The Metaethics of National Security

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Introduction

The two words "national security" never appear in the United States Constitution yet carry incredible weight in today's era of globalization. Those two words have come to encompass foreign relations, domestic policy, and a whole lot of executive discretion. In the realm of national security, the balance of powers has fluctuated between broad executive discretion and interbranch balance.[1] *United States v. Curtiss-Wright Exp. Corp.* embodies the former, where Justice Sutherland supports an expansive view of executive power.[2] He begins by establishing that the federal government has constitutional power in foreign affairs,[3] then embraces the idea that the President is the "sole organ of the federal government in the field of foreign relations."[4] Justice Robert Jackson's concurrence in *Youngstown Sheet & Tube Co. v. Sawyer* embodies the latter.[5] His tripartite framework outlines a hierarchy of presidential authority: (1) when the President acts under express or implied congressional authorization, their power is at maximum; (2) when the President acts where Congress has been silent, there is a "twilight zone" of authority; and (3) when the President acts counter to the express or implied will of Congress, their authority is at its lowest.[6] Put simply, the *Curtiss-Wright* vision of national security is highly deferential to the executive, while the *Youngstown* vision hinges executive power on congressional authorization.

The twentieth and twenty-first centuries have experienced a return to the *Curtiss-Wright* view of national security, shifting away from the balanced institutional participation at the heart of the *Youngstown* decision. This Note suggests that one reason for the executive's self-aggrandizement is a background principle that has been buried in the sand: morality. The moral aspects of national security decisions are largely absent from separation of powers discussions yet serve a

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1. *See* Harold Hongju Koh, The National Security Constitution in the Twenty-First Century 1–2 (2024).

2. United States v. Curtiss-Wright Exp. Corp., 299 U.S. 304, 318 (1936).

3. *Id.*; *see* Robert D. Sloane, *The Puzzling Persistence of Curtiss-Wright-Based Theories of Executive Power*, 37 William Mitchell L. Rev. 5072, 5080 (2011); Sarah H. Cleveland, *The Plenary Power Background of Curtiss-Wright*, 70 Univ. Colo. L. Rev. 1127, 1131–32 (1999).

4. *Curtiss-Wright*, 299 U.S. at 319–20 (quoting Chief Justice John Marshall, then a member of the House); *see* Jean Galbraith, *The Organs of U.S. Foreign Affairs*, 172 U. Pa. L. Rev. 1893, 1894 (2024).

5. Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 635–39 (1952) (Jackson, J., concurring).

6. *Youngstown*, 343 U.S. at 635–39.

pivotal role in their formulation and public reception. The following sections will advance two arguments: (1) alongside political and legal rationales, the moral aspects of national security decisions warrant explicit acknowledgement, and (2) recalibrating for the influence of morality ultimately favors greater congressional involvement in national security decision making than current practice.

The following sections are divided into three main parts. Part I analyzes why morality should be an explicit consideration within the realm of domestic national security. Subsection A discusses the concept of moral observation and its application to modern national security doctrine. Subsection B builds on that application to argue that national security decisions are not just political or legal decisions, but *moral* decisions, and outlines issues that arise when morality is neglected as an independent consideration. Subsection C shifts from metaethics to applied ethics, outlining a framework to assess the morality of war. Part II applies this moral framework to a series of case studies examining the moral implications of executive decisions in: (A) humanitarian action, (B) the war on terror, and (C) drone strikes. Part III sets forth the crux of this Note: if national security decisions involve moral deliberation, such "moral power" is better located with the Legislative Branch. The final section concludes with a proposal that Congress add language to the National Defense Authorization Act ("NDAA") that requires executive oversight by a non-partisan expert on wartime ethics.

I. NATIONAL SECURITY DECISIONS AS MORAL DECISIONS

A. Moral Observation

Gilbert Harman opens his seminal work *Ethics and Observation* with two hypotheticals.[7] The first designates: You are an emergency room doctor. After a major accident, six victims are rushed into your unit—one victim is in far worse shape than the others. With the limited resources in the emergency room, you encounter a difficult decision. You can dedicate all of the resources to save the victim in the worst shape, or use them to save the other five. Harman posits that there is a clear moral choice here: use the resources to save five people.[8] Accordingly, the first hypothetical establishes a moral principle that doctors should save the greatest number of lives possible.

In the second hypothetical, you are stationed in a hospital and treating six patients. One of them is perfectly healthy, while the other five patients are missing an organ—each one different than the next. On your lunch break, you realize that you can save the five patients with missing organs by harvesting the organs of the single healthy patient. Again, Harman suggests that there is a clear answer: you should not harvest the organs of a healthy patient in order to save the other five patients.[9] However, this outcome contravenes the moral principle established

7. GILBERT HARMAN, THE NATURE OF MORALITY: AN INTRODUCTION TO ETHICS 3–10 (1977).
8. *Id.* at 3.
9. *Id.*

in the first hypothetical, that doctors should save the greatest number of lives possible. The disparity begs a simple question: what changed?

The concept of moral observation holds that moral principles can be derived through non-inferential justification.[10] Like the "smell test" for obscenity, people can know that something is immoral when they see it.[11] Each instance of moral observation sets a process in motion: people formulate moral principles through experiences within a certain set of facts. Then, as new factual circumstances arise, those moral principles are tested—and they can be maintained, adjusted, or even abandoned. As those circumstances compound, a greater moral framework comes into formation and is constantly subject to revision. Harman's dual hypotheticals demonstrate how a moral principle formed in one factual circumstance may be tested and disconfirmed when applied to new facts.[12] That seems well enough, but it uncovers an important risk when deriving moral principles from pragmatic circumstances: that the first moral principle is retrospectively wrong. In contexts like national security, where decisions have profound effects on human lives, that risk is highly consequential.[13]

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10. ANDREW FISHER, METAETHICS: AN INTRODUCTION 141 (Taylor & Francis Group ed., 2014). This Note does not engage with debates over the veracity of moral intuitionism, instead focusing on its implications for national security law. The following resources may be helpful in navigating those broader critiques. *See generally* Preston J. Werner, *Moral Perception*, 15 PHIL. COMPASS 1 (2020) (arguing that perceptual experience is attuned to moral features of our environment); Janai Wright, *Towards a Phenomenological Defense of Moral Intuitionism: Articulating the Role of Consciousness*, 34 APORIA 9 (2024) (arguing that exploration of consciousness through phenomenal epistemology is illuminating for moral intuitionism); Mark van Roojen, *Moral Intuitionism, Experiments, and Skeptical Arguments*, *in* INTUITIONS (Anthony Robert Booth & Darrell P. Rowbottom eds., 2014) (proposing moral intuitionist responses to consequentialist and non-consequentialist arguments on dispositions undermining moral positions).

11. The obscenity "smell" test comes from Justice Stewart's concurrence in *Jacobellis v. State of Ohio*, 378 U.S. 184, 197 (1964) (Stewart, J., concurring) ("I shall not today attempt further to define the kinds of material I understand to be embraced within that shorthand description; and perhaps I could never succeed in intelligibly doing so. But I know it when I see it, and the motion picture involved in this case is not that.").

12. HARMAN, *supra* note 7, at 3.

13. Michael Walzer notes the heightened risk of moral mistakes in the national security context in his seminal book *Just and Unjust Wars*. MICHAEL WALZER, JUST AND UNJUST WARS 303 (5th ed. 2015) ("In moral life generally, one makes allowances for false beliefs, misinformation, and honest mistakes. But there comes a time in any tale of aggression and atrocity when such allowances can no longer be made."). Similar sentiments are echoed amongst scholars. *See* Mary B. DeRosa & Milton C. Regan, *Deliberative Constitutionalism in the National Security Setting*, *in* THE CAMBRIDGE HANDBOOK OF DELIBERATIVE CONSTITUTIONALISM 28 (Graeme D. Orr, Ron Levy, Hoi Kong & Jeff King eds., 2018) ("[D]ecisions relating to national security often involve issues of life, death and the fate of political communities."); Mary B. DeRosa, *National Security Lawyering: The Best View of the Law as a Regulative Ideal*, 31 GEO. J. LEGAL ETHICS 277, 300 (2018) ("National security lawyers and policymakers confront issues every day that, directly or indirectly, involve life, death, and safety."); Robert F. Bauer, *The National Security Lawyer, in Crisis: When the "Best View" of the Law May Not Be the Best View*, 31 GEO. J. LEGAL ETHICS 175, 233 (2018) ("[I]n national security policy—on questions of war or peace, life or death—lawyers must come under particular pressure to establish a favorable 'baseline' from which the legal analysis of particular facts can proceed in effectuating, if at all possible, a particular policy.").

This section proposes that the phenomenon of moral observation occurs within the realm of national security, which includes circumstances like war, humanitarian intervention, international conflicts, and foreign affairs. As a starting point, it may be helpful to consider commonplace reactions to the brutal circumstances of war. In a discussion on moral observation, Andrew Fisher recalls watching a war documentary on the testing of suffocating gas on political prisoners. The film recounted discomforting details, including a moment where "parents were vomiting and dying, but until the very last moment they tried to save their kids by doing mouth to mouth breathing."[14] Upon watching the footage, Fisher states that he "knew then and there that testing suffocating gas on political prisoners is *morally* abhorrent."[15] This demonstrates two important points: first, the events of war involve inherently moral subjects like death, torture, and genocide; second, this indicates that decisions regarding national security, being outcome determinative with regard to such subject matter, are to some degree *moral* decisions.

The degree to which national security law encompasses morality, and thus entails moral responsibility, begins with the nature of legal decisions themselves. Edward Levi describes the basic pattern of legal reasoning as "reasoning by example," dividing it into a three-step process where "similarity is seen between cases; next the rule of law inherent in the first case is announced; then the rule of law is made applicable to the second case."[16] The similarity of those characteristics "become evident if the legal process is approached as though it were a method of applying general rules of law to diverse facts."[17]

National security doctrine follows this classic three-step process, being derived from the factual circumstances of one war and applied to the next. But notably, this system of doctrinal codification harkens back to the formation of *moral* principles in Harman's hypotheticals: moral principles are formulated in particular factual circumstances and subsequently tested in alternative scenarios. The moral principle can then be accepted, adjusted, or disempowered. Perhaps this procedural mirroring allows morality to remain covertly embedded in a doctrinal process that not only parallels moral observation, but allows it to occur. In other words, the facts that give rise to national security law are the precise facts that shape the moral rules of national security; thus, the resultant legal precedent is capable of housing an embedded *moral* precedent. However, the question remains whether that relationship actually exists.

