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The Continuation of Politics by Other Means: The Original Understanding of War Powers

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TABLE OF CONTENTS

Introduction.....	170
I. War Powers: Allocation, Practice, and Criticism.....	175
A. The Constitutional Text.....	175
B. The Constitution in Practice	176
1. Congress and the President.....	176
2. The Courts and the War Powers.....	182
3. The Persian Gulf War.....	186

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C. The Academic Critique: The President Against the Professors	188
1. Original Intent Betrayed.....	189
2. The Separation of Powers Betrayed.....	192
3. Judicial Abdication	194
II. The British Legacy.....	196
A. English Constitutionalism and War.....	197
1. The Allocation of War Powers in the English Constitution and Eighteenth-Century Political Thought	198
2. The Declare-War Power in the English Constitution and Eighteenth-Century Political Thought	204
3. The Lessons of British History: The Sinews of War	208
4. The Lessons of British History: The Declaration of War.....	214
5. Summary of the British Model.....	217
III. War and Early America.....	218
A. Colonial Government.....	219
B. The War Powers in the New State Constitutions.....	221
1. Early Efforts to Rein in Executive Power.....	222
2. Executive Power Reborn: New York, Massachusetts, and New Hampshire.....	228
3. A Path Not Taken	234
C. The Articles of Confederation and the Prelude to Constitutionalism	235
IV. The New Constitution.....	241
A. The Constitutional Text in Context.....	242
1. The Declare War Clause	242
2. Other Constitutional War Powers Provisions.....	250
a. Other Formal Congressional Powers.....	250
b. The President's Powers	252
B. The Constitutional Convention and the Allocation of War Powers	256
1. Early Proposals: The Virginia Plan and Beyond.....	257
2. Making and Declaring War: The Debate of August 17.....	260
3. Peace and the Presidency	265
C. The State Ratification Debates.....	269
1. The Antifederalist Attack	270
2. The Federalist Responses.....	276

3. The Battle Joined: Ratification Arguments and the Centrality of Funding.....	279
4. War Powers and Judicial Abstention	287
5. The New Constitution in Practice.....	290
Conclusions	295
A. Modern War Revisited.....	296
B. War and Republicanism.....	302

The Continuation of Politics by Other Means: The Original Understanding of War Powers

John C. Yoo

In recent years, legal commentators have sharply criticized executive initiative in the war-making process. This Article examines the historical and legal background of the war powers in the Anglo-American world of the seventeenth and eighteenth centuries. The author argues that the war powers framework created by the Framers differs sharply from that envisioned by modern scholars. After exploring the Constitutional text, the political and legal context within which the Framers lived, experiences with British political history and state constitutions, and the arguments made during the ratification debates, the author concludes that the Framers created a framework designed to encourage presidential initiative in war. Congress was given a role in war-making decisions not by the Declare War Clause, but by its powers over funding and impeachment. The courts were to have no role at all. Professor Yoo suggests that the Constitution did not inadvertently exclude the judiciary. Instead, the Framers understood the Constitution as giving the two political branches weapons to struggle for influence over the war-making process—rendering judicial supervision unnecessary. The Article concludes that because the Framers failed to specify an exact relationship between the President and Congress in the area of war, precise procedures may evolve over time within the constitutional framework.

INTRODUCTION

Since the end of the Cold War, our nation has turned to the use of force in its foreign relations more frequently than some might have hoped. The increase in military interventions—in Lebanon, Grenada, the Persian Gulf, Panama, Kuwait, Somalia, Haiti, and now Bosnia—has been accompanied by increasing academic criticism of the way in which the federal government makes war.¹ This criticism, which represents a

1. See generally JOHN H. ELY, WAR AND RESPONSIBILITY: CONSTITUTIONAL LESSONS OF VIETNAM AND ITS AFTERMATH (1993); LOUIS FISHER, PRESIDENTIAL WAR POWER (1995); MICHAEL J. GLENNON, CONSTITUTIONAL DIPLOMACY (1990); LOUIS HENKIN, CONSTITUTIONALISM, DEMOCRACY, AND FOREIGN AFFAIRS (1990); HAROLD H. KOH, THE NATIONAL SECURITY CONSTITUTION: SHARING POWER AFTER THE IRAN-CONTRA AFFAIR (1990); FRANCIS D.

diversity of political and intellectual positions, is striking both for its uniformity of opinion and its harshness of tone.² Critics of the current war powers landscape accuse Presidents from Harry Truman to George Bush of waging "unconstitutional" wars, portray Congress as shirking its constitutional responsibilities, and point to the "powerful whiff of hypocrisy" found in the judiciary's hands-off attitude.³

According to these scholars, the post-World War II era has witnessed nothing less than "the disappearance of the separation of powers, the system of checks and balances, as it applies to decisions to go to war."⁴ Arguing that the Framers intended Congress to have exclusive control over the decision to go to war, they interpret the Declare War Clause⁵ as a separation of powers provision that not only empowers Congress, but also limits executive abilities to make war.⁶ Under this approach, in order to wage war, the President must receive a declaration of war or its "functional equivalent" from Congress. Should the President overstep these constitutional boundaries, the federal courts must intervene to right the balance by declaring the war unconstitutional or even by enjoining the President's actions.

WORMUTH ET AL., *TO CHAIN THE DOG OF WAR: THE WAR POWER OF CONGRESS IN HISTORY AND LAW* (1986); J. Gregory Sidak, *To Declare War*, 41 DUKE L.J. 27 (1991); Jane E. Stromseth, *Rethinking War Powers: Congress, the President, and the United Nations*, 81 GEO. L.J. 597 (1993).

2. I am referring here only to the most recent works on war powers. See *supra* note 1. To be sure, there is a much older, more diverse body of scholarship on war powers, the vast majority of which seems to be in agreement with the more recent work. See generally THOMAS F. EAGLETON, *WAR AND PRESIDENTIAL POWER: A CHRONICLE OF CONGRESSIONAL SURRENDER* (1974); FOREIGN AFFAIRS AND THE U.S. CONSTITUTION (Louis Henkin et al. eds., 1990); EDWARD KEYNES, *UNDECLARED WAR: TWILIGHT ZONE OF CONSTITUTIONAL POWER* (1982); W. TAYLOR REVELEY III, *WAR POWERS OF THE PRESIDENT AND CONGRESS: WHO HOLDS THE ARROWS AND OLIVE BRANCH?* (1981); ARTHUR M. SCHLESINGER, JR., *THE IMPERIAL PRESIDENCY* (1973); ANN VAN WYNN THOMAS & A.J. THOMAS, JR., *THE WAR-MAKING POWERS OF THE PRESIDENT: CONSTITUTIONAL AND INTERNATIONAL LAW ASPECTS* (1982); William Van Alstyne, *Congress, the President, and the Power to Declare War: A Requiem for Vietnam*, 121 U. PA. L. REV. 1 (1972); Arthur Bestor, *Separation of Powers in the Domain of Foreign Affairs: The Intent of the Constitution Historically Examined*, 5 SETON HALL L. REV. 527 (1974); Alexander M. Bickel, *Congress, the President and the Power to Wage War*, 48 CHI.-KENT L. REV. 131 (1971); Gerhard Casper, *Constitutional Constraints on the Conduct of Foreign and Defense Policy: A Nonjudicial Model*, 43 U. CHI. L. REV. 463 (1976); Leonard G. Ratner, *The Coordinated Warmaking Power—Legislative, Executive, and Judicial Roles*, 44 S. CAL. L. REV. 461 (1971).

Of course, the issue also arises in the numerous articles and comments on the War Powers Resolution. See, e.g., Stephen L. Carter, *The Constitutionality of the War Powers Resolution*, 70 VA. L. REV. 101 (1984); John H. Ely, *Suppose Congress Wanted a War Powers Act That Worked*, 88 COLUM. L. REV. 1379 (1988); Eugene V. Rostow, "Once More Unto the Breach: The War Powers Resolution Revisited," 21 VAL. U. L. REV. 1 (1986).

3. THOMAS M. FRANCK, *POLITICAL QUESTIONS/JUDICIAL ANSWERS: DOES THE RULE OF LAW APPLY TO FOREIGN AFFAIRS?* 30 (1992). See also sources cited *supra* notes 1-2.

