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## The Military Transgender Policy: The Realization of Madison's Incompatible Powers Narrative

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CARDOZO LAW REVIEW  
*de•novo*

THE MILITARY TRANSGENDER POLICY: THE  
REALIZATION OF MADISON’S INCOMPATIBLE  
POWERS NARRATIVE

*Ken Hyle*<sup>†</sup>

Last summer, President Trump purported to ban all transgender individuals from serving in the military via Twitter: “After consultation with my Generals and military experts, please be advised that the United States Government will not accept or allow . . . Transgender individuals to serve in any capacity in the U.S. military.”<sup>1</sup> In August 2017, the President followed his series of tweets with a Presidential Memorandum that formally dismantled President Obama’s framework<sup>2</sup> to permit transgender individuals to serve openly.<sup>3</sup> These restrictions led to a flurry of lawsuits in federal court.<sup>4</sup> In March 2018, President Trump issued a revised policy that aims to replace the categorical ban with one

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<sup>1</sup> Donald Trump (@realDonaldTrump) TWITTER (July 26, 2017, 6:55 AM), <https://twitter.com/realdonaldtrump/status/890193981585444864>; Donald Trump (@realDonaldTrump) TWITTER (July 26, 2017, 7:04 AM), <https://twitter.com/realdonaldtrump/status/890196164313833472>.

<sup>2</sup> While the purpose of this essay is to address shortcomings in the constitutional analysis of President Trump’s military transgender policy, my thesis applies equally to President Obama’s unilateral decision to lift restrictions on transgender military service.

<sup>3</sup> *Presidential Memorandum for the Secretary of Defense and the Secretary of Homeland Security: Military Service by Transgender Individuals*, WHITE HOUSE (Aug. 25, 2017), <https://www.whitehouse.gov/presidential-actions/presidential-memorandum-secretary-defense-secretary-homeland-security>.

<sup>4</sup> See *infra* Section I.

that is subject to some exceptions,<sup>5</sup> but the lawsuits and the debate over whether the policy is lawful continue.<sup>6</sup>

This essay highlights a critical shortcoming in the current constitutional analysis of the President's military transgender policy. Part I outlines the constitutional grounds on which federal courts have granted a preliminary injunction to enjoin the policy, highlighting how the courts have relied exclusively on constitutional *rights*. Part II presents James Madison's historical narrative on incompatible constitutional powers<sup>7</sup> as a basis for discussing why any substantive constitutional analysis of the policy must—at a minimum—address the underlying *separation of powers* issue. I then argue that any legal analysis of the President's military transgender policy that does not rigorously address the competing constitutional *powers* of the President and Congress within this context brings us another step closer to unfettered executive power.

## I. CONSTITUTIONAL RIGHTS VS. CONSTITUTIONAL POWERS

The President's transgender service ban, as derived from the 2017 Presidential Memorandum, has been interpreted to entail three distinct prongs: (1) the Accession Directive; (2) the Retention Directive; and (3) the Sex Reassignment Surgery Directive.<sup>8</sup> The 2017 Presidential Memorandum expressly stated that the President's constitutional power to issue the Directives is derived from Article II's Commander in Chief Clause.<sup>9</sup> Plaintiffs, both current and aspiring service members who are transgender, filed lawsuits in federal court to enjoin the directives on various constitutional grounds.

In October 2017, the United States District Court for the District of Columbia granted a motion for a preliminary injunction enjoining the first two directives,<sup>10</sup> holding that the plaintiffs were likely to succeed under the Equal Protection component of the Fifth Amendment's Due Process Clause.<sup>11</sup> The opinion did not discuss whether the President had the constitutional power to issue the directives,<sup>12</sup> but did implicitly assume that the directives were within the President's constitutional

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<sup>5</sup> *Presidential Memorandum for the Secretary of Defense and the Secretary of Homeland Security Regarding Military Service by Transgender Individuals*, WHITE HOUSE (Mar. 23, 2018), <https://www.whitehouse.gov/presidential-actions/presidential-memorandum-secretary-defense-secretary-homeland-security-regarding-military-service-transgender-individuals>.