It might be natural to assume that national security law would look to precedent with close scrutiny. But in practice, precedent seems to be the greatest

14. FISHER, *supra* note 10, at 141. William E. Connolly recalls a similar experience seeing images of the 9/11 terrorist attacks. WILLIAM E. CONNOLLY, PLURALISM 11 (2005) ("By the time I reached home images of the first tower collapsing were playing and replaying on CNN. It showed bodies catapulting to the earth. Images of the second collapse soon followed. As the images sank into the visceral register of being, feelings of desolation and uncertainty sank in with them.").

15. FISHER, *supra* note 10, at 141 (emphasis added).

16. Edward H. Levi, *An Introduction to Legal Reasoning*, 15 U. CHI. L. REV. 501, 501–02 (1948).

17. *Id*. at 502.

subject of avoidance. This turns Levi's model on its head: where the facts carry too much significance, they create an incentive to break from the rules. Perhaps it is simply "the nature of national security policy that many, perhaps most, issues feel like a crisis to those in the middle of them."[18] Strong facts give rise to ambitious rules, but ostensibly stronger facts give reason to break them. For example, consider the War Powers Resolution ("Resolution"), which was passed for the purpose of strengthening congressional oversight following President Nixon's Watergate scandal.[19] The Resolution was disempowered almost as quickly as it was conceived.[20] In fact, "no administration has accepted the constitutionality of the Resolution's key provisions."[21] Even recently, President Trump circumvented the congressional approval required under the Resolution by ordering three strikes on Iranian nuclear sites.[22] As practice continues to demonstrate, the most important facts in shaping legal doctrine seem to be the present ones. Like Fisher watching a wartime documentary, lawyers and politicians watch the events of war unfold, but they wield the all-important power to act on moral intuition.

B. See No Evil, Hear No Evil, Speak No Evil

Domestic national security decisions not only involve political and legal considerations, but *moral* considerations. Morality acts as an abstract background principle of domestic national security, rather than an explicit source of interbranch power. Hence, it remains unclear when and to what degree morality should factor into national security decisions. A brief survey examining how the term "morality" is utilized in national security literature reveals three possible approaches: locating morality within the law itself, locating morality within policy, and the vague treatment of morality as an unidentified factor.[23]

Some scholars locate morality within the law itself. Abram Chayes argues that "legal norm and moral precept are two expressions of the same deep human imperative" when it comes to use of military force,[24] and it does little to "package the two aspects into neat, analytically separate components."[25] This conception

18. DeRosa, *supra* note 13, at 300.

19. John R. Crook, *The War Powers Resolution—A Dim and Fading Legacy*, 45 CASE W. RSRV. J. INT'L L. 157, 158–59 (2012).

20. *Id.* at 162.

21. *Id.* at 159.

22. *See* Thomas Mackintosh & Nadine Yousif, *What We Know About US Strikes on Three Iranian Nuclear Sites*, BBC NEWS (June 23, 2025), https://perma.cc/ZJ38-ZQ5G; Isaac Chotiner, *The Dangerous Consequences of Donald Trump's Strikes in Iran*, NEW YORKER (June 22, 2025), https://perma.cc/74CD-M4NA.

23. These uses of the term "moral" do not necessarily encompass fully fledged moral views, but are intended to capture its typical usage in the national security lexicon. For instance, without appealing to any particular ethical framework, some scholars use the word "morality" interchangeably with terms like "policy" or "justice." Although the quoted language may not wholly encompass the author's precise moral outlook, this brief overview is merely meant to establish that there is a lack of consensus regarding the meaning of "morality" in the national security context, despite its frequent use in legal and political analysis.

24. ABRAM CHAYES, THE CUBAN MISSILE CRISIS 40 (1974).

25. *Id.*

of morality parallels the anti-positivist theory of jurisprudence. Ronald Dworkin holds that "what the law is depends in some way on what the law should be," and judicial interpretation should account for the foundational morality of the relevant political structure.[26] Similarly, Lon Fuller contends that the law should correspond to the demands of justice, morality, and social notions of what it ought to be.[27] Under the anti-positivist view, engagement in legal analysis inherently includes moral considerations; put frankly, morals are a feature of the law itself.

Others seem to locate morality within policy considerations, an approach more aligned with the legal positivist view that separates law from morality.[28] However, an amoral view of the law does not preclude *ad hoc* influences of morality on legal considerations; as H.L.A. Hart puts it, lawyers should be "occupied with the penumbra," but should not be preoccupied with it.[29] Mary DeRosa and Milton Regan argue that the high-stakes nature of national security creates an environment where lawyers feel heightened pressure to grant deference to policy considerations. For instance, when "policy-makers believe that a course of action will save lives, lawyers will feel tremendous pressure to find legal justification for it."[30] The positivist view does not deny the influence of moral and political considerations, but locates their "home" outside of the law.

Robert Bauer offers the similar perspective that lawyers can "make policy worse by failing to clarify for the policymakers the moral or legal considerations."[31] When lawyers have technical legal shortcomings, their work may exacerbate controversy over policy issues; but a policy triumph "casts a glow on the lawyers who facilitated it."[32] This view and the positivist view are opposite sides of the same coin: politicians pressure lawyers toward a certain legal outcome and the reputation of lawyers are dependent upon their execution of such orders. But Bauer's view locates morality elsewhere, as something that falls under the purview of lawyers but occupies a distinct ontological position from "legal" considerations. This view is emblematic of the last camp up for discussion, those who discuss morality as "undefined." Justice Robert Jackson takes this approach in his *Korematsu* dissent, where he suggests that the reasonableness of military exercise is an issue "delusive" of the Court; instead, those who command the forces are

26. Ronald A. Dworkin, *"Natural" Law Revisited*, 34 FLA. L. REV. 165, 165 (1982).

27. Lon L. Fuller, *Positivism and Fidelity to Law: A Reply to Professor Hart*, 71 HARV. L. REV. 630, 644 (1958).

28. *See* H. L. A. Hart, *Positivism and the Separation of Law and Morals*, 71 HARV. L. REV. 593, 606–15 (1958).

29. *Id.* at 615.

30. DeRosa & Regan, *supra* note 13, at 32. DeRosa and Regan do not explicitly use the term "morality" in making this argument, but it seems to be implicated by their reference to "saving lives." In its purely political sense, the phrase "saving lives" might refer to strategic considerations like saving the greatest number of American soldiers during military action. However, the general notion of believing a course of action will "save lives" likely references the moral precept that the saving of lives is a *per se* good action—something so powerful that its assertion puts pressure on lawyers to justify the related action.

31. Bauer, *supra* note 13, at 237.

32. *Id.*

responsible for the "political judgements of their contemporaries and the moral judgements of history."[33] He concludes that inquiries into military necessity fall outside of the Court's purview (and *by proxy* the law's purview) and locates responsibility for morality with individual decisionmakers, rather than executive policymakers.

The meaning of the term "moral" is largely taken for granted in domestic national security law—which feels contradictory in a subject matter that so often invokes fundamentally moral considerations, if not explicit moral language. The prevailing approach has been to suppress the meaning of morality, appealing to an ideal of legal objectivity. The purpose of this Note is not to advocate for any particular moral approach, but to advance the broader claim that morality should receive greater attention in national security matters. Although separating law and morality is the dominant practice in domestic national security, two separations of powers concerns give reason for morality to be brought to the forefront.

First, dismissing the role of morality to maintain a facade of objectivity obscures the balance of powers by taking a factor "off the scale" while allowing its weight to remain. Put differently, refraining from discussion of morality does not disempower its influence, it merely shifts the lexicon of the conversation. Along those lines, there are political strategies like "lawfare" that involve "using or misusing law as a substitute for traditional military means to achieve an operational objective."[34] Through this approach, government actors can avoid the critique of being overly moralistic while still pursuing their desired moral ends, as lawfare "manipulates something Americans value: respect for law."[35] As a result, legal terminology displaces the roles of considerations like policy and morality.[36] This indicates that the legal and political principles that govern national security decisions carry embedded moral weight derived from the factual circumstances in which they arose. Therefore, making "moral power" explicit would not only ensure that morality receives proper methodological consideration, but that it does not surreptitiously infect other factors.

Second, the Office of Legal Counsel's ("OLC") reliance on precedent empowers the President to "fill moral gaps" when presented with new factual circumstances. Statutory authority and historical practice act as guiding principles, but the fact dependent nature of national security decisions leads to significant

33. Korematsu v. United States, 323 U.S. 214, 248 (1944) (Jackson, J., dissenting).

34. JACK GOLDSMITH, THE TERROR PRESIDENCY 58 (2007); Charles J. Dunlap, Jr., *The Ethical Dimension of National Security Law*, 50 S. TEX. L. REV. 789, 795 (2009) (defining lawfare and cautioning that "an erroneous belief about what the law provides can undermine worthy efforts"). Some scholars use other terms to describe similar phenomena to lawfare. *See* Gabriella Blum, *The Role of the Client: The President's Role in Government Lawyering*, 32 B.C. INT'L & COMP. L. REV. 275, 278 (2009) ("In this uber-legalistic culture, if a lawyer advises her client that a policy is illegal, the client hears 'it is evil.'"); DeRosa & Regan, *supra* note 13, at 30 ("Law provides a publicly accessible set of grounds on which decisions must rely, and thus a common vocabulary of justification.").

35. GOLDSMITH, *supra* note 34, at 59.

36. *See* Bauer, *supra* note 13, at 245 ("In an 'über-legalistic culture,' there is an assumption that policy and law are somehow normatively linked, such that bad policy is rooted in bad law while good policy must rest on adequate legal justification.").

executive deference. As Bauer notes, a lawyer's understanding of client expectations is essential to the development of administrative legal positions.[37] And when it comes to matters of war, lawyers face significant pressure to provide a favorable legal ground supporting the administration's established policy preference.[38] The OLC has developed a precedent of advisory opinions that are often used to shield executive actors from legal consequences.[39] Through that mechanism, the executive is able to fill in the legal gaps that arise within the context of a particular war.

The existence of this OLC precedent gets complicated when the present entanglement of morality and the law is factored in. As noted above, the process of moral observation closely parallels the concept of precedent: the observer notes that a moral principle creates discomfort when attached to a factual circumstance, so it should not be repeated. The inverse may also be true: a moral principle creates comfort within a given factual circumstance and should therefore be repeated in future circumstances. Because lawfare enshrouds moral principles with law, the OLC precedent may contain a concomitant *moral* precedent of national security. This creates a risk that the OLC will apply the law in analogous factual circumstances but miss moral nuances underlying the application that render it inappropriate. Ultimately, the "headless prong" of morality disrupts the balance of national security powers in favor of executive discretion, an issue that calls for making morality explicit.

