variety of topics related to the use of contractors in conflict zones.

Finally, Congress and executive branch agencies took some steps to define the scope of acceptable privatization. For example, in part to address the role contract interrogators played in the torture at Abu Ghraib prison in Iraq and in CIA interrogations during the early post-9-11 period, Congress prohibited DoD from using interrogation contractors in most circumstances.¹⁹⁰ As a matter of agency policy, the CIA issued a similar directive. The Commission on Wartime Contracting identified potential boundaries around acceptable roles for security contractors,

183. *See id.*

184. *See* DICKINSON, *supra* note 20, at 118–20.

185. *Id.*

186. *See* FINAL REPORT, *supra* note 100, at 7.

187. Special Inspector General for Afghanistan Reconstruction, Pub. L. No. 110-181, § 1229, 122 Stat. 378, 378–385 (as amended by Pub. L. 110-417, § 1061(b)(11), 122 Stat. 4613; Pub. L. 111-38, § 1, 123 Stat. 1932; Pub. L. 117-286, § 4(b)(15), 136 Stat. 4344; Pub. L. 118-159, § 7809(a), 138 Stat. 2562) (codified at 5 U.S.C. § 415).

188. *See generally* Iraq Reconstruction Accountability Act of 2006, Pub. L. 109-440, 120 Stat. 3286, Dec. 20, 2006.

189. National Defense Authorization Act for Fiscal Year 2007, Pub. L. No. 109-364, §§ 815, 854, 120 Stat. 2083, 2322, 2343 (2007); U.S. Troop Readiness, Veterans’ Care, Katrina Recovery, and Iraq Accountability Appropriations Act, Pub. L. No. 110-28, § 3305, 121 Stat. 112, 136 (2007); National Defense Authorization Act for Fiscal Year 2008, Pub. L. No. 110-181, § 861, 122 Stat. 3, 253 (2008).

190. The National Defense Authorization Act for Fiscal Year 2010 prohibited contractor personnel from interrogating any individual “under the effective control of DOD or otherwise under detention in a DOD facility in connection with hostilities” unless the Secretary of Defense determines that a waiver to this provision is vital to U.S. national security interests. Pub. L. 111-84, § 1038, 123 Stat. 2190, 2541–42 (2009).

noting the variety of agency approaches.¹⁹¹ And the Office of Federal Procurement Policy issued an important rule on the topic.¹⁹²

To be sure, much of this activity focused only on contractors operating in conflict zones, with those contractors authorized to use force, such as security and interrogation contractors, receiving particular attention. Logistics and construction contractors also garnered significant scrutiny. And most of the reforms focused on use of force, human trafficking, and fraud and waste. In contrast, contractors engaged in intelligence gathering and analysis functions, as well as cyber operations, received less discussion.

4. Expanding the Possibilities for Criminal Prosecution and Civil Litigation

Litigation in U.S. federal courts also offered at least some limited avenues of accountability for contractor abuses. In 2007, Congress amended the Uniform Code of Military Justice to expand the authority of military courts to criminally prosecute civilian contractors operating in conflict zones.¹⁹³ The military has since used the provision, though rarely, to prosecute contractors.¹⁹⁴ And although significant constitutional questions remain about whether in general civilians may be prosecuted in military courts,¹⁹⁵ the U.S. Court of Appeals for the Armed Forces has upheld military prosecutions of contractors.¹⁹⁶

In addition, Congress expanded civilian criminal jurisdiction over contractors operating extraterritorially. The Military Extraterritorial Jurisdiction Act had long provided that federal courts have jurisdiction over prosecution of DoD contractors operating extraterritorially if they commit certain extraterritorial crimes. Congress amended the statute to include contractors employed by other agencies as well, so long as those agencies were supporting a DoD mission.¹⁹⁷ Under the authority of this provision, federal prosecutors brought criminal charges against security contractors working for the firm then known as Blackwater who used excessive force and killed seventeen people in Baghdad's Nisour Square while guarding U.S. State Department diplomats.¹⁹⁸ Four guards were convicted, one of murder and three of manslaughter and firearms charges,¹⁹⁹ although President Trump subsequently pardoned them.²⁰⁰

191. See FINAL REPORT, *supra* note 100, at 52–64.

192. OFPP Letter, *supra* note 178.

193. 100 U.S.C. § 802(a)(10).