<sup>6</sup> See *infra* Section I.

<sup>7</sup> James Madison, *Political Observations*, NATIONAL ARCHIVES (Apr. 20, 1795), <https://founders.archives.gov/documents/Madison/01-15-02-0423>.

<sup>8</sup> *Stockman v. Trump*, No. EDCV 17-1799 JGB (KKx), at 2 (C.D. Cal. Dec. 22, 2017).

<sup>9</sup> Presidential Memorandum, *supra* note 3.

<sup>10</sup> *Doe 1 v. Trump*, 275 F. Supp. 3d 167, 217 (D.D.C. 2017).

<sup>11</sup> *Id.* at 215.

<sup>12</sup> *Id.*

power to “control the United States military.”<sup>13</sup> However, the Court failed to define the source and scope of the President’s constitutional power to “control” the armed forces, and it is certainly debatable whether the President has unilateral control over the armed forces.<sup>14</sup>

In November 2017, the United States District Court for the District of Maryland granted a plaintiffs’ motion to preliminarily enjoin enforcement of the directives.<sup>15</sup> This Court also traced the plaintiffs’ likelihood of success on the merits to the Equal Protection Clause.<sup>16</sup> While the opinion addressed the invocation of national defense interests to justify enforcement of the directives, the Court dismissed this argument in the course of a balance of equities analysis, and did not address the specific allocation of constitutional power between the President and Congress within this framework.<sup>17</sup>

In December 2017, the United States District Court for the Western District of Washington granted a plaintiffs’ motion for a similar preliminary injunction.<sup>18</sup> This Court also focused its substantive constitutional analysis on the merits of an Equal Protection claim.<sup>19</sup> Strikingly, the opinion characterized the President’s actions as a *unilateral* proclamation of a ban on transgender service members.<sup>20</sup> By doing so, the Court appeared to have some implicit reservations about the President’s constitutional power to issue the directives without congressional involvement. However, at no point did the Court squarely address this separation of powers issue.

In another December 2017 case, the United States District Court for the Central District of California also preliminarily enjoined the directives.<sup>21</sup> While this Court avoided any discussion of the President’s constitutional power to unilaterally impose the directives, it did address the issue of whether the Court should defer to executive branch decisions related to the military (the “Military Deference Doctrine”).<sup>22</sup>

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<sup>13</sup> *Id.* at 194.

<sup>14</sup> The U.S. Constitution does not expressly grant the President authority to “control” the United States military. The Court presumably equated all aspects of military “control” with the following power in Art II, Section 2: “The President shall be Commander in Chief of the Army and Navy of the United States, and of the Militia of the several States . . .” U.S. CONST. art. II, § 2, cl. 1. However, such a presumption ignores the possibility that some aspects of military “control” are reserved to Congress. For example, imposing restrictions on the composition of the armed forces, which arguably falls under Congress’ Art I, Section 8 powers “[t]o raise and support Armies” and to “make rules for the government and regulation of the land and naval forces,” U.S. CONST. art. I, § 8, cls. 12 and 14, could easily be considered part of the power to “control” the military.

<sup>15</sup> *Stone v. Trump*, 280 F. Supp. 3d 747, 772 (D. Md. 2017).

<sup>16</sup> *Id.* at 768–72.

<sup>17</sup> *Id.* at 769.

<sup>18</sup> *Karnoski v. Trump*, No. C17-1297-MJP, 2017 WL 6311305, at \*23 (W.D. Wash. Dec. 11, 2017).

<sup>19</sup> *Id.* at 7.

<sup>20</sup> *Id.* at 6.

<sup>21</sup> *Stockman v. Trump*, No. EDCV 17-1799 JGB (KKx), at 21 (C.D. Cal. Dec. 22, 2017).

<sup>22</sup> *Id.* at 18.