C. What It Means to Be "Moral"

The current role of morality in domestic national security law is ambiguous. Accordingly, my first task in excavating the precise role of morality is clarifying what the "moral" aspects of national security actually refer to. To do so, I will shift from the metaethical argument that morality has a role in national security decisions to an applied analysis implementing an ethical framework. For decades, scholarly discourse on the morality of war has largely centered just war theory.[40] Thomas Acquinas's initial model included three requirements for just war: the authority of the sovereign, the just cause that those who are attacked deserve it, and the intent to promote the good and avoid evil.[41]

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37. *Id.* at 219.

38. *Id.* at 233.

39. *Id.*

40. *See* Jeff McMahan, *The Morality of War and the Law of War*, *in* JUST AND UNJUST WARRIORS: THE MORAL AND LEGAL STATUS OF SOLDIERS 19 (David Rodin & Henry Shue eds., 2008) ("Our understanding of the morality of war has for many centuries been shaped by a tradition of thought known as the theory of just war."); WALZER, *supra* note 13, at 335 ("In the years since this book was first published, just war theory has become a minor academic industry.") (emphasis removed). There is extensive discussion amongst scholars regarding its scope and application, which this Note does not substantively engage with. *See* Waseem Ahmad Qureshi, *Moral Dimensions of Warfare*, 50 SW. L. REV. 91, 95–99, 113–25 (2020) (considering realism and pacifism as alternatives to just war theory).

41. Rory Cox, *The Ethics of War Up to Thomas Aquinas*, *in* OXFORD HANDBOOK OF ETHICS OF WAR 122 (Seth Lazar & Helen Frowe eds., 2015).

The ideals of just war theory are foundational to the international legal regime, especially the values of necessity and proportionality.[42] As such, national security scholarship with a focus on international law grants significant attention to those overarching ethical frameworks, at least in comparison to its domestic law counterparts. I suggest that the moral principles utilized in international law might be applied to domestic national security. David Luban brings these moral precepts to the forefront when discussing the United Nations' ("UN") position on just warfare.[43] The UN does not explicitly define "just war," so Luban looks to various provisions of the UN Charter to derive what he titles "the UN definition" of just war:

(1) A war is unjust if and only if it is not just.

(2) A war is just if it is a war of self-defense (against aggression).

Luban wages various critiques against this definition, but the most central is its failure to account for the moral realities of war.[44] He explains that wars are frequently "fought for reasons which are recognizably moral," but their "morality cannot be asserted in terms of the categories of the UN definition; it must be twisted and distorted to fit a conceptual Procrustes' bed."[45] Due to this failure to acknowledge morality, Luban asserts that UN debates and discussions "have deteriorated into cynical and hypocritical rhetoric and are widely recognized as such."[46] I have proposed that a similar phenomenon is occurring in domestic national security law; the failure to acknowledge morality merely shifts legal rhetoric rather than meaningfully affecting legal methodology. And mirroring UN debates and discussions, OLC opinions continue to flout whatever legal limitations inhibit the executive's pre-determined course of action. Building from his critiques, Luban proposes a framework called the "new definition" for assessing the morality of war:

(1) A just war is (i) a war in defense of socially basic human rights (subject to proportionality); or (ii) a war of self-defense against an unjust war.

(2) An unjust war is (i) a war subversive of human rights, whether socially basic or not, which is also (ii) not a war in defense of socially basic human rights.[47]

42. Mary Ellen O'Connell, *The Just War Tradition and International Law Against War: The Myth of Discordant Doctrines*, 35 SOC'Y CHRISTIAN ETHICS 33, 40 (2015).

43. David Luban, *Just War and Human Rights*, 9 PHIL. & PUB. AFFS. 160, 160–61 (1980).

44. *Id.* at 173.

45. *Id.*

46. *Id.*

47. *Id.* at 175.

This definition could be transposed to the context of domestic national security law, given its capacity to address parallel downfalls of the international legal regime. However, doing so would also necessitate the incorporation of bedrock principles of international humanitarian law, which are often treated as discrete from domestic concerns. For instance, the core of Luban's framework is human rights, which he defines as "a right whose beneficiaries are all humans and whose obligors are all humans in a position to effect the right."[48] Essentially, human rights exist *qua* being a human, making them distinct from concepts like civil rights, where the relationship of obligations is defined by law.[49]

Furthermore, not all human rights are on equal footing, and some are understood to be more fundamental than others. For instance, a "socially basic human right" is one that is necessary for the enjoyment of other rights, being "the line beneath which no one is allowed to sink."[50] These include "security rights" to physical well-being and "subsistence rights" of minimal economic security.[51] The preservation of human rights can serve as a moral ground for war, but their infringement is not a *casus belli* (or sole factor) because the doctrine of proportionality still applies.[52] As contemplated by Luban, the doctrine of proportionality entails a balancing test: weighing the violations of socially basic human rights likely to result from a war with those it intends to rectify.[53] Ultimately, the "new definition" utilizes principles of just war theory to provide a moral framework that addresses national security decisions.

II. THE UNITARY EXECUTIVE AND MORAL DOMINATION

The previous section concluded by outlining Luban's "new definition" for assessing the morality of wartime actions. This section applies that framework to a series of case studies to locate the role that morality plays in national security decision making. I begin with a discussion of humanitarian action, looking to the Kosovo intervention to examine the role of domestic morality, then turn to the Rwandan genocide to understand the moral implications of failures to act. The second subsection focuses on two major scandals during the war on terror: the Torture Memos and the Abu Ghraib photographs. Lastly, I will discuss the moral

48. *Id*. at 174. Luban updates this focus to account for the centrality of statism in legitimate warfare. David Luban, *Intervention and Civilization: Some Unhappy Lessons of the Kosovo War*, *in* GLOBAL JUSTICE AND TRANSNATIONAL POLITICS 84–86 (Pablo De Greiff & Ciarin P. Cronin eds., 2002). Later sections will expand upon the implications of that acknowledgement in the discussion of Kosovo. *See infra* Part II(A)(i).

49. Luban, *supra* note 43, at 174.

50. *Id*.; HENRY SHUE, BASIC RIGHTS: SUBSISTENCE, AFFLUENCE, AND U.S. FOREIGN POLICY 18 (40th Anniversary Edition, 2020). When discussing the application of relativism to standards of civilized behavior, Luban describes a phenomenon reminiscent of moral observation. Luban, *supra* note 43, at 107 ("When we witness barbaric evil in action, matters assume a different aspect. The perpetrators become incomprehensible to us; the victim's sufferings overwhelm our imaginations. At that point, the distinction between the civilized and the barbaric appears like a bright line inscribed in the world.").

51. SHUE, *supra* note 50, at 20–29.

52. Luban, *supra* note 43, at 175.

53. *Id*. at 176.

failures of President Obama's counterterrorist drone strikes, despite the explicit emphasis that his administration placed on abiding by principles of just war theory.

Admittedly, my analysis has the benefit of hindsight, so I put forth a good faith effort to "show my work" with careful application of the "new definition" and analysis of the factual circumstances to examine the role that moral principles play. Through these three case studies, this section aims to demonstrate that: (1) moral considerations play a substantive role in national security decisions, and (2) bringing morality to the forefront supports the need for greater checks on the Executive Branch. However, my argument is not intended to propose that lawyers or politicians should use the "new definition" framework centered in this portion of the analysis; my inclusion of the framework is merely meant to draw out the moral nuances of national security decisions. The affirmative proposal that I ultimately make is much narrower in scope, focusing on the separation of powers and the need for greater congressional oversight.

A. Humanitarian Intervention

1. Kosovo

Amidst a period of major economic and political crisis in Serbia, Slobodan Milošević implemented policies intended to deprive Kosovar Albanians of political representation.[54] Kosovar Albanians began boycotting elections and organized an independent system of political institutions,[55] but the Liberation Army of Kosovo ("UCK") emerged after growing discontent with non-violent resistance.[56] The Serbian Police force soon destroyed the primary UCK forces and captured hundreds of fighters, an event that the media and international organizations dubbed "a human catastrophe."[57]

President Bill Clinton initiated United States involvement in Kosovo due to dissatisfaction with the efforts of European countries and the North Atlantic Treaty Organization ("NATO").[58] Clinton encouraged NATO to begin a bombing campaign of Kosovar Serb positions under a "diplomacy backed by force" strategy, which led to a dramatic increase in violence towards Kosovar Albanians.[59] NATO was not prepared for the rapid escalation and had inadequate resources to respond, so Clinton sent thousands of American soldiers to aid in air operations.[60] The War Powers Resolution imposes a sixty-day limit on engagement in

54. Milos Nikolić, *Kosovo in Historical Perspective: Past and Future*, 1 SEER: J. FOR LAB. & SOC. AFFS. IN E. EUR. 7, 15 (1998); JUDITH ARMATTA, TWILIGHT OF IMPUNITY: THE WAR CRIMES TRIAL OF SLOBODAN MILOSEVIC 122 (2010).

55. Nikolić, *supra* note 54, at 16.

56. *Id.* at 17.

57. *Id.* at 19.

58. John C. Yoo, *Kosovo, War Powers, and the Multilateral Future*, 148 U. PA. L. REV. 1673, 1673 (2000); David Wippman, *Kosovo and the Limits of International Law*, 25 FORDHAM INT'L L. J. 129, 129 (2001); Gerald G. Howard, *Combat in Kosovo: Ignoring the War Powers Resolution*, 38 HOU. L. REV. 261, 262 (2001). For a summary of the greater historical context, see Nikolić, *supra* note 54, at 8–17.

59. KOH, *supra* note 1, at 138; Luban, *supra* note 48, at 80.

60. *Id.*; Yoo, *supra* note 58, at 1673.

"hostilities" without congressional approval.[61] Because the military was on the verge of victory, Clinton continued the bombing campaign past the sixty-day time frame despite its clear escalation beyond the definitional threshold of "hostilities."[62] At seventy-eight days Milošević conceded, lending credence to Clinton's decision, but leaving open the question of whether the final eighteen days were justified.