194. See *United States v. Ali*, 71 M.J. 256, 268–69 (C.A.A.F. 2012).

195. DICKINSON, *supra* note 20, at 67.

196. *Ali*, 71 M.J. at 268–69.

197. See, e.g., 18 U.S.C. §§ 3261–3267. Despite broad bipartisan support, the U.S. Congress has not enacted draft legislation that would close additional loopholes in U.S. courts' jurisdiction over extraterritorial crimes committed by contractors working for the United States. See *Civilian Extraterritorial Jurisdiction Act of 2014*, H.R. 5096, 113th Cong. (2014).

198. Charlie Savage, *Three Ex-Blackwater Guards Are Resentenced in Iraq War Massacre*, N.Y. TIMES (Sep. 5, 2019), <https://perma.cc/6R28-WVYQ>.

199. *Id.*

200. Maggie Haberman & Michael S. Schmidt, *Trump Pardons Two Russia Inquiry Figures and Blackwater Guards*, N.Y. TIMES (Dec. 22, 2020), <https://perma.cc/RA2F-4T7V>.

Civil litigation also served as a check on some contractor excesses in this period. With respect to contractors operating in and near conflict zones, a broad array of cases made their way through the courts. Contract employees brought suits against their own employers, alleging claims such as negligent supervision and hiring.²⁰¹ U.S. armed forces also sued, claiming that contractors injured them.²⁰² Finally, cases were brought by third-party victims of contractor abuses.²⁰³ Some of these suits against interrogation contractors implicated in torture, brought by former detainees under the Alien Tort Statute, have settled for large sums²⁰⁴ or gone to trial and resulted in sizeable judgments.²⁰⁵

To be sure, such cases have faced significant litigation hurdles. In their defense, contract firms have invoked the political question doctrine, which has met with success in some cases.²⁰⁶ They have also asserted the *Feres* rule, a judge-made doctrine that limits U.S. armed forces from bringing tort suits in many instances.²⁰⁷ Some courts have barred suits under the “battlefield preemption doctrine,” which restricts the circumstances in which contractors can be sued for actions taken within armed conflict zones.²⁰⁸ Contractors have also attempted to invoke the state secrets doctrine to limit litigation.²⁰⁹

Still, there are likely more avenues for litigation against PMSCs than if victims were trying to litigate against the U.S. government directly. As noted above, the suits against contractors for engaging in torture have met with some success.²¹⁰ Direct suits against the U.S. government, by contrast, have met steeper hurdles.²¹¹

These four types of responses to national security privatization are certainly not a full solution to the problems that privatization raises. To begin, much of this reform activity has centered only on military and security contractors operating in conflict zones, which is only a subset of national security privatization activity. In addition, even in this limited domain, the reforms have been partial and have not fully addressed all the risks that contractors pose to human dignity. Oversight and transparency, while improved, remain spotty. And in a broad array of domains, privatized national security action has remained unseen and unaccountable. The key point, though, is that privatization has long been a central mechanism by which the executive has expanded his power in the national security realm, and it has also been a site for possible responses to that expanded power. Thus, privatization is a

201. DICKINSON, *supra* note 20, at 51–84.

202. *Id.*

203. *Id.*

204. Sheri Fink, *Settlement Reached in C.I.A. Torture Case*, N.Y. TIMES (Aug. 17, 2017), <https://perma.cc/5U52-R2GM>.

205. Mattathias Schwartz, *U.S. Jury Awards \$42 Million to Iraqi Men Abused at Abu Ghraib*, N.Y. TIMES (Nov. 12, 2024), <https://perma.cc/77NG-2Z2U>.

206. *See* DICKINSON, *supra* note 20, at 51–52.

207. *Feres v. United States*, 340 U.S. 135, 146 (1950).

208. *Saleh v. Titan*, 580 F.3d 1, 15–16 (D.C. Cir. 2009).