4. ELY, *supra* note 1, at ix.

5. "The Congress shall have Power . . . To declare War." U.S. CONST. art. I, § 8, cl. 11.

6. See, e.g., GLENNON, *supra* note 1, at 17.

Historical practice, however, has contrasted starkly with these constitutional arguments. Congress has issued a declaration of war only five times in its history. The post-1945 era has borne witness to a litany of undeclared wars and an even longer list of less significant uses of the military. The President has initiated conflict, often without any formal signs of congressional approval, and certainly without a declaration of war.⁷ With few exceptions, the federal courts either have refused to hear constitutional challenges to these wars,⁸ or have upheld the propriety of the executive action.⁹

This divergence of academic theory and political practice has led to an unusual arrangement of ideology and constitutional interpretation. "Liberals" who opposed unilateral executive authority have turned to the Framers' intent for support, arguing for a Constitution with a meaning fixed by the history of its drafting.¹⁰ "Conservatives" who favored enhanced presidential war powers have invoked the lessons of the recent past and the nation's post-ratification history to buttress a vision of a Constitution that has adapted to a dangerous world.¹¹

This Article argues, in a sense, that both sides are wrong. It agrees with the methodology employed by the critics of executive dominance over war powers but disagrees with their conclusions. When interpreting the text of the Constitution, we should seek to determine the meaning of its terms as understood by those who adopted its provisions. As the majority of scholars in the war powers area recognize, this is the best starting point to interpret the Constitution. As a *written* document, the Constitution's meaning does not change from the meaning it held for its drafters. Otherwise the Constitution's meaning would be as inconstant as, to paraphrase Horace, the times, or the mores.¹²

Seeking the original understanding of the war powers requires us to turn to untapped sources. Americans of the late eighteenth century would have defined terms in the Constitution—such as "Declare War" and "Commander in Chief"—in the context of how Great Britain, the colonies, and the states had gone to war in the recent past. Further, the

7. See *infra* notes 41-69 and accompanying text.

8. See, e.g., *DaCosta v. Laird*, 405 U.S. 979 (1972) (denial of certiorari); *Massachusetts v. Laird*, 400 U.S. 886 (1970) (denial of motion to file complaint); *Mora v. McNamara*, 389 U.S. 934 (1967) (denial of certiorari); *Mitchell v. Laird*, 488 F.2d 611 (D.C. Cir. 1973).

9. See, e.g., *Orlando v. Laird*, 443 F.2d 1039 (2d Cir.), *cert. denied*, 404 U.S. 869 (1971).

10. See, e.g., ELY, *supra* note 1, at 3-11; FISHER, *supra* note 1, at 1-12; GLENNON, *supra* note 1, at 80-84; KOH, *supra* note 1, at 74-84.

11. See, e.g., JOHN LEHMAN, *MAKING WAR: THE 200-YEAR-OLD BATTLE BETWEEN THE PRESIDENT AND CONGRESS OVER HOW AMERICA GOES TO WAR* (1992); Robert H. Bork, Address, *Erosion of the President's Power in Foreign Affairs*, 68 WASH. U. L.Q. 693, 695-701 (1990); Eugene V. Rostow, *Great Cases Make Bad Law: The War Powers Act*, 50 TEX. L. REV. 833 (1972).

12. See *McIntyre v. Ohio Elections Comm'n*, 115 S. Ct. 1511, 1525, 1530 (1995) (Thomas, J., concurring); Antonin Scalia, *Originalism: The Lesser Evil*, 57 U. CIN. L. REV. 849 (1989).

Framers would have understood the terms of the proposed federal Constitution by comparing them to the most significant public legal documents of the day: the state constitutions. As we will see, this was a common approach to interpreting the Constitution during the ratification debates. Finally, we will examine the records of the Constitutional Convention, the state ratifying conventions, and the public debates waged in the press, not for signs of legislative intent *per se*, but for indications of how Americans of the late eighteenth century *understood* the legal framework of war powers.

Most works have focused on the short discussion of the Declare War Clause at the Constitutional Convention and a few selected comments from *The Federalist*.¹³ Others rely heavily on post-ratification evidence from the first quarter-century of the nation's youth to fill in the Constitution's perceived ambiguities.¹⁴ But these approaches fail to recognize that the Framers neither acted in a historical vacuum, nor wrote on a constitutional *tabula rasa*.¹⁵ Nor can we take as dispositive private comments that were not made known to the state ratifying conventions or to the people. This Article will examine the ratifying debates, not to show that the Framers held unchanging, clear positions, but to show that the intellectual give-and-take of the public exchanges on both sides began from a shared understanding of the way war powers had functioned in the Anglo-American past.¹⁶ Finding this shared understanding, construed in relation to its proper legal context, is the best way to interpret the Constitution's allocation of war powers.

This Article focuses its analysis of the separation of powers on the history of British, colonial, and early state politics leading up to the ratification of the Constitution. It concludes that when the Framers adopted the Constitution, they were reacting as much as they were innovating, tinkering with existing mechanisms as much as they were breaking with tradition. The historical evidence reveals a Constitution that does not

13. See, e.g., ELY, *supra* note 1, at 3-5; see generally Raoul Berger, *War-Making by the President*, 121 U. PA. L. REV. 29 (1972).

14. See, e.g., KOH, *supra* note 1, at 70-71, 74-84; see generally ABRAHAM D. SOFAER, *WAR, FOREIGN AFFAIRS AND CONSTITUTIONAL POWER: THE ORIGINS* (1976). Sofaer, for example, devotes more than three-quarters of his book to an examination of post-ratification practice. The brief history of the early post-ratification period provided in this Article also draws into question the conclusions of these scholars. See *infra* notes 559-587 and accompanying text.

15. See, e.g., Steven G. Calabresi & Kevin H. Rhodes, *The Structural Constitution: Unitary Executive, Plural Judiciary*, 105 HARV. L. REV. 1153 (1992); Abner S. Greene, *Checks and Balances in an Era of Presidential Lawmaking*, 61 U. CHI. L. REV. 123 (1994); Lawrence Lessig & Cass R. Sunstein, *The President and the Administration*, 94 COLUM. L. REV. 1 (1994).

16. Tracing this evolution has been facilitated by the recent publication of the Library of America's two volume *THE DEBATE ON THE CONSTITUTION* (Bernard Bailyn ed., 1993). Although the materials in the set are available in other well-known collections, Bailyn has arranged the speeches, newspaper articles, and papers to show how the Federalists and Antifederalists responded to, and changed their ideas in reaction to, one another.

prescribe one exclusive method for going to war. A war may be constitutional, even if no declaration of war has issued or if the President has acted unilaterally, so long as one branch has not usurped the textually enumerated power of another. The Constitution establishes a war-making process that can vary with the circumstances and with the relative political power of the President and Congress. It assumes that the political branches will exercise their constitutional powers sometimes cooperatively and sometimes antagonistically. Moreover, the Constitution did not inadvertently allocate all war powers to the two political branches; rather, the nature of the mutable process it created made judicial supervision unworkable and undesirable.

The Framers established a system which was designed to encourage presidential initiative in war, but which granted Congress an ultimate check on executive actions. Congress could express its opposition to executive war decisions only by exercising its powers over funding and impeachment. The Framers established this system because they were not excessively worried by the prospect of unilateral executive action. The President was seen as the protector and representative of the People. In contrast, the Framers expressed a deep concern regarding the damage that Congress, and the interest groups that could dominate it, might cause in the delicate areas of war and foreign policy.

Part I of this Article establishes the necessary background for our study. Section A sets forth the constitutional text that governs the allocation of war powers. Section B describes the manner in which the three branches have exercised these powers throughout our nation's history. Section C reviews the contemporary scholarship on the war powers. Part II examines the Anglo-American understanding of war and of the separation of powers during the seventeenth and eighteenth centuries. Part III reviews how these ideas were transplanted to American soil. Section A describes the colonists' experience, and Section B discusses the revolutionaries' efforts in designing their state constitutions. Section C reviews the allocation of war powers in the Articles of Confederation. Part IV focuses on the events and ideas surrounding the drafting and ratification of the Constitution. Section A places the text of the Constitution's war provisions in the political and legal context within which eighteenth-century Americans would have understood them. Section B turns to the Constitutional Convention and links the debates over the Declare War Clause with the discussions concerning peacemaking. Section C discusses the arguments made during the ratification debates, both public and private, and shows how the Federalists invoked Congress' authority over appropriations to answer Antifederalist claims that the President was a king-in-the-making.