While the court ultimately declined to apply the Military Deference Doctrine, and held that the plaintiffs' Equal Protection claim was likely to succeed on the merits,<sup>23</sup> it skipped the first logical question a court should ask before deciding whether or not to defer to an executive branch decision related to the military: whether there is a source of constitutional power for the President to make the decision in the first place.

The above cases ultimately resulted in a nationwide preliminary injunction enjoining the directives. However, after the President released the revised 2018 Presidential Memorandum, which aimed to replace the categorical ban with one that is subject to some exceptions, lawyers for the President's Administration argued that the legal issues presented in the cases above were now moot.<sup>24</sup>

These arguments did not persuade the United States District Court for the Western District of Washington to lift the preliminary injunction. The Court concluded that the 2018 Presidential Memorandum does not moot plaintiffs' claims because it prohibits transgender people from serving unless they are "willing and able to adhere to all standards associated with their biological sex."<sup>25</sup> But even in this most recent case, the Court frames the substantive constitutional issues in terms of violations of constitutional *rights* rather than a search for constitutional *power*.<sup>26</sup> This is noteworthy because, unlike the 2017 Presidential Memorandum, which purported to be rooted in Article II's Commander in Chief Clause, the 2018 Presidential Memorandum cites only to "the authority vested in me as President by the Constitution and the laws of the United States of America . . ."<sup>27</sup> The White House is now presenting the President's constitutional power to issue the directives as much more broad.

The common thread among these cases is a consistent failure of the courts to analyze whether the President has unilateral constitutional *power* to impose the military transgender policy. The next section will explore, from a historical perspective, the dangers of missing this crucial step in the substantive constitutional analysis.

## II. JAMES MADISON'S NARRATIVE ON INCOMPATIBLE POWERS AND THE MILITARY TRANSGENDER POLICY AS A MODERN-DAY OUTGROWTH

The balance of constitutional war powers has traditionally been framed as tension between the President's Article II power to conduct

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<sup>23</sup> *Id.* at 19.

<sup>24</sup> *Karnoski v. Trump*, No. C17-1297-MJP, at 11 (W.D. Wash. Apr. 13, 2018).

<sup>25</sup> *Id.* at 12–13.

<sup>26</sup> *Id.* at 3.

<sup>27</sup> Presidential Memorandum, *supra* note 5.

war as Commander-in-Chief<sup>28</sup> and Congress' power to declare war.<sup>29</sup> As James Madison noted in his 1795 essay *Political Observations*, “The separation of the power of declaring war, from that of conducting it, is wisely contrived, to exclude the danger of its being declared for the sake of its being conducted.”<sup>30</sup> This demarcation of power anticipated a situation where the President might declare the United States to be in a state of war when Congress was at recess<sup>31</sup> and was designed to curb the concentration of constitutional power in the executive branch.

However, this is just one of several sets of constitutional powers Madison described as “incompatible” in *Political Observations*.<sup>32</sup> To understand the implications of Madison's incompatible powers narrative on the constitutional analysis of President Trump's military transgender policy, it is crucial to first discuss the historical context in which *Political Observations* was written.

Madison wrote *Political Observations* in response to a key debate he lost in the House of Representatives over a foreign affairs issue. Madison, frustrated at the Royal Navy's aggressive seizure of American ships during England's war with France, proposed a controversial bill that would have placed substantial economic sanctions on Great Britain.<sup>33</sup> President Washington, fearing the repercussions would be a war with Great Britain while the young republic was still fragile, instead proposed that John Jay be sent on a special envoy to negotiate an end to the crisis.<sup>34</sup> At the same time, Washington asked Congress to increase the size of the armed forces in case negotiations failed.<sup>35</sup> On May 30th, 1794, the House took up a Senate bill entitled “[a]n act to increase the Military Force of the United States, and to encourage the recruiting service” (the “Military Establishment Bill”).<sup>36</sup> The bill authorized the President, *at his discretion*, to raise an additional 10,000 troops for three years.<sup>37</sup> Federalists argued that the bill would ensure military preparedness if war broke out.<sup>38</sup> Congressional Republicans, including

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<sup>28</sup> U.S. CONST. art. II, § 2, cl. 1.