209. *See* Order Denying Motion to Dismiss Based on State Secrets, *Al Shimari v. CACI Premier Technology, Inc.*, No. 08-cv-00827 (E.D. Va. Feb. 27, 2019).

210. *See* Schwartz, *supra* note 205.

211. DICKINSON, *supra* note 20, at 202.

crucial, if often overlooked, part of the story of the 21st century National Security Constitution that Koh seeks to explicate and defend.

IV. THE NEW NATIONAL SECURITY PRIVATIZATION (2025-)

The second Trump administration has ushered in an era of radical government restructuring. This is emphatically not the kind of executive branch restructuring that Koh (and I and others) have argued for in the national security domain – encompassing clearer legislative limits on executive power, more coherent intra- and inter-agency coordination, executive branch legal interpretations that establish limits on executive power, and the like.²¹² Rather, it is precisely the opposite, involving even more expansive interpretations of presidential power, including greater presidential control over the executive branch under a theory of the “unitary executive” – a theory the U.S. Supreme Court seems likely to accept on a variety of fronts.²¹³

Privatization is playing a key role. Indeed, the administration—led initially by Elon Musk and a group of former tech industry leaders and employees operating through the so-called Department of Government Efficiency (“DOGE”)—has upended the entire federal government by making large, often seemingly arbitrary, multi-billion-dollar cuts to various agencies and their functions. In many respects, this approach could be seen as applying aspects of a private sector model to the federal government: a plan to lay off large numbers of employees and sell off assets at a rapid pace. No part of the federal government has been immune, as the Trump administration has imposed these cuts across virtually all agencies, including the national security agencies. And while the administration has in part directed the cuts to the federal bureaucracy directly through layoffs of large numbers of government workers, it has also suspended or cancelled vast numbers of government contracts and grants without much discernment regarding the content of those contracts and grants.

This radical restructuring brings the United States into a new phase, a qualitatively different and more pernicious era of national security privatization. Whereas before privatization entailed the shift of government functions to contractors, in this new phase the government is also cutting off many of the contracts themselves, sometimes for specific purposes, but often *en masse*, even as it awards (or promises to award) new contracts in some domains. Whereas before government actors within the federal bureaucracy typically initiated the contracting process, in this new phase private sector leaders and employees from outside

212. See, e.g., BAUER & GOLDSMITH, *supra* note 88; Dickinson, *supra* note 88.

213. With respect to the unitary executive theory, for example, the U.S. Supreme Court has signaled that it will hold that constitutional separation of powers principles prohibit legislative removal restrictions on the executive officers serving on multi-member boards of independent agencies. *Trump v. Wilcox*, 605 U.S. ___, 145 S. Ct. 1415 (2025). The Court thus indicated that it is likely to overturn longstanding precedent, *Humphrey’s Executor v. United States*, 295 U.S. 602 (1935), upholding the legislative framework for independent agencies, including for-cause removal restrictions on agency board members.

government have assumed positions within the government, in many cases under special rules applied in unusual ways and potentially in violation of the U.S. Constitution's Appointments Clause. Whereas before litigants found some ways to challenge the conduct of contractors who committed abuses, in this new phase litigation to challenge contract and grant cutoffs has often been thwarted in U.S. Article III courts. Whereas before the legal and policy framework of the government contracts system both guided the award of contracts and served as the basis for reforms to better protect public values, in this new phase privatization has undermined the government contracts framework itself: many of the cuts and new awards flout rules and procedures of that framework, including conflict of interest rules. The prospect of rapid reprivatization also risks undermining this framework.

Thus, once again, privatization has given the executive branch more discretion and power at the same time that it has curtailed protections for individual rights and weakened accountability mechanisms of enforcement and oversight. And once again, advocates of privatization have justified it in terms of efficiency – often without supporting those arguments with substantial data.²¹⁴ But in the second phase, the impacts have been much greater, as the executive branch has broadly wielded power to terminate contracts and grants on a monumental scale. This new privatization phase also poses a much greater risk of corruption, as the cuts in turn create space for the rapid award of contracts potentially outside normal contracting procedures. Thus, this dangerous new phase of privatization is reshaping government and radically expanding the scope of executive power, moving us yet farther from the ideal of balanced institutional participation.