The Conclusion returns to the debate between liberals and conservatives over the war powers. This Article's analysis ultimately shows why both the original understanding and subsequent practice are valuable for understanding our constitutional allocation of war powers. Original understanding analysis illuminates the general framework that the Framers erected and what their expectations were. Because the Constitution fails to specify an exact relationship between the President and Congress in the area of war, examination of post-ratification practice confirms our understanding of the allocation of war powers between the branches. Ultimately, however, it is the constitutional framework that endures, while the exact processes of going to war within that framework may change over time.

I

WAR POWERS: ALLOCATION, PRACTICE, AND CRITICISM

This Part describes the current war powers debate. Section A reviews the relevant provisions of the Constitution. Section B examines how, in the absence of clear constitutional commands, the executive and legislative branches have struggled for control over war during the past two centuries, with the post-World War II era witnessing increased presidential dominance countered by half-hearted congressional attempts at participation. Section B also examines how the federal courts have declined to intervene into inter-branch conflicts over presidential war-making. Section C examines the scholarly critique of executive dominance in war and the proposals for judicial solutions. Later Parts of this Article make clear that both this critique and the proposed solutions are incompatible with the original understanding of war powers.

A. *The Constitutional Text*

As with all constitutional questions, an analysis of war powers should begin with the constitutional text, which allocates war-making authority not to a single branch of government, but to both the executive and legislative departments. Article I gives Congress the power to "declare War, grant Letters of Marque and Reprisal, and make Rules concerning Captures on Land and Water."¹⁷ Congress also has the authority to "raise and support Armies,"¹⁸ to "provide and maintain a Navy,"¹⁹ to "make Rules for the Government and Regulation of the land and naval Forces,"²⁰ to "provide for calling forth the Militia to execute the Laws of the Union, suppress Insurrections and repel

17. U.S. CONST. art. I, § 8, cl. 11.

18. *Id.* cl. 12.

19. *Id.* cl. 13.

20. *Id.* cl. 14.

Invasions,"²¹ and to "provide for organizing, arming, and disciplining, the Militia."²² Congress also possesses other powers related to foreign affairs, including the power to regulate international commerce,²³ to establish immigration rules,²⁴ to pass laws punishing piracy and felonies committed on the high seas,²⁵ and to give its advice and consent to the appointment of ambassadors and the making of treaties.²⁶

Compared to this impressive list, the powers of the President at first glance appear somewhat paltry. Article II states that "[t]he President shall be Commander in Chief of the Army and Navy of the United States, and of the Militia of the several States, when called into the actual Service of the United States."²⁷ The President's other enumerated powers include the authority to receive ambassadors²⁸ and, with the advice and consent of the Senate, to make treaties and appoint ambassadors.²⁹ Finally, Article II vests "the executive Power"³⁰ and the duty to execute the laws in the President.³¹

The judiciary's powers are limited in the area of war powers, although the federal courts do have jurisdiction over cases that may relate to foreign affairs. Article III vests the judicial power of the United States in the federal courts,³² and gives them jurisdiction over cases arising under the Constitution, treaties, and other laws of the United States.³³ Other grants of jurisdiction include the authority to hear cases involving ambassadors and other foreign officials, maritime or admiralty law, or treason against the United States, and to hear diversity suits involving foreign states or citizens.³⁴ No provision explicitly authorizes the federal courts to intervene directly in war powers questions.

B. The Constitution in Practice

1. Congress and the President

The Constitution's division of authority establishes a framework that has evolved into the operational system of war powers we have today. The experiences of World Wars I and II might lead one to assume

21. *Id.* cl. 15.

22. *Id.* cl. 16.

23. *Id.* cl. 3.

24. *Id.* cl. 4.

25. *Id.* cl. 10.

26. *Id.* art. II, § 2, cl. 2.

27. *Id.* cl. 1.

28. *Id.* § 3.

29. *Id.* § 2, cl. 2.

30. *Id.* § 1, cl. 1.

31. *Id.* § 3.

32. *Id.* art. III, § 1.

33. *Id.* § 2, cl. 1.

34. *Id.*

that because Congress declared war in those two wars, the Constitution requires a declaration to trigger the President's powers as Commander in Chief.³⁵ However, formal declarations of war have constituted the exception rather than the rule in American history. The United States has declared war only five times: during the War of 1812, the Mexican-American War of 1848, the Spanish-American War of 1898, and World Wars I (1914) and II (1941). Yet, the United States has committed military forces into hostilities abroad at least 125 times in the Constitution's 207-year history.³⁶ In some cases, such as the Quasi-War with France in 1798, the Vietnam War, and the Persian Gulf War, Congress passed statutes or resolutions that authorized the President to engage in military operations, but did not label them declarations of war.³⁷ In other cases, most notably in the Korean War, Congress either never formally approved the intervention or chose only to appropriate funds for the President's actions.³⁸

Although declarations of war have been rare, Congress has never been wholly absent from the war powers equation. For much of the nineteenth and early twentieth centuries, Congress assented to presidential uses of force abroad.³⁹ Interventions undertaken without congressional approval were, for the most part, small-scale actions to protect American property, citizens, or honor abroad that had little risk of significant combat.⁴⁰ Larger-scale actions required the President to seek congressional approval for expanded military forces.⁴¹ Given this rela-

35. See, e.g., Sidak, *supra* note 1, at 73-75.

36. See, e.g., OFFICE OF THE LEGAL ADVISOR, U.S. DEP'T OF STATE, THE LEGALITY OF UNITED STATES PARTICIPATION IN THE DEFENSE OF VIET-NAM (1966), reprinted in 1 THE VIETNAM WAR AND INTERNATIONAL LAW 583, 597 (Richard A. Falk ed., 1968) [hereinafter DEFENSE OF VIET-NAM]; CONGRESSIONAL RESEARCH SERVICE, INSTANCES OF USE OF UNITED STATES ARMED FORCES ABROAD, 1798-1989 (Ellen C. Collier ed., Dec. 4, 1989), reprinted in THOMAS M. FRANCK & MICHAEL J. GLENNON, FOREIGN RELATIONS AND NATIONAL SECURITY LAW 650 (2d ed. 1993). The number of hostilities depends, of course, on the method of counting, and estimates range as high as 215. Ironically, the State Department's estimate (125) comes in far lower than the Congressional Research Service's count (215).

37. Act of May 28, 1798, ch. 48, 1 Stat. 561 (France); Southeast Asia (Tonkin Gulf) Resolution, Pub. L. No. 88-408, 78 Stat. 384 (1964) (Vietnam); Authorization for Use of Military Force Against Iraq Resolution, Pub. L. No. 102-1, 105 Stat. 3 (1991) (Persian Gulf).

38. In the Korean War, the vast majority of Congressmen approved of President Truman's military response to the North Korean invasion, but Congress recessed soon after the initiation of the war and President Truman chose not to ask for formal congressional approval when Congress returned. See DEAN ACHESON, PRESENT AT THE CREATION: MY YEARS IN THE STATE DEPARTMENT 414-15 (1969).

39. See SOFAER, *supra* note 14, at xvii, xx; see generally HENRY B. COX, WAR, FOREIGN AFFAIRS AND CONSTITUTIONAL POWER: 1829-1901 (1984). One notable exception was President Polk's deliberate efforts to provoke a war with Mexico without Congressional approval. See SCHLESINGER, *supra* note 2, at 41.

40. See W. Taylor Reveley III, *Presidential War-Making: Constitutional Prerogative or Usurpation?*, 55 VA. L. REV. 1243, 1257-60 (1969); WORMUTH ET AL., *supra* note 1, at 140-49.

41. See *infra* notes 44-69 and accompanying text.

tive inter-branch harmony, it is not surprising that the judiciary was not an active participant in war powers.