<sup>29</sup> U.S. CONST. art. I, § 8, cl. 11.

<sup>30</sup> Madison, *supra* note 7.

<sup>31</sup> *Id.*

<sup>32</sup> *Id.*

<sup>33</sup> *James Madison on War and Liberty*, THE SCHOLAR'S STAGE (Oct. 8, 2010), <http://scholars-stage.blogspot.com/2010/10/james-madison-on-war-and-liberty.html>.

<sup>34</sup> *Id.*

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

<sup>36</sup> 3 *Annals of Cong.* 735–39 (1794).

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

<sup>38</sup> Congressional records note that proponents of the Military Establishment Bill believed that “the interests and safety of the United States might be materially promoted *by our vesting the President with the power to raise these men*, if war should break out in the recess of Congress . . . [w]ho would say, that if war should be forced upon us, this would not be considered as a most valuable provision, because we might have this respectable body of troops engaged, equipped, and prepared to act the moment that hostilities should be declared by the constituted authority?” *Annals of Cong.*, *supra* note 36, at 736–37 (emphasis added).

Madison, feared the bill trampled on the basic constitutional principle of separation of powers.<sup>39</sup> It was this fundamental principle—the critical evaluation of constitutional *power*—that Madison later articulated in *Political Observations*.

Madison’s primary motive in writing *Political Observations* was to counter the ironic accusations against him and those supporting economic retaliation—as opposed to military action—as war hungry.<sup>40</sup> But *Political Observations* also contained a deeper sub-narrative involving the proper allocation of constitutional *power* among the executive and legislative branches. Madison viewed the debate over the Military Establishment Bill, particularly the federalists’ position, as a dangerous step toward plenary executive power.<sup>41</sup> He expressly warned against a “gradual assumption or extension of discretionary powers in the executive departments.”<sup>42</sup>

The constitution’s structure, Madison argued, created the necessary barrier against this encroachment of power. In support of his argument, Madison listed a series of incompatible constitutional powers.<sup>43</sup> According to this narrative, there are certain powers that pose a threat to liberty if surrendered by Congress to the President or from the President to Congress. Madison was ultimately concerned that constitutional analysis would develop in such a way as to view the lines separating the incompatible powers as imaginary.<sup>44</sup> He cautioned against efforts that erode these lines, particularly in the country’s most unguarded moments:

It cannot be denied, that there may, in certain cases, be a difficulty in distinguishing the exact boundary between legislative and executive powers; but the real friend of the constitution, and of liberty, by his endeavors to lessen or avoid the difficulty, will easily be known from him who labors to increase the obscurity, in order to remove the constitutional land-marks without notice.<sup>45</sup>

Madison did not believe that perfect line-drawing between executive and legislative power was feasible. Rather, he championed constitutional analysis that both acknowledged the existence of such incompatible powers and rigorously attempted to differentiate between

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<sup>39</sup> Congressional records note that opponents of the Military Establishment Bill believed “the bill ought to be named ‘A bill authorizing the President to *pass a law* for raising ten thousand men,’” and that “[u]pon the whole, [Madison] could not venture to give his consent for violating so salutary a principle of the Constitution, as that upon which this bill encroached.” *Id.* at 735–738 (emphasis added).

<sup>40</sup> *See generally* Madison, *supra* note 7.

<sup>41</sup> *Id.*

<sup>42</sup> *Id.*

<sup>43</sup> *Id.* “The Constitution expressly and exclusively vests in the legislature the power of declaring war . . . raising armies . . . and creating offices.” *Id.*

<sup>44</sup> *Id.*

<sup>45</sup> *Id.*

these powers.