The initial step in this new phase of privatization was the rapid termination of an enormous number of contracts with national security agencies,²¹⁵ valued in multiple billions of dollars.²¹⁶ Here we see that the earlier phase of privatization,

214. See, e.g., *Elon Musk Says Post Office, Amtrak Should Be Privatized*, REUTERS (Mar. 6, 2025).

215. The data on contract termination is difficult to obtain, as the DOGE government website is reportedly riddled with inaccuracies. See David A. Farenthold & Jeremy Singer-Fine, *DOGE Makes Its Latest Errors Harder to Find*, N.Y. TIMES (Mar. 13, 2025); Jessie Blaeser, *Just How Much Has DOGE Exaggerated Its Numbers? Now We Have Receipts*, POLITICO (Aug. 12, 2025), <https://perma.cc/3VFA-XLS9>. It also no longer breaks down contract data by agency in a user-friendly form. See *Wall of Receipts*, DEP'T OF GOV'T EFFICIENCY, <https://perma.cc/MF4T-WBA5>.

216. The first and perhaps most highly publicized cuts came at the U.S. Agency for International Development ("USAID"), where the Department of Government Efficiency ("DOGE") began its work, terminating multiyear grants and contracts valued at over \$60 billion—90% percent of the agency's awards—in just days. See *Trump Plans to Cut More than 90% of USAID Foreign Aid Contracts*, GUARDIAN (Feb. 26, 2025), <https://perma.cc/5FGQ-Z7GY>. At DoD, cuts to contracts and grants have totaled \$10 billion thus far. C. Todd Lopez, *Last Week in DOD: Additional DOGE Savings, Strengthening VA Partnership*, *Homeschool Review*, U.S. DEP'T OF DEF. (June 2, 2025), <https://perma.cc/BX27-LTFK>. Although it is a smaller number both in total and as a percentage of the overall agency budget, as compared to the USAID cuts, it is nonetheless still significant. Other agencies with a national security focus have also undergone rapid cuts to contracts and grants. The U.S. State Department has cut at least \$500 million in awards, many of which touched on disfavored policy areas, such as DEI, climate, and refugee support. See *DOGE-Terminated Contracts Tracker, State Department*, G2X (July 10, 2025), <https://perma.cc/JV3A-VJXQ>. The Department of Homeland Security ("DHS") has cut \$2.8 billion. See *DOGE-Terminated Contracts Tracker, Department of Homeland Security*, G2X (July 10, 2025), <https://perma.cc/2Y9Z-CH86>. The U.S. Department of Veterans Affairs ("VA") rapidly cut contracts and

by turning over vast governmental functions to contractors in the national security realm, laid the foundation. In this new phase, the Trump administration pulled the lever that the earlier contracts installed – exercising the discretion afforded under the contracting system itself to suspend or cut contracts and grants. In addition, privatization enhanced the ability of government actors to use AI because government contracts contain an enormous amount of data that is easily accessible. The prior era of privatization—the shift of many government functions to contractors—generated huge data troves that were ripe for the second Trump administration to mine.²¹⁷ Using AI tools, they were able to identify pathways for cuts, enabling rapid and large-scale change.²¹⁸ And by altering the facts on the ground so quickly, the DOGE strategy made judicial oversight far more difficult.

Challenging contract terminations in court is subject to significant legal obstacles. As a substantive matter, the terms of the contracts themselves typically give federal contracting officers broad authority to cancel the contract for the “government’s convenience,”²¹⁹ so long as the government pays a so-called “kill fee.” This contractual language makes any claim of improper contract termination difficult to maintain, and courts have sometimes construed this term quite broadly.²²⁰ It is true that the discretion afforded under this sort of contractual term is not unlimited. To the contrary, “[i]t is well established that such terminations are a breach of the contract if the contractor abuses her/his discretion or acts in bad faith.”²²¹ And some of the mass contract terminations imposed by the Trump administration may well meet this admittedly high standard, particularly because the terminations failed to follow established, required procedures. Nevertheless, it is difficult to deny that the broad ability of the government to terminate contracts poses a hurdle to any litigation to restore contract funding.