With the establishment of a large peacetime military force in the twentieth century, the prospect of unilateral presidential war-making appeared, concerns about congressional control emerged, and questions about the role of the judiciary arose. The Cold War period provoked almost continual struggles between the two branches over war powers.⁴² The first dispute accompanied the Cold War's first major conflict, which began when North Korean forces invaded South Korea on June 24, 1950. Three days later, the United Nations Security Council issued a resolution authorizing U.N. members to use force in resisting the invasion.⁴³ President Truman immediately committed American military forces without seeking congressional approval, even though substantial support existed in Congress for the President's unilateral decision.⁴⁴ Secretary of State Dean Acheson and Senate Majority Leader Scott Lucas both convinced Truman to rely on his Commander-in-Chief powers to support his actions, which led the President to refrain from seeking the congressional authorization he could have obtained easily. But while congressional authorization in the form of a resolution or declaration of war was not sought, Congress did pass several appropriation bills and draft extensions to support the war.⁴⁵

Only as the war soured at home and American commitments overseas expanded in response to the Soviet threat did some in Congress begin to question the President's authority. In that context the Truman administration began to claim that the President had the independent constitutional authority to commit troops anywhere in the world, with or without congressional authorization.⁴⁶ When the war first began, the State Department had defended the intervention as a United Nations "police action" authorized by the Security Council and by the President's traditional authority to send forces abroad to protect American interests and foreign policy.⁴⁷ As Congress began to debate Truman's disposition of forces in both Korea and Europe in 1951, the Truman administration articulated a more forceful position. According to the administration, the President's independent, broad authority included the power to use the military to protect American interests

42. See SCHLESINGER, *supra* note 2, at 127-207; see generally KOH, *supra* note 1.

43. See Stromseth, *supra* note 1, at 622-24.

44. See *id.* at 625-31.

45. See *id.* at 631-35.

46. See *Assignment of Ground Forces of the United States to Duty in the European Area: Hearings Before the Senate Comms. on Foreign Relations and Armed Services*, 82d Cong., 1st Sess. 88-93 (1951) (testimony of Secretary of State Acheson); see also ACHESON, *supra* note 38, at 402-15.

47. *Authority of the President to Repel the Attack in Korea*, Dep't of State Memorandum of July 3, 1950, DEP'T STATE BULL., July 31, 1950, at 173.

abroad and to execute treaty obligations, such as those imposed by the United Nations and the North Atlantic Treaty Alliance.⁴⁸

America's second major Cold War military intervention, Vietnam, stood on perhaps firmer constitutional footing.⁴⁹ Unlike the response to the surprise attack in Korea, large-scale American involvement in Vietnam began gradually. President Kennedy increased American military personnel in Vietnam from 685 when he entered office to approximately 16,000 by the time of his assassination.⁵⁰ Four days after taking office, President Johnson reaffirmed American policy to help the South Vietnamese government resist the stepped-up Vietcong offensive. National Security Action Memorandum 273 declared that it was "the central objective of the United States" to assist the South Vietnamese "to win their contest against the externally directed and supported Communist conspiracy."⁵¹ Another executive memorandum, drafted the following spring, stressed the necessity for American support and covert action to prevent a domino effect in Asia.⁵²

Formal congressional approval for American military involvement finally came in the form of the much-maligned Tonkin Gulf Resolution. After two apparent North Vietnamese attacks on American destroyers in early August 1964, President Johnson "seized the opportunity" to seek congressional authorization for any actions he might take in support of South Vietnam.⁵³ Congress responded by passing the Tonkin Gulf Resolution, which gave the President broad authorization in the Southeast Asian theater "to take all necessary steps, including the use of armed force, to assist any member or protocol state of [the Southeast Asia Treaty Organization (SEATO)] requesting assistance in defense of its freedom."⁵⁴ Notwithstanding the Tonkin Gulf Resolution,

48. See STAFF OF SENATE COMMS. ON FOREIGN RELATIONS AND ARMED SERVICES, 82D CONG., 1ST SESS., REPORT ON THE POWERS OF THE PRESIDENT TO SEND THE ARMED FORCES OUTSIDE THE UNITED STATES 21-27 (Comm. Print 1951). See also Stromseth, *supra* note 1, at 635-38.

49. John Hart Ely acknowledges, and I believe quite rightly, that the Vietnam War met constitutional requirements because of congressional authorization in the Tonkin Gulf Resolution. See ELY, *supra* note 1, at 16. Ely's problems with the Vietnam War stem from what he believes were unauthorized and hence unconstitutional military incursions in Cambodia and Laos. *Id.* at 69.

50. 3 THE PENTAGON PAPERS: THE DEFENSE DEPARTMENT HISTORY OF UNITED STATES DECISIONMAKING ON VIETNAM 17-20 (Senator Gravel ed., 1971).

51. NATIONAL SECURITY ACTION MEMORANDUM 273, Nov. 26, 1963, reprinted in THE NEW YORK TIMES, THE PENTAGON PAPERS 232, 233 (1971).

52. NATIONAL SECURITY ACTION MEMORANDUM 288, Mar. 17, 1964, reprinted in *id.* at 283-84.

53. The words are those of GEORGE C. HERRING, AMERICA'S LONGEST WAR: THE UNITED STATES AND VIETNAM, 1950-1975, at 122 (1979).

54. § 2, 78 Stat. 384, 384 (1964). Armed with the Tonkin Gulf Resolution, Kennedy's former advisers and President Johnson then took flexible response's emphasis on the calibrated use of force to new heights. The scale and intensity of troop involvement and aerial bombing quickly escalated: from 3,500 Marines landing at Danang in the spring of 1965, to 184,000 troops by the end

the State Department echoed the Truman administration's earlier position that the President could order armed forces abroad unilaterally, based on his Commander-in-Chief powers, historical practice, and the United States' obligations under the SEATO treaty.⁵⁵

A period of presidential weakness in the aftermath of the Vietnam War and Watergate prompted congressional efforts to assert control over the war-making process. In 1973, Congress passed the War Powers Resolution over President Nixon's veto to

fulfill the intent of the framers . . . and insure that the collective judgment of both the Congress and the President will apply to the introduction of United States Armed Forces into hostilities, or into situations where imminent involvement in hostilities is clearly indicated by the circumstances, and to the continued use of such forces in hostilities or in such situations.⁵⁶

The Resolution further declares Congress' belief that the President can exercise his Commander-in-Chief powers "only pursuant to (1) a declaration of war, (2) specific statutory authorization, or (3) a national emergency created by attack upon the United States, its territories or possessions, or its armed forces."⁵⁷ The Resolution attempts to prevent the President from sending the American military into combat without congressional approval, except in emergency situations.

Congress included three mechanisms in the Resolution designed to assure congressional participation in the war-making process. First, "[t]he President in every possible instance shall consult with Congress" before introducing the armed forces into hostilities, whether imminent or actual.⁵⁸ Second, the President must report to Congress within forty-eight hours of sending the military into (a) hostilities or imminent hostilities, (b) into the territory of another nation equipped for combat, or (c) in numbers which substantially increase the size of the American forces stationed in a foreign nation.⁵⁹ This report must explain why the President sent the troops, describe the constitutional and legislative

of 1965, 385,000 by the end of 1966, and 486,000 by the end of 1967; from 25,000 sorties and 63,000 tons of bombs dropped in 1965, to 108,000 sorties and 226,000 tons in 1967. The simultaneous breadth and precision of the intervention was almost comic: the bombing campaign extended to military bases, infiltration routes, transportation facilities and power plants throughout North Vietnam; at the same time, the White House directly ran the bombing campaign, with the President himself often picking the targets (one order prohibited bomber pilots from hitting piers at Haiphong unless no tankers were berthed there). See JOHN L. GADDIS, *STRATEGIES OF CONTAINMENT: A CRITICAL APPRAISAL OF POSTWAR AMERICAN NATIONAL SECURITY POLICY* 247-48 (1982).

55. DEFENSE OF VIET-NAM, *supra* note 36, at 596-98, 601-02.

56. War Powers Resolution, Pub. L. No. 93-148, § 2(a), 87 Stat. 555 (1973) (codified at 50 U.S.C. § 1541(a) (1988)).

57. *Id.* § 2(c), 87 Stat. at 555 (codified at 50 U.S.C. § 1541(c)).

58. *Id.* § 3, 87 Stat. at 555 (codified at 50 U.S.C. § 1542 (1988)).