The President's military transgender policy should invoke the concerns expressed in Madison's incompatible powers narrative. The Constitution provides Congress with the power "to raise and support Armies,"<sup>46</sup> "to provide and maintain a Navy,"<sup>47</sup> and to "make rules for the government and regulation of the land and naval forces."<sup>48</sup> Historically, this umbrella of constitutional power has given Congress discretion to set the parameters of the composition of the armed forces.<sup>49</sup> Congress has traditionally been the branch of government that initiates large-scale policies involving qualifications for and conditions of service in the armed forces, including the "Don't Ask, Don't Tell" statute, which was both passed and repealed by Congress, then presented to the President for his signature.<sup>50</sup>

The President's military transgender policy, which places restrictions on the makeup of the armed forces, was enacted without any congressional action. The 2017 Presidential Memorandum asserts that the President's authority to issue the policy stems from the Commander-in-Chief Clause. As a result, the policy should raise an issue as to the scope of executive power to unilaterally regulate the composition of the armed forces, without a directive from Congress.

Unsurprisingly, Congress has previously asserted that the Constitution reserves to itself the exclusive power to control the composition of the armed forces.<sup>51</sup> Under this reading, Congress must first make findings and provide a statutory framework for the executive branch's decision-making process.<sup>52</sup> On the other hand, it is also arguable that the executive branch, by way of the President and the Department of Defense, has constitutional power to unilaterally promulgate military personnel policies that affect overall military effectiveness.<sup>53</sup> In light of this gray area of constitutional *power*, this essay serves as a cautionary note to the courts that the President's

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<sup>46</sup> U.S. CONST. art. I, § 8, cl. 12.

<sup>47</sup> U.S. CONST. art. I, § 8, cl. 13.

<sup>48</sup> U.S. CONST. art. I, § 8, cl. 14.

<sup>49</sup> See e.g., 10 U.S.C. § 654 (*repealed* 2010), available at <https://www.gpo.gov/fdsys/pkg/USCODE-2010-title10/pdf/USCODE-2010-title10-subtitleA-partII-chap37-sec654.pdf>; see also Women's Armed Services Integration Act, Pub. L. 80-625, 62 Stat. 356 (1948).

<sup>50</sup> 10 U.S.C. § 654 (*repealed* 2010), available at <https://www.gpo.gov/fdsys/pkg/USCODE-2010-title10/pdf/USCODE-2010-title10-subtitleA-partII-chap37-sec654.pdf>.

<sup>51</sup> *Id.* ("Congress makes the following findings: (1) Section 8 of article I of the Constitution of the United States commits exclusively to the Congress the powers to raise and support armies, provide and maintain a Navy, and make rules for the government and regulation of the land and naval forces . . . .").

<sup>52</sup> *Id.* "The Secretary of Defense shall ensure that the standards for enlistment and appointment of members of the armed forces reflect the policies set forth in subsection (b)." *Id.*

<sup>53</sup> See e.g., *DoD Retention Policy for Non-Deployable Service Members* (Feb. 14, 2018), available at <https://www.defense.gov/Portals/1/Documents/pubs/DoD-Universal-Retention-Policy.PDF> (directing changes to military personnel policies necessary to provide more ready and lethal forces).



military transgender policy has led to a resurfacing of Madison's incompatible powers concerns. It is critical that the judicial branch referee the competing constitutional powers of the political branches in this realm.<sup>54</sup>

In fact, the military transgender cases involve the same set of incompatible powers that Madison debated in the House against the Military Establishment Bill and later highlighted in *Political Observations*:

[Madison] thought that it was a wise principle in the Constitution, to make one branch of Government raise an army, and another conduct it. If the Legislature had the power to conduct an army, they might embody it for that end. On the other hand, if the President was empowered to raise an army, as he is to direct its motions when raised, he might wish to assemble it for the sake of the influence to be acquired by the command.<sup>55</sup>

As noted above, the current constitutional analysis of the President's military transgender policy is void of any substantial analysis of whether the President has the *unilateral power* to enact the policy.<sup>56</sup> In the cases about the constitutionality of the policies, the Courts have turned a blind eye to a potentially impermissible blending of incompatible constitutional powers—the power “to raise an army” and the power “to direct its motions when raised.”<sup>57</sup> The Courts, as Madison feared, have failed to even acknowledge an incompatible powers issue when addressing the military transgender policy cases.