In addition, as a procedural matter, contract claims generally are routed, at least initially, not to Article III federal courts but to the Court of Federal Claims (“CFC”), a court whose judges lack the full independence protections of Article III

grants worth at least \$2.9 billion. See *DOGE-Terminated Contracts Tracker*, Department of Veterans Affairs, G2X (July 10, 2025), <https://perma.cc/7XUB-7E9E>. Although the VA does not directly engage in national security functions, it is included here because its support to veterans arguably brings it within the national security infrastructure.

217. Makena Kelly, David Gilbert, Vittoria Elliott, Kate Knibbs, Dhruv Mehrotra, Dell Cameron, Tim Marchman, Leah Feiger & Zoë Schiffer, *Inside Elon Musk’s “Digital Coup”*, WIRED (Mar. 13, 2025), <https://perma.cc/9YD9-W2HS>.

218. See *id.*; Hanna Natanson, Gerrit De Vynck, Elizabeth Dvoskin & Danielle Douglas-Gabriel, *Elon Musk’s DOGE is Feeding Sensitive Federal Data into AI to Target Cuts*, WASH. POST (Feb. 6, 2025), <https://perma.cc/G8BX-85Q6>; Jared Keller, *The US Army Is Using ‘CamoGPT’ to Purge DEI From Training Materials*, WIRED (Mar. 6, 2025), <https://perma.cc/P2AJ-ZFS>; Brandon Roberts, Vernal Coleman & Eric Umansky, *DOGE Developed Error-Prone AI Tool to “Munch” Veterans Affairs Contracts*, PROPUBLICA (June 6, 2025), <https://perma.cc/KRK4-29W3>.

219. FAR § 49.1.

220. See, e.g., *Kyrgoski Constr. Co., Inc. v. U.S.*, 94 F.3d 1537, 1541, 1543–44 (Fed. Cir. 1996).

221. David B. Dixon & Michael R. Rizzo, *Challenging Trump 2.0 En Masse Contract Terminations*, PILLSBURY WINTHROP SHAW PITTMAN LLP (Feb. 24, 2025), <https://perma.cc/77CF-6KA9> (citing *Kyrgoski Constr. Co.*, 94 F.3d at 1541).

courts, such as lifetime tenure.²²² These courts also cannot provide injunctive relief and therefore cannot reverse grant terminations. The jurisdictional issue arises because the Tucker Act grants jurisdiction to the CFC and waives sovereign immunity for suits based on “any express or implied contract with the United States.”²²³ Legal challenges to government action that in any way involve contracts or grants, therefore, face an argument that the action is at heart a violation of contractual terms and belongs in the CFC in the first instance, even when the claims are for injunctive relief under the Administrative Procedure Act (“APA”) or the U.S. Constitution. Indeed, on an emergency basis in litigation challenging the Trump administration cuts and suspensions of contracts and grants, the Supreme Court has embraced a relatively broad view of the types of APA claims that must be routed to the CFC.²²⁴ The lower courts must now sort through these issues.²²⁵ Here, we see that the widespread initiatives to privatize governmental functions in phase one have weakened the ability to challenge the even more extreme exercise of executive branch discretion in this new phase of privatization.

222. See, e.g., CONG. RSCH. SERV., R47641, FEDERAL AND STATE COURTS: STRUCTURE AND INTERACTION 9–10 (2023). Courts have confronted this jurisdictional issue in a number of cases now working their way through the federal court system. See generally *AIDS Vaccine Advoc. Coal. v. U.S. Dep’t of State*, 770 F. Supp. 3d 121 (D.D.C. 2025); Transcript of Proceedings, *Personal Servs. Contractor Ass’n v. Trump*, No. 25-cv-00469 (D.D.C. Mar. 6, 2025); *U.S. Conf. of Cath. Bishops v. U.S. Dep’t of State*, 770 F. Supp. 3d 155 (D.D.C. 2025).