59. *Id.* § 4(a), 87 Stat. at 555-56 (codified at 50 U.S.C. § 1543(a)).

authority for the action, and estimate the scope and duration of the intervention.⁶⁰

The reporting requirement then triggers the third requirement: the controversial sixty-day clock. Once the President has reported military intervention to Congress, the Resolution requires the President to terminate the intervention within sixty days.⁶¹ Three events can forestall removal of American forces: (1) a declaration of war or specific congressional authorization; (2) congressional extension of the sixty-day period; or (3) congressional inability to meet due to armed attack on the United States.⁶² The President may also extend the sixty-day period once for thirty days if he certifies that the additional time is necessary to permit the safe withdrawal of American armed forces.⁶³ Finally, the Resolution permits Congress to terminate an unauthorized presidential use of military force at any time by concurrent resolution.⁶⁴

Most commentators would agree that the Resolution has not proven to be a resounding success. No President has ever acknowledged its constitutionality, and no President has ever formally complied with its terms. The high watermark of presidential recognition of the Resolution was President Ford's messages to Congress in which he took "note" of the Resolution when he sent military forces to evacuate Americans from South Vietnam and Cambodia and to rescue American sailors in the S.S. *Mayaguez* incident.⁶⁵ President Carter did not consult with Congress before attempting the doomed rescue attempt of the Iranian hostages, although he did send a report to Congress concerning the incident that was "consistent" with the Resolution's provisions.⁶⁶ President Reagan refused to comply formally with the Resolution when he ordered the use of American military force in Lebanon, Grenada, Libya, and the Persian Gulf, although he did report the deployments in messages that were "consistent with the Resolution."⁶⁷ In both the

60. *Id.*

61. *Id.* § 5(b), 87 Stat. at 556 (codified at 50 U.S.C. § 1544(b)). The clock begins ticking after a report is submitted or is required to be submitted, whichever is earlier. *Id.*

62. *Id.*

63. *Id.*

64. *Id.* § 5(c), 87 Stat. at 557-58 (codified at 50 U.S.C. § 1544(c)). Section 5(c)'s concurrent resolution device is almost certainly unconstitutional after the Supreme Court's invalidation of the legislative veto in *INS v. Chadha*, 462 U.S. 919, 944-59 (1983). *But see* Carter, *supra* note 2, at 129-33 (declaring section 5(c) not necessarily unconstitutional after *Chadha*).

65. *See* Report of President Gerald R. Ford (May 15, 1975), reprinted in FRANCK & GLENNON, *supra* note 36, at 593.

66. Letter to the Speaker of the House and the President Pro Tempore of the Senate Reporting on the Operation (Apr. 27, 1980), reprinted in PUBLIC PAPERS OF THE PRESIDENTS OF THE UNITED STATES: JIMMY CARTER 1980-81, at 777.

67. In the Lebanon intervention, President Reagan did sign legislation that found that section 4(a)(1) had been triggered and that the 60-day clock was running. Multinational Force in Lebanon Resolution, Pub. L. No. 98-119, § 2(b), 97 Stat. 805 (1983). However, the President's signature did

Panama invasion and Operation Desert Storm in the Persian Gulf, President Bush sent reports to Congress which he noted were "consistent with" the War Powers Resolution, but he did not acknowledge that he had to consult with Congress or that he had to remove the troops in sixty days.⁶⁸ And, participating in the NATO interventions in Bosnia, President Clinton notified Congress of military action in messages that used similar language.⁶⁹

Despite presidential noncompliance, Congress has never sought to enforce the Resolution's terms either by using section 5's concurrent resolution mechanism or by removing funding for the military action. Congressional inaction has led challengers of the president's use of military force to seek judicial declarations that the President has violated the Constitution.

2. *The Courts and the War Powers*

Although individual members of Congress have criticized presidential actions in these various wars, Congress as a body has never sought to block executive war-making in the courts. But individuals who have been adversely affected by these military interventions have challenged presidential action by seeking redress in the courts. These actions have met with little success, because the Supreme Court has deferred to the conduct of international relations by the other branches, particularly the President. By relying on doctrines including political questions, ripeness, mootness, and standing, and by refusing to grant a writ of certiorari, the Court has studiously avoided becoming embroiled in war powers disputes.⁷⁰

From the earliest days of the Republic, the Court has recognized that the other branches must permit the President some amount of discretion in the conduct of foreign relations. When Chief Justice John Marshall was a Congressman, he declared that the President was "the sole organ of the nation in its external relations."⁷¹ Later, when he

not constitute an endorsement of the Resolution, especially when viewed in light of the fact that the statute gave the President a new 18-month period within which to keep forces in Lebanon. *See id.* § 6, 97 Stat. at 807.

68. *See* Report of President George Bush (Dec. 21, 1989), *reprinted in* FRANCK & GLENNON, *supra* note 36, at 596 (Panama); Report of President George Bush (Aug. 9, 1990), *reprinted in id.* at 597 (Persian Gulf).

69. President Clinton also has repeatedly asserted in regards to contemplated American interventions in Haiti and Bosnia that he does not need congressional approval to send American troops into harm's way. *See, e.g.,* The President's News Conference, 30 WEEKLY COMP. PRES. DOC. 1614, 1616 (Aug. 3, 1994) (Haiti); Letter to Senate Leaders on the Use of United States Armed Forces in International Operations, 29 WEEKLY COMP. PRES. DOC. 2104 (Oct. 18, 1993) (Haiti and Bosnia).

70. *See* ALEXANDER M. BICKEL, *THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS* 111-98 (1962).

71. 10 ANNALS OF CONGR. 613 (1800).

wrote *Marbury v. Madison*, Marshall made clear that there were "[q]uestions in their nature political" which were entrusted to the executive branch and removed from judicial review.⁷² In discussing whether the Jefferson administration could withhold Marbury's commission, Marshall wrote:

By the constitution of the United States, the president is invested with certain important political powers, in the exercise of which he is to use his own discretion, and is accountable only to his country in his political character, and to his own conscience. . . . The subjects are political . . . and being entrusted to the executive, the decision of the executive is conclusive.

....

... Questions in their nature political, or which are, by the constitution and laws, submitted to the executive, can never be made in this court.⁷³

Even when faced with the modern wars of the twentieth century, the Court has continued to recognize that foreign affairs questions often are beyond judicial competence. In 1918, the Court in *Oetjen v. Central Leather Co.* declared, "The conduct of the foreign relations of our Government is committed by the Constitution to the Executive and Legislative—'the political'—Departments of the Government, and the propriety of what may be done in the exercise of this political power is not subject to judicial inquiry or decision."⁷⁴ The twentieth-century Court also has held that the political question doctrine applies to the determination of when war has ended⁷⁵ and whether the United States has recognized a foreign government.⁷⁶

The foremost statement of the convergence of judicial deference and executive discretion in foreign affairs came in Justice Sutherland's opinion in *United States v. Curtiss-Wright Export Corp.*:

Not only . . . is the federal power over external affairs in origin and essential character different from that over internal affairs, but participation in the exercise of the power is significantly limited. In this vast external realm, with its important, complicated, delicate and manifold problems, the President alone has the power to speak or listen as a representative of the nation.

....

It is important to bear in mind that we are here dealing . . . [with] the very delicate, plenary and exclusive power of

72. 5 U.S. (1 Cranch) 137, 170 (1803).

73. *Id.* at 165-66, 170.

74. *Oetjen v. Central Leather Co.*, 246 U.S. 297, 302 (1918); see also *Chicago & S. Air Lines, Inc. v. Waterman S.S. Corp.*, 333 U.S. 103, 111 (1948) (holding that executive decisions as to foreign policy are constitutionally assigned to the political branches, not the judiciary).

75. See *Commercial Trust Co. v. Miller*, 262 U.S. 51, 57 (1923).

76. See *United States v. Belmont*, 301 U.S. 324, 330 (1937); *Oetjen*, 246 U.S. at 302.

the President as the sole organ of the federal government in the field of international relations⁷⁷

Baker v. Carr expresses the modern version of the political question doctrine.⁷⁸ Although not a foreign affairs case, several of *Baker's* justiciability factors apply with vigor to war powers and foreign affairs issues. Although "it is error to suppose that every case or controversy which touches foreign relations lies beyond judicial cognizance,"⁷⁹ Justice Brennan commented:

Not only does resolution of such issues frequently turn on standards that defy judicial application, or involve the exercise of a discretion demonstrably committed to the executive or legislature; but many such questions uniquely demand single-voiced statement of the Government's views.⁸⁰

Baker's broad definition of the political question doctrine has permitted enhanced presidential powers in foreign affairs, primarily because the "single-voiced statement of the Government's views" has come almost exclusively from the executive branch. Over time, Chief Justice Marshall's original doctrine of presidential discretion in certain political areas involving the "nation, not individual rights,"⁸¹ has neatly dovetailed with the President's growing control over foreign affairs.⁸²

Given these broad doctrines, it should come as no surprise that the Supreme Court has avoided challenges to the use of the war power. In the Korean and Vietnam Wars, for example, the Court regularly refused to grant a writ of certiorari for cases brought by draftees challenging the wars' constitutionality.⁸³ Several times, Justice Douglas dissented from the denial of certiorari on the ground "that the constitutional questions raised by conscription for a presidential war are both substantial and

77. *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304, 319-20 (1936).