The Kosovo intervention presents a tough case under Luban's "new definition," so much so that it prompts him to supplement it.[63] He clarifies that the invasion was morally just because it defended a socially basic human right, but the picture gets complicated when intervention leads to violence surmounting what would have otherwise occurred.[64] Put differently, the intervention abides by the principle of proportionality, but also escalates violence to a degree that does not seem fundamentally necessary. Luban argues that state sovereignty must account for domestic political legitimacy, meaning the "decision to intervene must be politically legitimate back home as well as morally legitimate abroad."[65] He elaborates that Clinton's "arguments that flip-flop between morality and national self-interest" represent the "twin demands for international and domestic legitimacy."[66]

Luban's clarification is consistent with my argument that morality is a discrete aspect of domestic national security decisions, and even extends the connection between just war theory and domestic national security law. However, I propose that state action not only implicates domestic political legitimacy, but also domestic *moral* legitimacy. First, the decision to intervene in a humanitarian conflict must be morally permissible under international law. Then it must be approved according to domestic political considerations, such as the willingness to utilize American resources and endanger the lives of American soldiers. These political factors are accompanied by underlying moral implications, mirroring the above examples, including the risk of escalating violence through the use of democratic resources, and the fundamental value of domestic lives in proportion to "foreign lives."[67] Rather than the domestic and international being domains of a different *kind*, they are also domains that speak a different *language*.

International law has greater acknowledgement of the moral dimensions of humanitarian action, while domestic law has become couched in lawfare.[68] Accordingly, the symbiotic relationship between the two legal contexts becomes

61. KOH, *supra* note 1, at 144.

62. *Id*.

63. Luban still accepts his argument but believes that his dismissal of state sovereignty rendered it incomplete. Luban, *supra* note 48, at 84.

64. *Id*. at 84–86.

65. *Id*.

66. *Id*. at 86. In line with Luban's interpretation, President Clinton stated that "[n]ational security begins at home" when announcing his candidacy. Eric James Szandzik, *President Clinton's Nonintervention in the Rwanda Genocide*, 185 WORLD AFFS. 176, 184 (2022).

67. *See* Luban, *supra* note 48, at 82 (explaining that low-risk air strikes signal that "Americans considered one American life to be worth thousands of Yugoslav lives—hardly a resounding endorsement of the doctrine of universal human rights").

68. *See* GOLDSMITH, *supra* note 34, at 58–59.

undermined by their differences. Due to this "communication breakdown," domestic and international legal issues are separated into discrete categories. But the idea of their shared relation, even on an abstracted level, is not unfounded. For instance, DeRosa and Regan acknowledge the connection between domestic and international legitimacy from the other direction, stating that decisions must be "seen as legitimate not only by a state's citizens, but by the wider international community."[69] But much like morality, the concept of legitimacy is relatively abstracted and squishy, encompassing factors like a nation's moral reputation.[70] The question of state sovereignty may pose less of a concern than Luban lets on; at bottom, U.S. domestic law cares about human rights, it's just afraid to admit it.

The Kosovo intervention not only highlights the relationship between international and domestic law, but underscores the importance of locating moral principles within particularized factual circumstances—including threshold questions on the nature of the violence itself. Following the NATO air strikes, most western states supported the recognition of Kosovo's independence as a special *sui generis* case, given the severity of the targeted violence and humanitarian violations that occurred.[71] In contrast, Russia advocated against Kosovo's right to unilateral secession and refused to recognize their territorial independence.[72] But in the years following the Kosovo intervention, Russia began leveraging the Kosovo precedent to legitimize military intervention in post-Soviet states by acknowledging their independence.[73] In particular, Russia appealed to international rights like self-determination and upholding the well-being of Russian-speaking people.[74]

For instance, the Russian policy narrative surrounding the annexation of Crimea centered respect for international principles like justice, equality, and truth "without double standards."[75] But notably, Russia's humanitarian argument was founded in "counterfactual security threats to the lives of local population rather than facts," including the presumption that there "could have been" violent clashes in Crimea, but without evidence.[76] Thus, the circumstances underscoring the occupation of Crimea present a vastly different calculus than Kosovo, where there were already violent deprivations of human rights occurring. In fact, scholars have described the Crimean

69. Bauer, *supra* note 13, at 17.

70. KAREN J. GREENBERG, ROGUE JUSTICE: THE MAKING OF THE SECURITY STATE 109 (2016).

71. VALUR INGIMUNDARSON, THE 'KOSOVO PRECEDENT': RUSSIA'S JUSTIFICATION OF MILITARY INTERVENTIONS AND TERRITORIAL REVISIONS IN GEORGIA AND UKRAINE 7 (2022), https://perma.cc/9BZP-E3Q4; Lena Surzkho-Harned & Jiří Nykody¨m, *Why the 'Kosovo Precedent' Was a Gateway for Russia's Abuse of International Law*, LOOP: ECPR'S POLITICAL SCIENCE BLOG (Feb. 20, 2023), https://perma.cc/2DD9-XWK3.

72. INGIMUNDARSON, *supra* note 71, at 6.

73. *Id*. at 8.

74. Vasile Rotaru & Miruna Troncota±, *Continuity and Change in Instrumentalizing 'The Precedent.' How Russia Uses Kosovo to Legitimize the Annexation of Crimea*, 17 SE. EUR. & BLACK SEA STUD. 325, 327–28 (2017). Russia has utilized the Kosovo precedent to legitimize military intervention in Chechnya, Georgia, Crimea, and the invasion of the Ukraine. *Id*. at 327.

75. *Id*. at 332.

76. *Id*. at 333.

intervention as "a dress rehearsal for Russia's 2022 war against Ukraine."[77] Since the invasion of Ukraine, Russia's goal of territorial aggrandizement has become more explicit, suggesting a lack of genuine intention to support the post-Soviet states in becoming viable entities.[78] The moral principles embodied in international law are not self-sufficient, but must be carefully examined according to particularized factual circumstances.

2. Rwanda

The failure to intervene in the Rwandan genocide was one of President Clinton's greatest regrets during his time in office.[79] In the 1980s, the Rwandan economy was under significant stress, accompanied by widening socio-economic disparities.[80] But when the decade came to a close, approximately 480,000 Rwandans had become refugees—many of them part of the Tutsi ethnic minority who had fled from previous episodes of violence.[81] In October 1990, the Rwandan Patriotic Front ("RPF") launched a major attack of seven thousand fighters, beginning a civil war against the Habyarimana regime. Propaganda quickly spread blaming the Tutsi for the attacks, and labeling all of their Hutu supporters as traitors.[82] The Arucha Peace Agreement seemed to resolve the conflict, but was soon subverted by the Hutu-dominated government.[83] The Rwandan Genocide began in April 1994, and lasted for one hundred days, resulting in the death of approximately 800,000 people.[84] President Clinton initiated an operation to remove U.S. nationals and encouraged UN peacekeepers to withdraw due to concerns of violence.[85] He later estimated that he could have saved 300,000 lives through military intervention because the genocide primarily targeted unarmed civilians.[86]

Scholars have proposed several reasons for the Clinton administration's refusal to intervene. The predominant explanation is the failed UN peacekeeping mission in Somalia, where the United States launched a series of raids "so disastrous and publicly humiliating that they would redefine presidential decision-making for the next decade."[87] Another factor was the lack of domestic support, due to

77. INGIMUNDARSON, *supra* note 71, at 11.

78. *Id*. at 12.

79. Szandzik, *supra* note 66, at 177–78; Zachary D. Kaufman, *Biden Administration Wrong to Send Bill Clinton to Rwanda for Anniversary*, MIAMI HERALD (Apr. 25, 2024), https://perma.cc/B7P7-7CSH.

80. *Id*. at 14.

81. *Id*. at 13; United Nations, *Rwanda: A Brief History of the Country*, OUTREACH PROGRAMME ON THE 1994 GENOCIDE AGAINST THE TUTSI IN RWANDA AND THE UNITED NATIONS, https://perma.cc/E4SP-4X8U [hereinafter UN Outreach].

82. *See* UN Outreach, *supra* note 81.

83. *Id*.

84. *UN Reflects on the 1994 Genocide Against the Tutsi in Rwanda*, UN NEWS (Apr. 7, 2025), https://perma.cc/4NE9-HH2G.

85. Szandzik, *supra* note 66, at 179–80.

86. *Id*. at 181.

87. Ian Stettner, *Somalia Syndrome*, BROWN POL. REV. (Feb. 22, 2023), https://perma.cc/7THW-YXP9.

increasing non-interventionist sentiment amongst the general populus.[88] Still yet, there was the perceived lack of American interests at stake. Despite Clinton's stance that extreme forms of human suffering demanded action early in his presidency, those "public pronouncements were abandoned when the opportunity arose."[89] Indeed, Clinton stated that the Rwandan genocide "less directly affect our own security interests" than the concurrent Bosnian War, concluding "America cannot solve every problem and must not become the world's policeman."[90] Some politicians were more extreme, like Senator Bob Dole who proposed that United States "military personnel should be asked to risk their lives only in support of U.S. interests."[91]

Under the "new definition," intervention would have been just because the basic right of the Tutsi to the security of personhood was violated, assuming the ensuing military action would have been proportional to said harm.[92] But notably, the "new definition" does not directly address the moral wrongness of *inaction*. Joshua Kassner takes up this question, and analyzes whether a rights-based inquiry supports a moral obligation of humanitarian intervention.[93] First, he reasons that because basic rights are owed to each individual by all others, the moral obligation to uphold them transcends political boundaries.[94] In other words, the agreement to uphold basic rights may be viewed as a moral contract held by all individuals, with all individuals. Therefore, in having one's own basic rights ensured, people must ensure the basic rights of others—making inaction immoral. Kassner provides the following hypothetical to illustrate this point at the individual level: Imagine you come across a person being assaulted, and they ask you to call for help.[95] Non-intervention would not just entail ignoring the request, but implies that the demand should be made to the *assailant* because they are the party violating a basic right.[96] Therefore, at the individual level, third parties may have a moral obligation to intervene where a basic right is being violated.

Given this obligation for positive action, the question of scale takes focus. Because moral intervention by individual actors would be futile at the international level, collective action becomes necessary to combat widespread grievances like genocide.[97] Here, Kassner proposes that states become the *de facto*

88. Szandzik, *supra* note 66, at 186.

89. *Id.* at 194.

90. Interview with President Clinton on CNN's Global Forum (May 3, 1994) (transcript on file with The American Presidency Project, https://perma.cc/6VGX-WTWD).

91. Bob Dole, *Peacekeepers and Politics*, N.Y. TIMES (Jan. 24, 1994), https://perma.cc/U86N-7HKQ.

92. Luban indicates as much when he states, "[t]he Rwanda case is instructive because the American role in Rwanda was shameful—not merely failing to intervene, but frantically maneuvering to stop others from intervening as well." Luban, *supra* note 48, at 90.

93. JOSHUA J. KASSNER, RWANDA AND THE MORAL OBLIGATION OF HUMANITARIAN INTERVENTION 51 (2013).

94. *Id.* at 51–52.

95. *Id.* at 72.