What, then, are the global implications of missing this step in the

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<sup>54</sup> The obvious counterargument for judicial intervention is the Political Question Doctrine. See generally *Baker v. Carr*, 369 U.S. 186 (1962). However, federal courts have rejected categorical rules that ban or significantly restrict judicial review of separation of powers cases in the context of military affairs. For example, in *Hamdi v. Rumsfeld*, a separation of powers case, the U.S. Supreme Court reviewed whether the Executive had the authority to detain citizens who it determined were enemy combatants. *Hamdi v. Rumsfeld*, 542 U.S. 507, 516-517 (2004). Justice O'Connor expounded: “[W]e necessarily reject the Government's assertion that separation of powers principles mandate a heavily circumscribed role for courts in such circumstances.” *Id.* at 535-36. “We have long since made clear that a state of war is not a blank check for the President when it comes to the rights of the Nation's citizens . . .” *Id.* John Yoo, a constitutional scholar who arguably takes a more rigid approach to the judiciary's role in separation of powers cases involving military affairs, acknowledges that, “[t]he exclusion of judicial review from the decision of war does not exclude the courts completely from reviewing the prosecution of war. When the war effort involves domestic affairs or, unfortunately, operations within the territorial United States, the political branches may call upon the courts to play a role.” John C. Yoo, *Judicial Review and the War on Terrorism*, 72 GEO. WASH. L. REV. 427, 440 (2003). Under this theory, the implementation of exclusion-based personnel policies in the military, such as the President's transgender ban, will either precede a state of war or occur after the initiation of war, thus falling within the *prosecution* category. Furthermore, exclusion-based personnel policies in the military have typically been interconnected with broader social issues impacting American civilians, placing such policies within the scope of *domestic affairs*.

<sup>55</sup> *Annals of Cong.*, *supra* note 36 (emphasis added).

<sup>56</sup> See *supra* Section I.

<sup>57</sup> *Id.*

constitutional analysis of the President's military transgender policy? Madison's language in *Political Observations* reflects a profound concern over the development of constitutional norms that perceive any constitutional boundaries between incompatible powers as imaginary. I would argue that Madison's reference in *Political Observations* to "the real friend of the constitution, and of liberty . . ." <sup>58</sup> is an allusion to the judicial branch. As an early supporter of judicial review, <sup>59</sup> Madison envisioned the judicial branch as protecting the boundaries between incompatible powers. Although Madison does not expressly invoke a role for the judicial branch in *Political Observations*, there is language within his incompatible powers narrative that suggests such a role. First, Madison's concerns over political influence and elections imply some role for a nonpolitical, independent arbiter of constitutional power disputes. <sup>60</sup> Second, Madison alludes to a comprehensive deliberative process for the establishment of precedent in constitutional power disputes, which arguably suggests some involvement by a judicial body with legal expertise. <sup>61</sup> Under this interpretation, it is the responsibility of the courts to protect against the establishment of constitutional norms that treat the barriers between incompatible powers as imaginary. Without the judicial branch policing this area of constitutional law, the blending of incompatible powers might lead to unconstrained executive power.

To illustrate, there is one arguably well-established set of incompatible powers that have blended over time, leading to expansive executive power: the power to declare or initiate war, which is constitutionally committed to Congress, <sup>62</sup> and the power to conduct war, which is constitutionally committed to the President. <sup>63</sup> Over the years, the power to declare war has progressively shifted from the hands of Congress to the President. In the present day, with these incompatible powers thoroughly consolidated in the Executive, the current President unilaterally directed the United States military to launch airstrikes

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<sup>58</sup> Madison, *supra* note 7.

<sup>59</sup> See generally, C. Perry Patterson, *James Madison and Judicial Review*, 28 CAL. L. REV. 22, (1939).

<sup>60</sup> "There are not a few ever ready to invoke the name of Washington; to garnish their heretical doctrines with his virtues, and season their unpalatable measures with his popularity. Those who take this liberty, will not, however, be mistaken; his truest friends will be the last to sport with his influence, above all, for electioneering purposes . . ." Madison, *supra* note 7.