78. Justice Brennan wrote:

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

Baker v. Carr, 369 U.S. 186, 217 (1962).

79. *Id.* at 211.

80. *Id.* (footnote omitted).

81. *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 166 (1803).

82. *See, e.g.*, *The Prize Cases*, 67 U.S. (2 Black) 635, 666-71 (1863) (President had power to blockade the South during Civil War); *Durand v. Hollins*, 8 F. Cas. 111, 112 (C.C.S.D.N.Y. 1860) (No. 4,186) (President has discretion to act to protect lives and property of citizens).

83. *See, e.g.*, *Holtzman v. Schlesinger*, 484 F.2d 1307 (2d Cir. 1973), *cert. denied*, 416 U.S. 936 (1974).

justiciable," but to no avail.⁸⁴ Moreover, lower courts faced with Vietnam War suits regularly dismissed them as presenting political questions.⁸⁵ For example, determining that the President and Congress had made a joint decision to wage the war, the Second Circuit held that "the constitutional propriety of the means by which Congress has chosen to ratify and approve [the Vietnam War] is a political question."⁸⁶ Two years later the District of Columbia Circuit agreed that whether the form of congressional approval for a war is constitutionally sufficient was a political question.⁸⁷ Furthermore, it held that whether President Nixon had complied with congressional desires to bring the war to an end was also non-justiciable.⁸⁸ The D.C. Circuit abstained from decision not only because of difficulties in discovering judicial standards, but also out of deference to the executive:

Even if the necessary facts were to be laid before it, a court would not substitute its judgment for that of the President, who has an unusually wide measure of discretion in this area, and who should not be judicially condemned except in a case of clear abuse amounting to bad faith. Otherwise a court would be ignoring the delicacies of diplomatic negotiation, the inevitable bargaining for the best solution of an international conflict, and the scope which in foreign affairs must be allowed to the President if this country is to play a responsible role in the council of the nations.⁸⁹

The judicial tradition of deference has continued during the post-Vietnam era, even in the context of the War Powers Resolution.⁹⁰ When various plaintiffs challenged the Reagan administration's use of the American military in Central America in 1982 and the Persian Gulf in 1987, the D.C. Circuit dismissed the suits as presenting non-justiciable political questions.⁹¹ When twenty-nine Members of Congress sued President Reagan for allegedly sending illegal aid to El Salvador in violation of the War Powers Resolution, the same court held that whether

84. *DaCosta v. Laird*, 405 U.S. 979, 979 (1972) (Douglas, J., dissenting); see *Massachusetts v. Laird*, 400 U.S. 886, 886-99 (1970) (Douglas, J., dissenting); *Mora v. McNamara*, 389 U.S. 934, 935-39 (1967) (Douglas, J., dissenting).

85. See, e.g., *Holtzman*, 484 F.2d at 1308-12; *Mitchell v. Laird*, 488 F.2d 611, 614-15 (D.C. Cir. 1973); *DaCosta v. Laird*, 471 F.2d 1146, 1147-50 (2d Cir. 1973); *Sarnoff v. Connally*, 457 F.2d 809, 809-10 (9th Cir.), *cert. denied*, 409 U.S. 929 (1972); *Orlando v. Laird*, 443 F.2d 1039, 1043-44 (2d Cir.), *cert. denied*, 404 U.S. 869 (1971); *Simmons v. United States*, 406 F.2d 456, 459-60 (5th Cir.), *cert. denied*, 395 U.S. 982 (1969).

86. *Orlando*, 443 F.2d at 1043.

87. *Mitchell*, 488 F.2d at 615-16.

88. *Id.*

89. *Id.* at 616.

90. The War Powers Resolution contains no explicit judicial review provisions.

91. See *Sanchez-Espinoza v. Reagan*, 770 F.2d 202, 210 (D.C. Cir. 1985) (Central America) and cases cited *infra* note 92.

the President had to comply with the Resolution's terms presented a non-justiciable political question.⁹²

3. *The Persian Gulf War*

The current state of the war powers doctrine is probably best summarized by examining the legal events surrounding the Persian Gulf War. On August 2, 1990, Iraqi forces invaded Kuwait. President Bush responded by sending about 230,000 American troops to the Gulf, and on November 8 he sent another 200,000 for offensive military operations.⁹³ Later that month the United Nations Security Council gave America and her allies the authorization it needed to "use all necessary means" to eject Saddam Hussein's forces from Kuwait.⁹⁴ Although he received informal congressional support, President Bush did not ask for a declaration of war from Congress. Instead, he used his Commander-in-Chief powers to send forces, already authorized and funded by Congress, to the theater of operations.

President Bush's decision to act unilaterally did not sit well with many in Congress. The Senate Majority Leader stated that "a planned military offensive, which is, by definition, an act of war, must receive the prior authorization of the Congress."⁹⁵ On November 19, fifty-three Members of the House of Representatives and one Senator brought suit in the federal district court of the District of Columbia.⁹⁶ The plaintiffs sought an injunction against the President preventing him from beginning offensive operations without first obtaining a declaration of war or other explicit congressional authorization. The congressmen claimed that "their interest guaranteed by the War Clause of the Constitution is in immediate danger of being harmed by military actions the President may take against Iraq."⁹⁷

In announcing the decision in *Dellums v. Bush*, Judge Greene agreed with many of the plaintiffs' arguments, but ultimately dismissed the suit on justiciability grounds. As a threshold matter, the court brushed aside the executive's claim that the court could not decide the case because it presented a "political question." It found that "an of-

92. *Crockett v. Reagan*, 720 F.2d 1355 (D.C. Cir. 1983), *cert. denied*, 467 U.S. 1251 (1984); *see also Lowry v. Reagan*, 676 F. Supp. 333 (D.D.C. 1987), *aff'd*, No. 87-5426 (D.C. Cir. Oct. 17, 1988) (*per curiam*) (challenge by 110 members of Congress to the reflagging operation in the Persian Gulf in 1987 as violating the War Powers Resolution).

93. *See* Letter to the Speaker of the House and the President Pro Tempore of the Senate on the Deployment of Additional United States Armed Forces to the Persian Gulf, 26 WEEKLY COMP. PRES. DOC. 1834 (Nov. 16, 1990).

94. Res. 678, U.N. SCOR, 46th Sess., 2693d mtg. (Nov. 29, 1990), *reprinted in* FRANCK & GLENNON, *supra* note 36, at 646.

95. *Dellums v. Bush*, 752 F. Supp. 1141, 1151 n.28 (D.D.C. 1990).