96. *Id.*

97. *Id.* at 52.

obligation bearers, due to their resources and capacity to carry out the individual obligations of their constituencies on a united front.[98] Consequently, the positive moral obligation for humanitarian intervention becomes located in state sovereignty, at which point the connection of sovereign statehood to domestic morality (as outlined in the Kosovo case study) picks up.[99] Moral obligations demanded intervention in the Rwandan genocide. But on the domestic front, Clinton was able to deny its status as a genocide and emphasize the absence of a domestic political obligation to intervene. Explicit acknowledgement of moral principles would have prompted humanitarian intervention, and safeguarded against executive action that undermines the importance of moral considerations.

B. The War on Terror

1. The Torture Memos

Soon after the 9/11 attacks, President Bush released a memorandum suspending application of the Geneva Conventions to members of al-Qaeda, and excluding the Taliban from protection as "unlawful combatants."[100] The memorandum stated that as "a matter of *policy*, the United States Armed forces shall continue to treat detainees humanely."[101] Soon after, a group of OLC lawyers released a series of unpublished memoranda granting broad authority to use brutal and coercive interrogation tactics, which would eventually be called the "Torture Memos."[102] The memos were defended under the justification of preemptive self-defense, despite the United States backing a zero-tolerance policy on torture.[103] The most criticized aspect of the memos was their narrow definition of "torture," requiring that victims "must experience intense pain or suffering of the kind that is equivalent to the pain that would be associated with serious physical injury so severe that death, organ failure, or permanent damage resulting in a loss of significant body function will likely result."[104] Today, the Torture Memos have been widely acknowledged as a legal overstep.[105]

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98. *Id.*

99. *See supra* Part II(A)(i).

100. Wayne Sandholtz, *Closing Off the Torture Opinion*, 18 S. CAL. INTERDISC. L. J. 589, 590 (2009); Memorandum from President George W. Bush to the Vice President et al. (Feb. 7, 2002) (on file with the Def. Intel. Agency, https://perma.cc/TFP3-3C32) [hereinafter Memorandum from George W. Bush].

101. *See* Memorandum from George W. Bush, *supra* note 100 (emphasis added).

102. Sandholtz, *supra* note 100, at 591.

103. KOH, *supra* note 1, at 157.

104. Memorandum from Assistant Att'y Gen. Jay S. Bybee to Alberto R. Gonzales, Counsel to President George W. Bush 13 (Aug. 1, 2002) (on file with the U.S. Dep't of Just., https://perma.cc/C8YU-FK9H).

105. *See* GREENBERG, *supra* note 70, at 108 ("Yoo had turned the question about torture into an opportunity to extend his, and the rest of the War Council's radical reinterpretation of American law."); Peter Margulies, *When to Push the Envelope: Legal Ethics, the Rule of Law, and National Security Strategy*, 30 FORDHAM L. REV. 642, 647 (2006) ("Administration lawyers articulated a narrow definition of torture wholly at odds with the spirit and logic of international law").

In *The Terror Presidency*, Jack Goldsmith discusses his ultimate decision to withdraw the Torture Memos. Just eight weeks into his role as Assistant Attorney General, Goldsmith became worried about excessive interrogation.[106] While reading past OLC opinions on counterterrorism, he encountered the exceedingly narrow definition of torture and decided that the Torture Memos should be withdrawn.[107] But before a replacement opinion could be prepared, the Abu Ghraib photographs were released, depicting the torture and abuse of detainees in an Iraqi prison that had been occupied by American forces.[108] Goldsmith found himself in a double-bind, weighing the tremendous public pressure to withdraw the opinion with the countervailing pressure from his colleagues to defend OLC precedent.[109] He ultimately withdrew the Torture Memos and resigned from his position (for a multitude of reasons).[110]

Goldsmith listed a number factors he considered when deciding to withdraw the opinion. His initial thought was that torture is "a universally condemned and *morally repugnant* practice."[111] However, Goldsmith "quickly set aside" that consideration because the "OLC's ultimate responsibility is to provide information about legality, regardless of what morality may indicate, and even if harm may result."[112] Nonetheless, he acknowledged that "the nature of the question [as one regarding torture] . . . informed how the OLC should answer."[113] Ultimately, the dispositive factors in Goldsmith's analysis were: (1) the reliance on one-sided legal arguments ignoring congressional authority, (2) the "tendentious tone" of the opinion, and (3) the overbroad grant of authority to executive actors in relation to the facts.[114]

Goldsmith immediately considered but quickly disavowed the importance of morality, while nonetheless permitting that the "nature" of torture may inform how the OLC answers the legal question.[115] This acknowledgement raises concern. Goldsmith provides for this caveat immediately after noting the severe moral implications of torture, indicating that his ambiguous consideration of the "nature" of torture derives from, or at the very least overlaps with, its moral abhorrence. This proximity rises above *post hoc ergo propter hoc*, and his order of operations acutely suggests that the former consideration brought to mind the later. Indeed, Goldsmith concedes that morality was the first subject to intuitively arise upon reading the Torture Memos, supporting its capacity to

106. GOLDSMITH, *supra* note 34, at 142.
107. *Id*. at 144, 155.
108. *Id*. at 157–58.
109. *Id*. at 159.
110. *Id*. at 161.
111. *Id*. at 146 (emphasis added).
112. *Id*. at 146–48. *See* GREENBERG, *supra* note 70, at 103 ("He would limit his analysis to 'legality, regardless of what morality may indicate, and even if harm may result,' as he had done with the Geneva Conventions question.").
113. GOLDSMITH, *supra* note 34, at 148.
114. *Id*. at 148–51.
115. *Id*. at 148.

operate at a covert level. Ultimately, his account serves as a practical demonstration of how morality's role as a background principle allows it to become a subsurface consideration in legal decisions. This ability of morality to surreptitiously seep into legal decision making creates an ontological ambiguity where legal and political rationales become entangled with moral underpinnings.

There is a "trouble that looms when legality, regardless of morality or harm, becomes the focus of inquiry."[116] Goldsmith's withdrawal of the Torture Memos feels less triumphant when considering his broad disavowal of any moral reasons for doing so. His rationale implies that the fundamental flaw of the Torture Memos is not the cruelty and denial of basic human rights that they espoused, but their failure to address counterarguments and pointed tone. Reckoning with the "nature" of torture allows Goldsmith to engage in quasi-moral argumentation but does little to affect future implementation. The solution to this issue is not to disavow the importance of morality, only to abstract it into a background principle of uncertain weight. Instead, locating the relevant analysis in morality is critical to understanding what exactly went askew, and how those wrongs might be avoided in the future.[117]

The Torture Memos would be impermissible under Luban's "new definition" because they sanction torturous practices as a form of preemptive self-defense, meaning military actors are permitted to violate basic human rights without *any* proportionate harm needing to take place. The "new definition" would render a result that is ultimately in line with Goldsmith's decision; however, it directly confronts the issue of morality that is so intuitively central to the Torture Memos, rather than necessitating that the scope of blame remain relegated to legal bad faith.

Taking a similar approach, Robert Bauer critiques the "sanitized distance" that the OLC is obligated to maintain, suggesting that lawyers should "openly leaven [their] analysis with the kind of considerations that Goldsmith identifies."[118] DeRosa and Regan criticize that view, and argue that lawyers are valuable to the national security process because they offer a distinctly legal view rather than a "correct" one.[119] As such, the considerations raised by Goldsmith would simply dilute legal analysis with factors already considered elsewhere in the political process. Neal Katyal similarly critiques the Torture Memos' lack of objectivity, stating the OLC must be a neutral actor rather than "a pep squad masquerading as a quasi-judge."[120] The approach outlined in this Note might help unify these seemingly discordant views. First, moral analysis does not have a discrete arena

116. *See* GREENBERG, *supra* note 70, at 105.

117. And as suggested by Peter Margulies, "[a]n unduly rigid application of ethical restrictions on bias might chill lawyering even where ethnicity, religion, or national origin was one criterion among many." Margulies, *supra* note 105, at 649.

118. Bauer, *supra* note 13, at 249. Bauer's list outlining such factors includes morality, but he neglects to define what that entails or engage in substantive discussion of its importance. *Id*. at 250.

119. DeRosa & Regan, *supra* note 13, at 6.

120. Neal K. Katyal, *Internal Separation of Powers: Checking Today's Most Dangerous Branch from Within*, 115 YALE L. J. 2314, 2336 (2006).

for legal or political consideration, which may alleviate the bothersome moral distance noted by Bauer without implicating the corresponding duplication or separation of powers concerns. Furthermore, the moral analysis need not be undertaken by lawyers; in fact, this Note ultimately argues that such matters should be entrusted with an independent Legislative Branch appointee.[121] But regardless of the approach, the rigorous pursuit of moral objectivity in domestic national security law undercuts the important moral considerations inherent to wartime decision making.

2. Abu Ghraib

In October 2001, the United States invaded Afghanistan and took thousands of suspected members of al-Qaeda and the Taliban into custody.[122] Abu Ghraib is a prison outside of Baghdad where "Iraqis were detained, interrogated, and ultimately tortured."[123] In April 2004, hundreds of photographs depicting the torture of prisoners at Abu Ghraib were released to the media.[124] Two pictures were particularly infamous. The first depicts Abdou Hussain Saad standing atop a box in a Christ-like pose, with a shawl covering his body and a bag over his head.[125] There are wires attached to his fingers, toes, and penis, which would electrocute him if he fell.[126] The photograph was first published in *The New Yorker*, and became "the most emblematic image of the torture scandal,"[127] having "echoes of innocence, sacrifice, and suffering" that are "made all the more chilling by the hooding and wires—a decidedly modern emblem of martyrdom."[128] The second picture depicts a person naked on the floor with a leash around their neck, held by reservist Lyndie England.[129] She recalls being "told by her supervisors to pose for the infamous photo," initially published in *The Washington Post*.[130] In other photos, soldiers are depicted smiling with a thumbs-up in front of naked, humiliated, and even deceased torture victims.[131]

The Abu Ghraib photographs exacerbated public outrage surrounding the subject of torture, being released around the time that the Torture Memos were leaked.[132]

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121. *See infra* Part III(B).

122. Sandholtz, *supra* note 100, at 590.

123. *Factsheet: Torture at Abu Ghraib and Al Shimari v. CACI*, CTR. FOR CONST. RTS. (Mar. 28, 2024), https://perma.cc/3JV4-RPAZ.

124. *Id.*

125. *Id.*

126. *Id.*

127. Dora Apel, *Torture Capture: Lynching Photographs and the Images of Abu Ghraib*, 64 ART J. 88, 91 (2005).

128. *Id.*

129. *Id.*

130. *Id.*

131. Philip Gourevitch & Errol Morris, *Exposure*, NEW YORKER (Mar. 24, 2008), https://perma.cc/H948-KPXQ; Seth Hettena, *Reports Detail Abu Ghraib Prison Death; Was it Torture?*, NBC NEWS (Feb. 17, 2005), https://perma.cc/H6UN-E9SE.