223. 28 U.S.C. § 1491(a)(1).

224. See, e.g., *Dep’t of Educ. v. California*, 604 U.S. 640 (2025) (stating that the APA’s waiver of sovereign immunity does not apply when another statute “that grants consent to suit expressly or impliedly forbids the relief which is sought” and concluding that the Tucker Act is such a statute); *Nat’l Insts. of Health v. Am. Pub. Health Ass’n*, 606 U.S. ___, 145 S. Ct. 2658, 2659 (2025) (concluding that challenge to grant terminations must be routed to CFC but that APA challenge to policy guidance that led to terminations could proceed in federal district court); but see *Dep’t of State v. AIDS Vaccine Advoc. Coal.*, 604 U.S. ___, 145 S. Ct. 753 (2025) (allowing some aspects of constitutional claims challenging mass grant terminations to proceed in federal district court).

225. Even prior to these recent Supreme Court rulings, some federal courts had already dismissed grant and contract claims against the Trump administration for lack of jurisdiction and sent those claims to the CFC. See, e.g., *U.S. Conf. of Cath. Bishops v. State*, 770 F. Supp. 3d 155, 161–166 (D.D.C. 2025); Oral Order and Transcript of Proceedings, *Pers. Servs. Contractor Ass’n v. Trump*, Case No. 25-cv-00469 (D.D.C. Mar. 6, 2025). Other courts have taken a more nuanced approach, emphasizing that the plaintiffs in the cases before them are not truly bringing contract claims but rather alleging that the government violated rights guaranteed by the Constitution or federal statutes that are independent of the contracts, and that the equitable remedies sought cannot be boiled down to money damages for contract violations. See *Widakuswara v. Lake*, 2025 WL 1521355 (DC Cir. 2025) (en banc) (adopting reasoning of Judge Pillard’s dissent in panel decision, *Widakuswara v. Lake*, 2025 WL 1288817, at *10–14 (Pillard, J. dissenting from grant of stay pending appeal)); *Amica Ctr. for Immigr. Rights v. Dep’t of Just.*, 2025 WL 1852762, at *13 (D.D.C. July 6, 2025); *Pacito v. Trump*, 772 F. Supp. 3d 1204, 1214–1219 (W.D. Wash. 2025); *AIDS Vaccine Advoc. Coal. v. State*, 770 F. Supp. 3d 121, 135–137 (D.D.C. 2025), vacated on other grounds sub. nom. *Glob. Health Council v. Trump*, 2025 WL 2480618 (DC Cir. Aug. 28, 2025). In one of the first cases decided after the Supreme Court’s decision in *American Public Health Association*, the case challenging contract and grant cutoffs at Harvard, the district court concluded that the entirety of the claims belonged in federal district court, and not the CFC, because the claims at issue arose under the First Amendment and Title VI of the Civil Rights Act. *President & Fellows of Harvard Coll. v. U.S. Dep’t of Health & Human Servs.*, ___ F. Supp. 3d ___, 2025 WL 2528380, at *13–14 (D. Mass. 2025).

The new phase of privatization is also distinctive because many governmental roles are being filled by appointees who have retained their roles within the private sector *at the same time* that they were serving within the government. In addition, they have served in positions that stand outside normal bureaucratic hierarchies but still wield significant policy influence. Most notable was Musk himself, who continued to be CEO of Tesla, Twitter/X, and SpaceX while also serving as a special governmental employee (“SGE”) with the title of “senior advisor to the President.” Musk was widely understood to oversee DOGE even though he had no formal appointment within or as the head of DOGE.²²⁶ Similarly, Tom Krause, the CEO of Cloud Software Group, who was also hired as an SGE, retained his role as CEO even as he was put in charge of the Treasury Department’s payment system.²²⁷ Such appointments may violate the U.S. Constitution’s Appointments Clause if these individuals are making significant decisions without presidential nomination and Senate confirmation.²²⁸ Appointments of this nature also raise significant concerns about conflicts of interest: both Musk and Krause, for example, were running companies that had received, and were applying for, large federal government contracts even as they were exerting influence within the government.²²⁹ In addition, multiple federal agencies were investigating allegations of regulatory violations at Musk’s companies as he was serving in the government as an SGE. And because SGEs are exempt from some financial disclosure and conflict-of-interest rules that apply to full-time governmental workers, the risk of corruption is substantially increased.²³⁰