96. *See generally id.*

97. *Id.* at 1147.

fensive entry into Iraq by several hundred thousand United States servicemen under the conditions described above could be described as a 'war'" under the Constitution, and that Congress had the sole authority to declare war.⁹⁸ The court then held that the congressmen had standing to pursue the case because the prospect of war, and the possibility that the plaintiffs would not have an opportunity to vote on a declaration of war, stated a cognizable injury.⁹⁹ However, the court refused to reach the merits because the plaintiffs represented only a fraction of Congress: "[U]nless the Congress as a whole, or by a majority, is heard from, the controversy here cannot be deemed ripe; it is only if the majority of the Congress seeks relief from an infringement on its constitutional war-declaration power that it may be entitled to receive it."¹⁰⁰

In a decision perhaps less heralded by the press and academia, another judge of the same court agreed with the result in *Dellums*, but on more forceful political question grounds. In *Ange v. Bush*,¹⁰¹ a sergeant in the National Guard challenged the President's order deploying him to the Persian Gulf as a violation of the Declare War Clause and the War Powers Resolution. Unlike Judge Greene in *Dellums*, Judge Lamberth held that determining whether the President had violated the Constitution or the Resolution by sending troops to the Gulf without specific congressional approval was a non-justiciable political question. Referring to *Baker v. Carr*'s test for political questions, Judge Lamberth found that the plaintiff sought a finding "which the judicial branch cannot make pursuant to the separation of powers,"¹⁰² and held that the plaintiff was asking "the court to delve into and evaluate those areas where the court lacks the expertise, resources, and authority to explore."¹⁰³ Like Judge Greene, Judge Lamberth also held that plaintiff's claim was not ripe for decision because it called for a speculative decision on whether the President actually intended to send the American forces into war.¹⁰⁴

Events after the district courts' rulings are familiar. Although Congress had approved appropriations and reserve call-ups for Operation Desert Storm, many Members in both the House and Senate opposed the use of force to eject Iraq from Kuwait. On January 8, the President asked Congress for a resolution supporting the use of "all possible means" to implement the U.N. Security Council's directives, but he also made clear the next day that he did not need congressional

98. *Id.* at 1146.

99. *Id.* at 1147-48.

100. *Id.* at 1151.

101. 752 F. Supp. 509, 510 (D.D.C. 1990).

102. *Id.* at 512.

103. *Id.* at 514.

104. *Id.* at 515.

approval as a constitutional matter.¹⁰⁵ After televised debates, Congress approved a resolution supporting the President on January 12. Five days later, navy ships began launching Tomahawk cruise missiles against targets in Iraq, and the Air Force launched a 2000-sortie-a-day air assault that systematically destroyed Iraq's air force, supply depots, ground assets, and command-and-control facilities. On February 24, allied ground forces began a massive armor and infantry offensive that sent Iraqi forces in Kuwait into retreat and battered the Iraqi Republican Guards inside Iraq itself. On February 28, only 100 hours after ground operations had begun, President Bush declared a cease-fire, and Iraq announced that it would comply with all U.N. resolutions.

The actions of the President, Congress, and the courts during the Persian Gulf crisis illustrate the nature of war powers in our constitutional democracy. Even though the modern Supreme Court has never ruled on the proper constitutional allocation of war powers among the three branches, what Professor Reisman calls an "operational code of competence"¹⁰⁶ has formed among them. In other words, the President, Congress, and the federal courts have acted according to a set of norms and rules that they deem authoritative. In the war powers context, the President has taken the primary role in deciding when and how to wage war. Congress has fallen into the role of approving the interventions either through authorization before operations have begun or appropriations after the fact, while the judicial branch has abstained from inter-branch war powers disputes because they raise non-justiciable political questions. Put less charitably, we have a system which Professor Koh describes as one of "executive initiative, congressional acquiescence, and judicial tolerance."¹⁰⁷ Professor Koh's views are emblematic of a growing consensus among international and constitutional law scholars that the President's war powers grasp exceeds his constitutional reach. This critique is discussed below.

C. The Academic Critique: The President Against the Professors

For the most part, legal academia has sharply criticized the current state of war powers. In a series of recent books, foreign relations and international law scholars such as John Hart Ely,¹⁰⁸ Louis Henkin,¹⁰⁹ Michael Glennon,¹¹⁰ Thomas Franck,¹¹¹ Louis Fisher,¹¹² and Harold

105. See LEHMAN, *supra* note 11, at 46-47.

106. See W. Michael Reisman, *War Powers: The Operational Code of Competence*, 83 AM. J. INT'L L. 777 (1989).

107. KOH, *supra* note 1, at 117.

108. See ELY, *supra* note 1.

109. See HENKIN, *supra* note 1.

110. See GLENNON, *supra* note 1.

111. See FRANCK, *supra* note 3.

Koh,¹¹³ have taken the Presidents to task for waging unconstitutional war and have chastised the courts for abdicating their duty to adjudicate war power cases. These scholars rest their arguments on three bases: first, that the Framers intended Congress to exercise exclusive control over the decision to go to war; second, that modern separation of powers doctrine requires congressional approval of war; and third, that the courts have a constitutional duty to determine the proper allocation of war-making power between the President and Congress.

1. *Original Intent Betrayed*

In a curious reversal of roles, the war powers question displays critics of the legal theories of the Reagan and Bush administrations readily invoking the intent of the Framers. They claim that the Declare War Clause, in light of their reading of the thoughts of the Constitution's drafters, clearly indicates that the Framers intended that Congress play an equal, if not paramount, role in the decision to go to war. This original intent argument is an important part of the academic critique of presidential power that this Article intends to refute.¹¹⁴

In his recent book, *War and Responsibility*, Professor Ely makes the strongest case for the idea that the Framers wanted Congress to have the upper hand. After reading the relevant constitutional clauses, Ely declares that there is a "clarity of the Constitution on this question."¹¹⁵ Often it is true that "the 'original understanding' of the document's framers and ratifiers can be obscure to the point of inscrutability;" but "[i]n this case," Ely says bluntly, "it isn't."¹¹⁶ According to Ely, the inescapable conclusion is that "all wars, big or small, 'declared' in so many words or not . . . had to be legislatively authorized."¹¹⁷ Only when Congress has authorized a war do the President's Commander-in-Chief powers over the armed forces kick in.

112. See FISHER, *supra* note 1.

113. See KOH, *supra* note 1.

114. Almost all of the current studies on war and foreign affairs powers rely on the historical studies of the Framers' intent by Charles Lofgren, Abraham Sofaer, and Raoul Berger written during the Vietnam War. See CHARLES A. LOFGREN, "GOVERNMENT FROM REFLECTION AND CHOICE": CONSTITUTIONAL ESSAYS ON WAR, FOREIGN RELATIONS, AND FEDERALISM (1986); SOFAER, *supra* note 14; Berger, *supra* note 13. I believe these studies suffered from two major defects. First, they could not benefit from the publication of THE COMPLETE ANTI-FEDERALIST (Herbert J. Storing ed., 1981) [hereinafter STORING], the massive project of the THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION (Merrill Jensen ed., 1978) [hereinafter JENSEN], or the large numbers of books and articles which have appeared in the last decade on the Framers and their time. Second, they paid insufficient attention to certain aspects of pre-1787 history, such as the British or colonial sources. Instead of institutional or constitutional development, these studies focused on selected comments by various Framers.

115. ELY, *supra* note 1, at 5.

116. *Id.* at 3.

117. *Id.*

Ely builds support for his conclusion by unearthing evidence of the Framers' intent. He points to statements by James Madison, James Wilson, and Justice Story which suggest that the Framers placed the authority to declare war in Congress because they wanted to reduce the number of occasions when the nation would go to war. Ely and others¹¹⁸ place great emphasis on a speech by James Wilson before the Pennsylvania ratifying convention:

This system will not hurry us into war; it is calculated to guard against it. It will not be in the power of a single man, or a single body of men, to involve us in such distress; for the important power of declaring war is vested in the legislature at large: this declaration must be made with the concurrence of the House of Representatives: from this circumstance we may draw a certain conclusion that nothing but our national interest can draw us into war.¹¹⁹

Apparently the Framers thought that the more numerous the body that decided on war, the less likely war would be.¹²⁰ Thus, as Ely notes, the Framers "pursued a substantive end (the limitation of war to the absolutely necessary) by procedural means (requiring the concurrence of both houses of Congress as well as the president)."¹²¹

Armed with this evidence, Ely finds that the Framers' design has "complete contemporary relevance."¹²² Requiring Congress to authorize war not only slows down the decision to go to war, but also forces those who shall pay for the war—the People of the United States—to reflect on its wisdom. Other scholars interpret the Framers' intent as not only an effort to "clog" the processes of war, but also as an affirmative attempt to curtail the powers of the President. According to Professor Glennon, "[o]riginal constitutional materials indicate that the Framers intended a narrowly circumscribed presidential war-making power, with the Commander in Chief Clause conferring minimal policy-making

118. See, e.g., Berger, *supra* note 13, at 36-37.

119. 2 JONATHAN ELLIOT, *THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION, AS RECOMMENDED BY THE GENERAL CONVENTION AT PHILADELPHIA, IN 1787*, at 528 (1836).