132. DAVID COLE, THE TORTURE MEMOS: RATIONALIZING THE UNTHINKABLE 19 (2009) ("Around the time that the Abu Ghraib photos emerged, someone leaked the August 2002 Torture Memo to the *Washington Post*, which published the memo on its website.").

Accordingly, the actions that they depict follow a parallel rationale to the Torture Memos under the "new definition," violating the principle of proportionality by depriving people of their basic right of security under preemptive self-defense. However, I present the Abu Ghraib photographs independently because they aptly demonstrate how moral observation underscores political and legal action. These photographs were deeply disconcerting to the public, and the response following their release closely parallels Fisher's anecdote on suffocating gas—from observing the photos, people *knew* the torture was morally abhorrent.[133] The public discourse did not end at moral disapproval, but grew into political and legal disapproval over the national security principles that legitimized those actions. In fact, the photographs spurred public outrage over the Torture Memos and ultimately contributed to their "premature" withdrawal by Goldsmith.[134]

The visceral reaction prompted by the Abu Ghraib photographs reveals the underlying moral responsibility inherent to national security decisions. But because those moral considerations remain covert, the executive is able to sanction the inhumane treatment of political prisoners without accounting for fundamental moral repercussions. A number of soldiers at Abu Ghraib reported feelings of deep betrayal, thinking "they were nobly defending America, only to find themselves following orders that crossed moral lines."[135] Eric Fair, an interrogator at Abu Ghraib, stated that he "failed to disobey a meritless order" and instead "intimidated, degraded and humiliated a man who could not defend himself." He concluded: "I compromised my values. I will never forgive myself."[136] The orders were dealt in legal and political terms, rendering their morality something to be deciphered by the recipient. In that regard, the command and the duty are incongruent—the input is legal or political responsibility, and the output is moral blameworthiness. This is not to say that the military actors at Abu Ghraib are faultless, but to point out that the fundamental nature of morality does not mean it should be taken for granted. Rather, it is a pivotal consideration that warrants explicit acknowledgement.

C. The Philosopher President

President Barack Obama came into office with a focus on humanitarian principles, receiving a Nobel Peace Prize for his vision of "a world without nuclear weapons."[137] He was also reported to study just war theory, with presidential aides describing him as a student of Acquinas and Augustine.[138] In a speech on

133. *See supra* Part I(A).

134. GOLDSMITH, *supra* note 34, at 172. Goldsmith had already been drafting a memorandum explaining his reasons for withdrawing the Torture Memos, but he ultimately never released the draft due to pressure to immediately withdraw the opinion following the scandal of the Abu Ghraib photographs. *Id*.

135. Saria Mohamed, *Abuse by Authority: The Hidden Harm of Illegal Orders*, 207 IOWA L. REV. 2183, 2229 (2002).

136. *Id.*

137. Prince Williams, *Barack Obama Is a War Criminal*, HARV. POL. REV. (Sep. 29, 2021), https://perma.cc/7EDC-6BGH.

138. David Luban, *What Would Augustine Do?*, BOS. REV. (June 6, 2012), https://perma.cc/F43E-EKLQ.

drone warfare, President Obama stated that "this is a just war—a war waged proportionally, in last resort, and in self-defense."[139] Stemming from this background, his approach to national security emphasized respect for the international rule of law and strategic multilateralism.[140] For instance, the Obama administration narrowed the focus of counterterrorism, dismissing the broad "war on terror" label in exchange for war with a "specific transnational terror network."[141] They also proposed the use of targeted drone strikes to streamline "fewer civilian casualties, elimination of key leaders, and deconstruction of terrorist safe havens."[142] President Obama had significant personal involvement in the drone strikes, supervising the nomination of targets and granting ultimate approval for their killing.[143] In fact, within three days of assuming office, President Obama took two actions regarding the War on Terror: first, he prohibited torture in accordance with the law; second, he ordered a drone strike on Pakistan estimated to kill eleven people.[144]

Following the 9/11 attacks, the UN Security Council authorized member states to "take the necessary steps to prevent the commission of terrorist attacks."[145] Few scholars disagree that the United States could morally engage in self-defense.[146] However, the drone program was nonetheless subject to substantial criticism, perhaps in part because its technological novelty presented difficult moral questions. A primary justification set forth by the Obama administration was the "unwilling and unable" doctrine, permitting a state to take unilateral action when other governments are unable; however, that approach must be weighed against the risks of civilian casualties and escalation of the conflict.[147] Executive policies obscured the impact of the strikes on civilians, including the

139. Press Release, Remarks by President Obama at the National Defense University (May 23, 2013), https://perma.cc/WK7Z-MT82. Koh, then U.S. State Department Legal Advisor, similarly stated that CIA counterterrorism operations adhere to the just war principles of distinction and proportionality. Hillel Ofek, *The Tortured Logic of Obama's Drone War*, 27 NEW ATLANTIS 35, 40 (2010). John Yoo notes that drone strikes impose a greater deprivation of liberty than practices that Koh has criticized—including detention, interrogation, and trial by military. *Id.*

140. KOH, *supra* note 1, at 170.

141. *Id.*

142. Ava Shafiei, *Invisible Precedents: The U.S. Drone Strike Program Under the Obama Administration*, 1 SWARTHMORE INT'L RELS. J. 42, 43 (2017); KOH, *supra* note 1, at 175.

143. Luban, *supra* note 138.

144. Jonathan G. D'Errico, *Executive Power, Drone Executions, and the Due Process Rights of American Citizens*, 87 FORDHAM L. REV. 1185, 1190 (2018).

145. Rosa Brooks, *Drones and the International Rule of Law*, 28 ETHICS & INT'L AFFS. 83, 92 (2014).

146. *Id.* at 92 ("Most commentators agreed that the initial U.S./NATO campaign constituted a clear case of individual and collective self-defense after the 9/11 attacks"); Luban, *supra* note 138 ("In the wake of the September 11 attacks, there can be little doubt that the United States could morally use force in self-defense.").

147. Luban, *supra* note 139. Luban argues that the "unwilling and unable" doctrine should be considered a last resort, due to the risks of civilian casualty and escalation. *Id.*

Central Intelligence Agency ("CIA") practice of counting all "military age men" killed in the vicinity as combatants unless proven otherwise.[148]

Aside from the issue of collateral damage, Rosa Brooks argues that the drone strike program relied on overbroad interpretations of international legal concepts. The United States treated the UN authorization as an ongoing sanction to use force against any suspected terrorist, an interpretation contrary to the traditional temporal limitations on self-defense to a "continuing" and "imminent" threat.[149] In fact, a leaked Justice Department white paper relied on members of al-Qaeda "continually plotting attacks" to justify the presence of a continued threat, as the government "cannot be confident that none is about to occur."[150] Brooks calls it a "radical assault on a once-stable concept" to interpret the lack of knowledge of a future attack to constitute an imminent threat.[151]

Lastly, with regard to the question of domestic morality, drones are a discreet weapon that do not risk the lives of American soldiers.[152] This function of drone warfare reorients a familiar inquiry—when "foreign lives" no longer need to be balanced with "American lives," what are they worth?[153] The premise that American lives are somehow "worth more" is morally troubling to say the least, and fundamentally adverse to human rights.[154] Nonetheless, the loss of American lives has been a central *political* consideration for executive decisions to enter into war. Drone strikes take that consideration to its logical extreme and confronts decision makers with the *moral* question of how much human lives are worth when American lives are no longer at stake. Rather than being presented with a balancing test, politicians now face a full-blown moral inquiry. Standing at the crossroads of warfare and execution, President Obama's drone program violated core tenets of just war theory.

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148. *Id*.; Michael Walzer, *Just & Unjust Targeted Killing & Drone Warfare*, 145 DAEDALUS 12, 17 (2016) ("If the targeted insurgent or terrorist leader was surrounded by, or simply in the vicinity of, a group of men between the ages of fifteen and sixty . . . an attack was permitted, and the dead or injured were not counted as collateral damage subject to the proportionality rule, but rather as legitimate military targets.").

149. Brooks, *supra* note 145, 92–94.

150. *Id*. at 94 (emphasis removed).

151. *Id.*

152. D'Errico, *supra* note 144, at 1191.

153. *See supra* Part II(A)(i). Some scholars also express concern about the depersonalization of warfare through its digitization. Ofek, *supra* note 139, at 42 ("The great virtue of remote-controlled warfare—the physical distance between us and our enemies—is also a vice, in that it also creates psychological distance and disconnection") (internal quotations omitted); Luban, *supra* note 138 ("There is also the jarring fact that the drone operators sit in safety thousands of miles away, insulated from the destruction they cause.").

154. *See* Luban, *supra* note 48, at 82 (stating that Kosovo sent the message "that Americans considered one American life to be worth thousands of Yugoslav lives—hardly a resounding endorsement of the doctrine of universal human rights"); Dawn E. Johnsen, *When Responsibilities Collide: Humanitarian Intervention, Shared War Powers, and the Rule of Law*, 53 HOU. L. REV. 1055, 1096 (stating that in situations where "the United States has the capacity to devastate populations in another country through air strikes without risk to American lives," not considering foreign casualties "would seem especially perverse in the context of humanitarian interventions").

Luban argues the President should have a hand in national security decisions due to political accountability, suggesting the greater issue is a "genuinely skeptical" decision-making process rather than decisions "within the executive branch versus outside review."[155] Although rigorous decision making is important, the resulting legitimacy might be limited by constraints on transparency. The potential harms of releasing information on national security matters are direct and quantifiable, while the benefits of transparency are imprecise and forward-looking.[156] As such, reform efforts internal to the Executive Branch might face inherent limitations in terms of public accountability. In his memoir *A Promised Land*, Obama writes that he intended to save people but "the world they were a part of, and the machinery I commanded, more often had me killing them instead."[157] President Obama put exceptional emphasis on principles of just war during his administration, yet his drone strike program continues to receive significant criticism from scholars and the public alike. Perhaps the issue should not be attributed to particular presidents and factual circumstances, but to the wider institutional trend in national security towards executive aggrandizement. As these case studies have aimed to demonstrate, the pattern persists no matter who is in the driver's seat.

III. CONGRESSIONAL REFORM

Part I of this paper demonstrated that the moral dimensions of national security decisions are not adequately accounted for by the Executive Branch, and this section will propose that the bipartisan Legislative Branch is a better venue for moral considerations. The first subsection defends this point through the conception of Congress as being most responsive to the plurality of opinions within the United States. The second subsection proposes the appointment of a non-partisan expert on wartime ethics to oversee executive national security decisions.