Finally, it is important to see all of these mass firings and contract terminations as ultimately part of a process not of downsizing but of reprivatization. Indeed, Trump administration officials and DOGE leaders have indicated that the DOGE-led cuts across the federal government, including in the national security agencies, are a prelude to further privatization.²³¹ Thus, we are likely to see the award

226. Niha Masih & Trisha Thadani, *Elon Musk Leaves Trump Administration After Contentious Tenure*, WASH. POST (May 29, 2025), <https://perma.cc/U7JE-9DJJ>; *see also* *Does 1–26 v. Musk*, 771 F. Supp. 3d 637, 650–51 (D. Md. 2025).

227. Dave Paresh, *DOGE Put Him in the Treasury Department. His Company Has Federal Contracts Worth Millions*, WIRED (Feb. 21, 2025), <https://perma.cc/T2VE-XXD6>.

228. U.S. CONST. art. II, § 2. *See* *Does 1–26*, 771 F. Supp. 3d at 668–69 (concluding that plaintiffs were likely to succeed on merits of Appointments Clause claim because Musk “without having been duly appointed as an Officer of the United States, exercised significant authority reserved for an Officer while serving in a continuing governmental position”). The court granted a preliminary injunction on a variety of grounds, but the Fourth Circuit issued an administrative stay. *Does 1–26 v. Musk*, 2025 WL 910413, at *1 (4th Cir. Mar. 25, 2025). Meanwhile, the district court subsequently certified a class action in the case, including on the Appointments Clause claim. *J. Does 4, 7, 22, 27, 28 & 29 v. Musk*, No. 25-0462, at 24 (D. Md. Aug. 18, 2025), <https://perma.cc/NES6-CERM>; *see also* *New Mexico v. Musk*, No. 25-cv-429, 2025 WL 1502747, at *16 (D.D.C. May 27, 2025) (denying government’s motion to dismiss Appointments Clause claim challenging Musk’s actions at 17 agencies).

229. *See* Cristin Dorgelo, *Unprecedented Use of Special Government Employees Raises Serious Ethical Concerns*, CTR. ON BUDGET & POL’Y PRIORITIES (May 1, 2025), <https://perma.cc/632V-UAH3>.

230. *See id.*

231. Musk, for example, has called for the Trump administration to “privatize everything we possibly can.” *See, e.g., Elon Musk Says Post Office, Amtrak Should Be Privatized*, REUTERS (Mar. 6, 2025).

of new contracts and grants. This privatization potentially includes: (1) shifting functions from the federal government to private contractors funded by the government;²³² (2) shifting contractual funding to new contractors performing work more in line with administrative priorities;²³³ and (3) awarding new contracts to administration loyalists to replace cancelled contracts.²³⁴ All of these processes increase executive branch discretion and power.

The point is not that any of these changes are necessarily bad ideas in all cases. Certainly, there were inefficiencies that were in need of reform. But it is important to see that the privatization process may occur with little or no involvement of the legislative or judicial branches. Indeed, when privatization occurs in the national security realm, there is even less oversight than usual because courts tend to defer to the executive in this domain generally. And with President Trump's decision to fire many executive branch Inspectors General,²³⁵ there will be even less independent oversight within the agencies themselves. Such a system is ripe for corruption, cronyism, and executive overreach. Thus, we see that national security privatization, which accelerated during the period from 1989–2024, has now been turbo-charged to radically expand executive power and further unbalance the national security constitutional framework that Koh envisions.