<sup>61</sup> "Nor will it be denied, that precedents may be found, where the line of separation between these powers has not been sufficiently regarded; where an improper latitude of discretion, particularly, has been given, or allowed, to the executive departments. But what does this prove? That the line ought be considered as imaginary; that constitutional organizations of power ought to lose their effect? No—It proves with how much deliberation precedents ought to be established, and with how much caution arguments from them should be admitted . . ." Madison, *supra* note 7.

<sup>62</sup> U.S. CONST. art. I, § 8, cl. 11.

<sup>63</sup> U.S. CONST. art. II, § 2, cl. 1.

against targets associated with chemical-weapons capability in Syria.<sup>64</sup> In a May 31, 2018 Memorandum Opinion, the Office of Legal Counsel (OLC) affirmed the President’s legal authority to unilaterally direct such military action.<sup>65</sup> The Memorandum Opinion unequivocally affirms a constitutional norm by stating that “[t]he President’s direction was consistent with many others taken by prior Presidents, who have deployed our military forces in limited engagements without seeking prior authorization of Congress.”<sup>66</sup> In defining the scope of the President’s unilateral war powers, OLC, an arm of the executive branch, has deferred to the historic practice of courts declining to intervene when these arguably incompatible powers have been consolidated in the Executive.<sup>67</sup> This historic blending of incompatible war powers provides the President opportunities to exert great influence over foreign and domestic policy without any meaningful legal constraints on those powers.

Similarly, if the courts fail to *rigorously address* the blending of incompatible powers presented in the pending military transgender cases, the aggregate result will be quite remarkable—a new constitutional norm that accepts that the executive branch would, in practice, be empowered to unilaterally initiate war, direct that war, and control the composition of the armed forces conducting that war. It is time for the courts to reinforce the barriers between Madison’s incompatible powers in order to check the rapid expansion of executive power.

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<sup>64</sup> *April 2018 Airstrikes Against Syrian Chemical-Weapons Facilities, Memorandum Opinion for the Counsel to the President*, OFFICE OF LEGAL COUNSEL, (May 31, 2018), [https://www.justsecurity.org/wp-content/uploads/2018/06/2018-05-31-syrian-airstrikes\\_1-office-of-legal-counsel.pdf](https://www.justsecurity.org/wp-content/uploads/2018/06/2018-05-31-syrian-airstrikes_1-office-of-legal-counsel.pdf).

<sup>65</sup> *Id.*

<sup>66</sup> *Id.* The Memorandum Opinion references a number of historical examples of unilateral Presidential military action to support its legal conclusion. See e.g., *Authority to Use United States Military Forces in Somalia*, 16 Op. O.L.C. 6, 9 (1992); *Proposed Deployment of United States Armed Forces into Bosnia*, 19 Op. O.L.C. 327, 331 (1995) (“In at least 125 instances, the President acted without express authorization from Congress.”); *Deployment of United States Armed Forces to Haiti*, 28 Op. O.L.C. 30, 31 (2004); *Authority to Use Military Force in Libya*, 35 Op. O.L.C. \_\_\_, at 6 (Apr. 1, 2011).

<sup>67</sup> Memorandum Opinion, *supra* note 64. In developing the historical practice doctrine, OLC has applied a two-step framework to justify unilateral Presidential action. First, the proposed military operations must serve important national interests. Second, the President’s use of force in defense of important national interests must not constitute “war” within the meaning of the Declaration of War Clause of the Constitution. *Authority to Use Military Force in Libya*, OPINIONS OF THE OFFICE OF LEGAL COUNSEL 1 (April 1, 2011). Curtis Bradley and Jack Goldsmith have argued that this two-step framework provides no meaningful legal check on presidential power. *OLC’s Meaningless ‘National Interests’ Test for the Legality of Presidential Uses of Force*, LAWFARE, (JUNE 5, 2018), <https://www.lawfareblog.com/olcs-meaningless-national-interests-test-legality-presidential-uses-force>.