A. Who Should Handle Morality?

In *Just and Unjust Wars*, Michael Walzer argues that there can be no justice in war if there are not responsible people.[158] Although democracy provides a framework to distribute that responsibility, the state is "governed at a great distance from its ordinary citizens by powerful and often arrogant officials."[159] Walzer acknowledges that moral authority is certainly different than legal authority, but cautions that it is wrong to think that moral authority does not exist. The previous sections have taken issue with the Executive Branch's capacity to adequately consider the moral aspects of wartime decisions. I now argue that bringing morality to the forefront supports greater congressional checks on national security

155. Luban, *supra* note 138. In making this claim, Luban is responding to the *New York Times* alternative of judicial review of targeted killing decisions. He did not address the possibility of a legislative check on executive action.

156. *See* DeRosa, *supra* note 13, at 302.

157. BARACK OBAMA, A PROMISED LAND 353 (2020); *see* Williams, *supra* note 137.

158. WALZER, *supra* note 13, at 287.

159. *Id.* at 301.

decision making; as the authority for ethical oversight would be better delegated through a representative legislature than a unitary executive.[160]

In 1973, Senator George McGovern wrote that he is "convinced that the United States today is closer to one-man rule than at any time in our history—and this is paradoxically by a President who is not popular."[161] He argues that this shift towards executive discretion was underscored by congressional inaction, and we "must seek a pluralism of power" between Congress and the President.[162] Since then, the concept of pluralism has developed to encompass a number of meanings, including the familiar idea of the United States as a "melting pot,"[163] partisan interests as "overlapping cleavages,"[164] and a "bicameral orientation to citizenship" with limits to ensure "an exclusionary, unitarian movement does not take over an entire regime."[165] But for the present purposes, I will define pluralism as the diverse belief systems held by members of the U.S. population.

As a constitutional matter, the responsibility of Congress to represent pluralist perspectives underscores its centrality in national security decisions, which is especially amplified by the intrinsic moral qualities of those decisions. The protection of marginalized identities and belief systems has particular sanctity when it comes to "matters of conscience," or the basic liberty to have one's own core religious beliefs, moral beliefs, and the like.[166] As indicated by its Article I powers, Congress is designated to be the central venue for the mediation of diverse and plural interests.[167] Indeed, some scholars have argued that pluralism is not only a reasonable approach, but "the only approach" in ensuring that legislators are "responsive to their constituents, to interest groups, and to their parties."[168] As such, the lack of pluralism in the Executive Branch gives reason to shift the balance of national security powers toward Congress.

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160. My argument is limited to the balance of power between Congress and the President. The judiciary is limited to retroactive action, whereas this proposal necessitates proactive regulation. Furthermore, scholarship on domestic national security tends to focus on Congress as a check on executive action, especially given Congress's constitutional grant of war powers. *See* George S. McGovern, *The Presidency and a Pluralism of Power*, 62 KY. L. J. 200, 206 (1973) ("The Supreme Court is subject to fate and executive appointment . . . the true priority is to protect the place of the Congress in the federal system.").

161. *Id.* at 200.

162. *Id.* at 206.

163. Jennifer L. Hochschild, *Pluralism, Identity Politics, and Coalitions: Towards Madisonian Constitutionalism*, *in* THE FUTURE OF DEMOCRATIC POLITICS: PRINCIPLES AND PRACTICES 12 (Gerald M. Pomper & Marc D. Weiner eds., 2003).

164. *Id.*

165. CONNOLLY, *supra* note 14, at 2–3.

166. *See* Nelson Tebbe, *The Principle and Politics of Liberty of Conscience*, 135 HARV. L. REV. 267, 274–75 (2021).

167. *See id.*; Jonathan S. Gould, *The Law of Legislative Representation*, 107 VA. L. REV. 765, 835 (2021) ("A body of law that pulls legislators in competing directions enables responsiveness to competing interests that each *should* be given a voice in the legislative process."); Jeremy Waldron, *Representative Lawmaking*, 89 B.U. L. REV. 335, 343 (2009) ("When the diverse perspectives are brought together in a collective decision-making process, that process will be informed by much greater informational resources than those that attend the decision-making process of any single individual.").

168. Gould, *supra* note 167, at 835.

There are also a number of pragmatic reasons favoring greater congressional influence over national security. As a starting point, pluralistic deliberations are an important safeguard against oversimplified decision making, which is particularly important where information is confidential and insulated from large-scale public discourse.[169] Second, executive circumvention of statutory authority has become so commonplace that the phenomenon is effectively codified as a feature of modern war powers. For instance, Presidents have consistently thwarted the War Powers Resolution, and "Congress has not mustered the collective will to insist on full and timely compliance with the Resolution in a wide range of cases."[170] Lastly, the OLC can engage in *ad hoc* games of "find the statute" by fitting the law to executive desire, rather than ensuring executive action flows from the law.[171] In the modern domestic national security schema, "blanket *ex ante* statutory authorizations are so broad that presidents can often take action without needing to seek contemporaneous legislative approval at all."[172]

The clearest limitation on shifting national security power from the Executive Branch to the Legislative Branch is congressional inefficiency. The need for speedy decision making and a unified national front are paramount in the arena of war.[173] Even if the discretion granted to the executive results in moral hegemony, perhaps that is better than congressional inaction—after all, ought implies can. However, bringing morality to the forefront could actually incentivize Congress by imposing a *moral* duty to act. David Mayhew argues that Congress has a "penchant for blunt simple action" because approval of legislative action depends

169. *See* Margulies, *supra* note 105, at 662 ("Dialogue between lawyers, policymakers, and other relevant institutions or audiences, including Congress and international organizations, allows a multiplicity of players to offer their views as active contributors to debate."). *See also* Simone Chambers, *Behind Closed Doors: Publicity, Secrecy, and the Quality of Deliberation*, 12 J. POL. PHIL. 389, 408 (2004) ("On fundamental questions that affect the broader public, the more secret and closed is the debate, the more important it is that all possible views are represented.").

170. Crook, *supra* note 19, at 159. Furthermore, in the forty years since the Resolution was adopted over President Nixon's veto, there have been at least 136 reports filed "consistent with" the Resolution. "Only one . . . specifically stated that forces had been introduced into hostilities or imminent hostilities." *Id*. at 160.

171. KOH, *supra* note 1, at 115 (defining "find the statute" as searching "the U.S. Code for preexisting statutes that they can claim already directly or implicitly authorized the challenged action"); *id*. at 142 (utilizing a "found" statute to reverse the legislative invitation for Cuban refugees to come to the United States).

172. Andrew Kent & Julian Davis Mortenson, *The Search for Authorization: Three Eras of the President's National Security Power*, *in* CAMBRIDGE COMPANION TO THE UNITED STATES CONSTITUTION 2 (Karen Orren & John W. Compton eds., 2018).

173. United States v. Curtiss-Wright Exp. Corp., 299 U.S. 304, 320. *See* Kent & Mortenson, *supra* note 172, at 3 (stating that the national security realm's "particularly high stakes combination of urgency and uncertainty has resulted in a scheme of extraordinarily open-ended legislative delegation that probably exceeds any other area of American governance"); Dani Heba, The Unitary Executive Theory: Benefits and Dangers 50 (May 20, 2023) (B.A. Thesis, City Univ. of New York) (on file with CUNY Academic Works, https://perma.cc/96FH-N2NW) ("While it is important to have one person, the president, making the final decision on [matters in times of war] for accountability purposes, this power has been abused to intrude on Americans' fundamental constitutional rights many times with no accountability.").

on the means-ends appraisals of the public.[174] The high stakes and intricate nature of national security decisions create an incentive for congresspeople to take surface-level stances, as reelection largely hinges on public approval.[175]

Furthermore, unlike the complex inner workings of national security law and policy, the abstracted "morality" of wartime action is of common concern to the general public. In fact, a growing body of empirical work tests the public's moral intuitions on matters of warfare through hypotheticals, revealing a nuanced set of responses that are not fully consistent with a particular moral schema. For instance, a study examining public assessment of the legitimacy of drone strikes found that while "scholars often relate legitimate strikes to one moral norm," the public can intuitively combine them into "unique constellations of moral norms."[176] Another study examining how public opinion reflects "substantive demands of international law, specific moral principles, or instrumental considerations"[177] similarly found that people combine instrumental and normative considerations when determining right and wrong.[178] Both results demonstrate the amorphous and intuitive nature of the public's moral conceptions of warfare. This abstracted moral position has long been reflected in politics as well; for instance, a 1971 Gallup Poll reported that approximately fifty percent of Americans believed the Vietnam War was *morally* wrong.[179]

Here arises a fundamental misalignment: the general populus conceptualizes war in abstracted terms, while Congress and the Executive shroud discussion of war in legal and political jargon. Encoding national security decisions in lawfare not only suppresses underlying moral considerations, but evades popular views on warfare. Therefore, making morality an explicit consideration in national security would incentivize faster legislative action, decreasing the concern that congressional inaction would render it fully incapable of the responsiveness that national security decisions require.

In addition to the distinct nature of public conceptions of warfare, other considerations may mitigate concerns over congressional inefficiency. First, there is the hyperbolic status of national emergencies. During national security crises, legal actors have too often "skewed [the] calculus toward expediency, without paying sufficient attention to abiding values."[180] This overemphasis on expediency is compounded by the (shockingly) lengthy duration of national emergencies. In many instances, decisions justified under the emergency powers do not require

174. DAVID R. MAYHEW, CONGRESS: THE ELECTORAL CONNECTION 138–40 (1974).

175. *See id.* at 15–17.

176. Paul Lushenko, *The Moral Legitimacy of Drone Strikes: How the Public Forms Its Judgments*, 6 TEX. NAT'L SEC. REV. 12, 29–30 (2023).

177. Janina Dill & Livia I. Schubiger, *Attitudes Toward the Use of Force: Instrumental Imperatives, Moral Principles, and International Law*, 65 AM. J. POL. SCI. 612, 612 (2021).

178. *Id.* at 630–31. In drawing this conclusion, Dill and Schubiger found that the respondents' "normative concerns for how a war ought to be fought, however, resemble more closely the legal demands of distinction and necessity rather than the moral principle that civilian's liability should determine how a war is conducted." *Id.* at 630. The modern conflation of morality and the law might add nuance to that conclusion; although, the study derived the principles of "legal logic" from international treaty law rather than domestic national security law. *Id.* at 615.