V. CONCLUSION

Koh's book provides an important reminder of the constitutional values that should be built into our national security framework. He argues that we need to rebuild a system of balanced institutional involvement both in the process of developing national security policy and in deploying diplomatic and military resources abroad. This balanced involvement, he contends, must reinvigorate the

232. For example, Erik Prince, the former CEO of the private security firm Blackwater, known for its role working for the U.S. government in Iraq and Afghanistan, has been at the forefront of many such initiatives, including a plan for contractors to take over U.S. military operations against the Houthi rebels in Yemen. Zachary Cohen, Phil Mattingly & Priscilla Alvarez, *The Return of Erik Prince: How a Notorious Military Contractor Maneuvered His Way Back Inside Trump's Orbit*, CNN (Mar. 13, 2025), <https://perma.cc/HY82-L2DD>. The DoD is also considering outsourcing more ancillary functions, including services on domestic military bases, including food services, the operation of commissaries, and childcare. Konstantin Toropin & Thomas Novelly, *Pentagon Turns Focus to Potentially Privatizing Commissaries, Military Exchanges*, MILITARY.COM (Apr. 11, 2025), <https://perma.cc/6UBV-YU7W>.

233. For example, the Trump administration is considering a proposal to repurpose \$40 billion of USAID funding to startup companies and investors working in developing countries. See Elizabeth Dvoskin, Jeff Stein, Hannah Natanson & Jacob Bogage, *DOGE Wants Businesses to Run Government Services 'as much as Possible'*, WASH. POST (Mar. 30, 2025), <https://perma.cc/3S5D-NRAF>.

234. Musk and other leaders from Silicon Valley have argued that the current process for awarding contracts and grants, including in the defense tech sector, is "stagnant," and "monopolistic" *Id.* Large companies such as consulting giants have long held government contract awards in the billions, including at DoD and other national security agencies, and are seeing their contracts terminated. See, e.g., Danny Ngyun & Jessie Blaeser, *Trump's Contract-Cutting Blitz Rattles a Once-Flourishing DC Industry*, POLITICO (May 25, 2025). Musk and other Silicon Valley leaders have argued for a new, rapid bidding process for new contracts that would presumably open the door to their companies. See, e.g., *A New Era of Defense Innovation*, PALANTIR BLOG (Dec. 19, 2025), <https://perma.cc/DG2F-WP26>.

235. Maggie Haberman, Charlie Savage & Anni Karni, *Trump Fires at Least 12 Inspectors General in Late-Night Purge*, N.Y. TIMES (Jan. 24, 2025), <https://perma.cc/6HBJ-KTCK>.

crucial roles that the legislative and judicial branches play as a counterweight to what otherwise becomes simply unchecked presidential power. And although as Koh documents both Democratic and Republican Presidents have played a role in expanding executive power in the national security domain, the second Trump administration is asserting a form of unbridled executive power that may be unprecedented in American history. That makes Koh's insights and proposed reforms more important than ever.

At the same time, any complete account of how executive power over national security has expanded in recent decades must include an analysis of privatization. From 1989–2024, the increased outsourcing of national security functions from governmental to private entities allowed the executive branch to engage in national security policymaking and military deployments with far less oversight from either Congress or the courts. And though reforms to the contracting process itself provided a potential counterweight to rein in some of the abuses, such reforms were limited and, in some cases, reliant on executive branch acquiescence.

The privatization story is even more important as we enter the radical new phase of privatization being pursued by the second Trump administration. President Trump has taken all the tools created by the previous phase—all the flexibility, data, and opacity that outsourcing generated—and used it in service of an unprecedented attack on our governmental system. The administration has imported unaccountable private sector actors into government, terminated hundreds of contracts, built new AI models in order to terminate hundreds more, and then created the possibility of reprivatizing functions to loyalists who will be directly dependent on presidential largesse. All this activity often evades either legislative or judicial oversight in part because it involves contracted services.

Thus, even as Koh's book provides a vibrant and persuasive account of the expansion of presidential power over national security and possible reforms that would help rebuild a true National Security Constitution, the second Trump administration is using the combination of privatization and AI to move with astonishing rapidity in the opposite direction. In response, anyone interested in a more accountable national security system must use Koh's book as the blueprint while applying his principles to the new era of extreme national security privatization that is rapidly taking root.