179. Crook, *supra* note 19, at 158.

180. Margulies, *supra* note 105, at 642.

the expediency envisioned by the current balance of powers. For example, the International Emergency Powers Act ("IEEPA") enacted in 1977 provides presidential authority to regulate a range of economic activities during a national emergency.[181] The average length of a "national emergency" under the statute is nearly a decade.[182] In fact, an emergency declared under the IEEPA in 1979, after U.S. Embassy staff were taken as hostages in Iran, continued to its fifth decade as of 2025.[183] Thus, the timeliness concerns implicated by congressional inefficiency are, at the very least, already over-accounted for in the current balance of powers.

Second, reform efforts might circumvent the issue of congressional inefficiency almost entirely by focusing on oversight rather than legislative action. Neal Katyal suggests that a "Congress that conducts little oversight provides a veneer of legitimacy to an adventurist President" by permitting them to appeal to the system of checks and balances even when those checks are compromised by modern political dynamics.[184] Legislative oversight does not necessitate wide-ranging consensus, given congressional committees can be tasked with implementation. I will expand on this idea in the subsequent section, but provide this brief mention to locate the motivation for my proposal within the broader separation of powers critique.

In sum, Congress is the favorable venue to account for the moral aspects of national security decisions, warranting a shift from the current balance of power that is dramatically skewed towards the Executive Branch. By neglecting to acknowledge the morality of national security decisions, Congress fails its duty to represent the pluralist interests of the population on matters of conscience. This error is twofold: first, Congress is neglecting a core reason that national security falls under its constitutional purview; second, Congress is incentivized to circumvent such decisions when they are framed through a complex legal and political lexicon. Therefore, making morality increasingly explicit would deter congressional inaction by imposing a *moral* obligation to represent the pluralist views of the population. In 1973, Senator McGovern proclaimed that "now is the time for a determined effort to change, not the person in the White House, but the power of the Presidency."[185] Perhaps, over half a century later, the time has come to heed the call.

B. Proposal: NDAA Ethics Requirements

As postulated by James Madison in Federalist 58: "The power of the purse may, in fact, be regarded as the most complete and effectual weapon with which any constitution can arm the immediate representatives of the people . . . for carrying

181. *See* CHRISTOPHER A. CASEY, JENNIFER K. ELSEA & LIANA W. ROSEN, CONG. RSCH. SERV., R45618, THE INTERNATIONAL EMERGENCY ECONOMIC POWERS ACT: ORIGINS, EVOLUTION, AND USE 10 (2025).

182. *Id*. at 65.

183. *Id*. at 20–21.

184. Katyal, *supra* note 120, at 2322.

185. McGovern, *supra* note 160, at 206.

into effect every just and salutary measure."[186] The National Defense Authorization Act ("NDAA") establishes or continues defense policies and restrictions, addresses organizational matters related to the Department of Defense ("DoD"), and provides authorization on the use of appropriated funds.[187] Although the NDAA is not an appropriations bill, it has historically reflected congressional sentiment towards subsequent appropriations.[188] The NDAA is one of the most consistent bills in Congress, being signed into law for fifty-nine years and garnering significant bipartisan support.[189] Furthermore, it is the primary congressional opportunity to have a hand in shaping national security policy.[190] The House Armed Services Committee ("HASC") and Senate Armed Services Committee ("SASC") are the "authorizing committees" with jurisdiction over the NDAA.[191]

The SASC and HASC are charged with "exercising continuous watchfulness" over the DoD, so there are naturally a number of significant oversight provisions in the NDAA.[192] Activities conducted under Title 10 of the U.S. Code, which (largely) codifies the DoD, are subject to oversight by the SASC and HASC.[193] Additionally, there are over three hundred reporting requirements in Title 10 spanning "spending breakdowns to readiness assessments and strategy reports."[194] The NDAA also features specialized oversight reporting procedures. In the NDAA for FY 2014, Congress imposed a more formal reporting structure for "sensitive military operations," including timely notice of certain operations, and quarterly briefings to oversee the trajectory of the campaigns.[195] Similar formal requirements were imposed for oversight of cyber operations.[196] In the FY 2025 NDAA, the "accountability and oversight" provisions extend the requirement for an annual report on

186. THE FEDERALIST NO. 58 (James Madison); *see* McGovern, *supra* note 160, at 207 ("Congress must exert its authority to achieve a full measure of influence. It should mount a consistent and coherent effort, founded on its foremost power—control over appropriations.").

187. VALERIE HEITSHUSEN & DANIEL M. GETTINGER, CONG. RSCH. SERV., IF10515, DEFENSE PRIMER: THE NDAA PROCESS 1 (2025); Oona A. Hathaway, Tobias Kuehne, Randi Michel & Nicole Ng, *Congressional Oversight of Modern Warfare: History, Pathologies, and Proposals for Reform*, 63 WM. & MARY L. REV. 137, 155 (2021).

188. HEITSHUSEN & GETTINGER, *supra* note 187.

189. William McCellan "Mac" Thornberry, *The National Defense Authorization Act: The Sturdy Ox of Legislation*, 58 HARV. J. LEGIS. 1, 1 (2021); Hathaway et al., *supra* note 187, at 187.

190. Thornberry, *supra* note 189, at 7.

191. HEITSHUSEN & GETTINGER, *supra* note 187.

192. Hathaway et al., *supra* note 187, at 154.

193. *Id*. at 155.

194. *Id*.

195. Thornberry, *supra* note 189, at 11–12. The definition of "sensitive military operations" has changed since codification, but now includes: "(1) a lethal operation or capture operation conducted by the armed forces or conducted by a foreign partner in coordination with the armed forces that targets a specific individual or individuals; (2) an operation conducted by the armed forces in self-defense or in defense of foreign partners, including during a cooperative operation; or (3) an operation conducted by the armed forces to free an individual from the control of hostile foreign forces." 10 U.S.C. § 130(f)(d)(1)–(3).

196. Thornberry, *supra* note 189, at 13; Hathaway et al., *supra* note 187, at 171.

civilian casualties, and direct a report on the implementation of the *DoD Instruction on Civilian Harm Mitigation and Response*.[197]

In line with the HASC and SASC authority for oversight of the DoD, Congress should require the appointment of a non-partisan expert on wartime ethics in the next NDAA to oversee the annual reports on military operations provided by the DoD. I will call this role the War Ethics Advisor ("WEA"). This role would function similarly to that of the Inspectors General ("IG") as an internal watchdog of the DoD, but with a specialized focus on wartime ethics advisement.[198] By "giving force to traditions that are already part of our subtle constitutional landscape," the movement towards executive domination of national security may be "pulled back toward equilibrium."[199]

It is worth noting that the DoD is already subject to the oversight of an IG, but their scope of authority is much broader than the specialized function outlined for the WEA.[200] Similar to an IG, the WEA could be an inferior officer of the United States—being appointed by the President or head of an agency and approved with the advice and consent of the Senate.[201] However, the WEA would serve a more limited function, like conducting investigations of ongoing DoD strategy, and auditing the annual reports that the DoD is already consistently required to prepare under the NDAA.

The WEA might also offer recommendations on their suggested course of action and issue reports regarding corruption and moral disregard.[202] These courses of action might be limited to principles of just war theory akin to the international context, or left to the discretion of the WEA's area of expertise—this Note does not take a position on the matter. The WEA would likely have far less remedial power than the IG due to its limited advisory role, but flagrant violations of the principles of just war could be subject to disciplinary action, programmatic reform, or legislative change in the subsequent NDAA.[203] Lastly, the WEA should be subject to removal by the President or the Secretary of Defense for good cause, with a statutory requirement that the reasons be submitted to

197. SEN. JACK REED & SEN. ROGER F. WICKER, U.S. SENATE COMMITTEE ON ARMED SERVICES, FISCAL YEAR 2025: NATIONAL DEFENSE AUTHORIZATION ACT EXECUTIVE SUMMARY 17 (2024), https://perma.cc/759Z-TXY8.

198. *See* Andrew C. Brunsden, *Inspectors General and the Law of Oversight Independence*, 30 WM. & MARY L. REV. 1, 9 (2021).

199. Katyal, *supra* note 120, at 2348.

200. The Inspector General is responsible for conducting audits, inspections, and investigations related to programs, operations, and misconduct; providing leadership and coordination; recommending policies to promote efficiency; preventing waste, fraud, and abuse; and keeping Congress fully informed of problems and corrective action. Fernando R. Laguarda, *Challenges to the Independence of Inspectors General in Robust Congressional Oversight*, 19 GEO. J. L. & PUB. POL'Y 211, 227 (2021). Neal Katyal comments on this limited role when arguing in favor of greater presidential reporting requirements in national security matters, stating that while the IGs "no doubt exercise a check on abuse … they currently focus on mismanagement and fraud, not on the development of sound policy." Katyal, *supra* note 120, at 2347.

201. Brunsden, *supra* note 198, at 11–12.

202. *See id*. at 9.

203. *See id*. at 9–10.

Congress in writing thirty days prior to protect against pretextual removal.[204] In sum, establishing a position like the WEA would permit a greater congressional role in national security decision making, and invoking the power of the purse through the NDAA would help to ensure its efficacy.

C. Conclusion

The gravity and importance of national security decision making cannot be overstated in today's globalized society. However, the over-emphasis on legal neutrality in formulating the rationales that govern domestic national security might problematically curtail the importance of their inherent moral nature. The metaethical principle of moral observation demonstrates the reality that moral considerations are deeply embedded in the rationales underlying wartime decisions, stemming from the factual circumstances in which they arise. In other words, to deny the moral severity of practices like humanitarian intervention, torture, and genocide is to deny a fundamental factor motivating domestic political responses. By bringing morality to the forefront, national security law would gain *greater* transparency by preventing such rationales from covertly influencing the outcome of OLC opinions. However, the incorporation of ethical principles need not be accomplished by lawyers, and might be located within the authority of legislative actors.

The second portion of this Note proposed that the Legislative Branch is the appropriate venue for these moral considerations to take place, founded in congressional responsibility to uphold and encourage pluralistic perspectives within the United States. In particular, Congress should require the appointment of a non-partisan expert on wartime ethics in the NDAA to oversee the actions of the DoD. The purpose of this Note is not to outline a moral framework for national security decisions, but to suggest that morality is a pivotal factor in the separation of powers that continues to go unacknowledged. Explicitly acknowledging the role of morality in national security is pivotal to ensuring a proper balance of powers, lest we take the foundational for granted by characterizing it as arbitrary.

204. *See id.* at 12; Morrison v. Olson, 487 U.S. 654, 691 (1988) (finding "good cause" removal provision is appropriate for independent counsel).