120. The case of the Spanish American War of 1898 provides a real-life contradiction to this theory. Congress and various influential citizens had clamored for a war against Spain for several years, but had met resistance from President Grover Cleveland. See, e.g., EDMUND MORRIS, *THE RISE OF THEODORE ROOSEVELT* 572 (1979); see also SCHLESINGER, *supra* note 2, at 82. Congress also proved more hawkish than the President during the Quasi-War with France in 1798 and the War of 1812 with the British. See generally ALEXANDER DECONDE, *THE QUASI-WAR: THE POLITICS AND DIPLOMACY OF THE UNDECLARED WAR WITH FRANCE 1797-1801* (1966).

121. ELY, *supra* note 1, at 140 n.10.

122. *Id.* at 5. Ely criticizes Robert Bork's support for broad executive war-making powers as "out of accord with [his] usual . . . 'original intent' approach to constitutional interpretation." *Id.* at 143 n.24; see generally Bork, *supra* note 11.

authority"¹²³ except in the case of sudden attacks.¹²⁴ Agreeing with Glennon, Professor Henkin notes, "[t]he President's designation as Commander in Chief, then, appears to have implied no substantive authority to use the armed forces, whether for war (unless the United States were suddenly attacked) or for peacetime purposes, except as Congress directed."¹²⁵

Critics of presidential war powers also maintain that the bulk of American history supports a vision of shared authority over national security. They conclude that during all but minor military deployments abroad during the nineteenth and early twentieth centuries, presidents did not use force without authorization. Concludes Ely, "Of course real life is never entirely neat and clean, but the original constitutional understanding was quite consistently honored from the framing until 1950."¹²⁶

While substantially in agreement, Professor Koh sees a more subtle shift from the Framers' intent of congressional pre-approval of military action to a system in practice where the President leads and Congress follows: "Although the Constitution's drafters had assigned Congress the dominant role in foreign affairs, the president's functional superiority in responding to external events enabled him to seize the pre-eminent role in the foreign policy process, while Congress accepted a reactive, consultative role."¹²⁷ However, according to Koh, even when the President took the initiative in war powers, he always sought congressional support for the use of force afterwards. In Koh's mind, this arrangement satisfies the constitutional design because it ensures "balanced institutional participation" in foreign affairs decision making by the three branches.¹²⁸

These scholars see the Constitution violated first by President Truman in the Korean War. They argue that President Truman's decision to enter the Korean War violated the Constitution because he never received specific congressional approval to do so.¹²⁹ Although these scholars are split over whether the Tonkin Gulf Resolution constituted a

123. GLENNON, *supra* note 1, at 80-81. Glennon even invokes the name of Alexander Hamilton, that great worshipper of executive power, for the proposition that Congress alone possesses the authority to take the country into war. *Id.* at 84 (*citing* Alexander Hamilton, *The Examination*, reprinted in 25 THE PAPERS OF ALEXANDER HAMILTON 444, 456 (Harold C. Syrett ed., 1977)).

124. See GLENNON, *supra* note 1, at 84. Admitting that the Constitutional Convention changed Congress' authority from the power to "make" war to the one to "declare" war, Glennon refers to James Madison's explanation of the change as one to "[leave] to the Executive the power to repel sudden attacks." *Id.* at 82.

125. HENKIN, *supra* note 1, at 26.

126. ELY, *supra* note 1, at 10. Unfortunately, Ely leaves discussion of this not uncontroversial statement to the footnotes, where it takes up almost three pages. *Id.* at 147-51 n.54.

127. KOH, *supra* note 1, at 79.

128. *Id.* at 69.

129. See, e.g., ELY, *supra* note 1, at 10-11, 12-23.

sufficient authorization for the Vietnam War,¹³⁰ they remain in agreement that the post-Vietnam war conflicts were unconstitutional. For example, both Glennon and Koh argue that the Reagan and Bush interventions, such as those in Grenada and Panama, violated the Constitution because they did not receive congressional approval.

2. *The Separation of Powers Betrayed*

Proponents of a reinvigorated congressional role in war powers also rest their arguments on separation of powers doctrine. Contending that the deference paid to the President in *Curtiss-Wright* was unjustified, critics of presidential power argue that foreign affairs should receive no special exemption from the separation of powers principle established by Justice Jackson in his concurring opinion in *Youngstown Sheet & Tube Co. v. Sawyer*.¹³¹ that in areas where both the President and Congress share powers, the Constitution places limits on how far the President may act without the support of Congress.

Youngstown involved a 1952 national steel strike that threatened the war effort in Korea. Relying on his Commander-in-Chief and inherent executive powers, Truman issued an order authorizing the Secretary of Commerce to seize and run the steel mills. The steel companies challenged the seizure in federal court on the ground that the President had not acted pursuant to the Constitution or statute. Not only had Congress failed to authorize such action, it recently had considered and rejected a law that would have given the President such powers. In response, the President claimed he was acting to secure the supply of steel necessary for the war in Korea pursuant to his wartime powers.¹³² By a six-to-three vote, the Supreme Court rejected the President's attempt to exercise his executive war-making powers in the domestic sphere.

Youngstown is best known not for its majority opinion, but for Justice Jackson's concurrence, and it is on this concurrence that critics of presidential dominance rest their case for a vision of shared executive-legislative decision-making in foreign affairs. Jackson admitted that "[t]he actual art of governing under our Constitution does not and cannot conform to judicial definitions of the power of any of its branches based on isolated clauses or even single Articles torn from context."¹³³ Nonetheless, he continued, "[p]residential powers are not fixed but fluctuate, depending upon their disjunction or conjunction

130. Compare ELY, *supra* note 1, at 16, with GLENNON, *supra* note 1, at 94-95.

131. 343 U.S. 579, 635-38 (1952) (Jackson, J., concurring).

132. See *id.* at 582-86; MAEVA MARCUS, TRUMAN AND THE STEEL SEIZURE CASE: THE LIMITS OF PRESIDENTIAL POWER 74 (1977).

133. *Youngstown*, 343 U.S. at 635 (Jackson, J., concurring).

with those of Congress.”¹³⁴ Justice Jackson then articulated his famous three-part test for determining the validity of the exercise of executive power: (1) when the President and Congress act together, the President’s power is at its zenith; (2) when the President acts in violation of an act of Congress, his power “is at its lowest ebb”; (3) when the President acts in the absence of congressional authorization in an area of concurrent powers, he is in “a zone of twilight.”¹³⁵ While Justice Jackson’s thoughts on executive power took the form of a concurrence, a majority of the Court since has made it part of the Court’s separation of powers jurisprudence.¹³⁶

Most scholars rely on *Youngstown* to undercut presidential claims of unilateral war-making power vis-a-vis Congress. Koh reads *Youngstown* as “embrace[ing] the principle of balanced institutional participation in foreign affairs,”¹³⁷ one that would suggest that both the Congress and the President must agree on the setting of foreign policy and the use of war powers. Henkin applies *Youngstown* in conjunction with the War Powers Resolution to conclude that Presidents who use force in compliance with the Resolution will find their authority at a maximum; Presidents who do not will find their power at its lowest ebb.¹³⁸ Glennon argues for an even narrower conception of presidential authority: presidential attempts to initiate war are always at the third category (“lowest ebb”), because the Declare War Clause not only

134. *Id.*

135. Jackson wrote:

1. When the President acts pursuant to an express or implied authorization of Congress, his authority is at its maximum, for it includes all that he possesses in his own right plus all that Congress can delegate. In these circumstances, and in these only, may he be said (for what it may be worth) to personify the federal sovereignty. If his act is held unconstitutional under these circumstances, it usually means that the Federal Government as an undivided whole lacks power. A seizure executed by the President pursuant to an Act of Congress would be supported by the strongest of presumptions and the widest latitude of judicial interpretation, and the burden of persuasion would rest heavily upon any who might attack it.

2. When the President acts in absence of either a congressional grant or denial of authority, he can only rely upon his own independent powers, but there is a zone of twilight in which he and Congress may have concurrent authority, or in which its distribution is uncertain. Therefore, congressional inertia, indifference or quiescence may sometimes, at least as a practical matter, enable, if not invite, measures on independent presidential responsibility. In this area, any actual test of power is likely to depend on the imperatives of events and contemporary imponderables rather than on abstract theories of law.

3. When the President takes measures incompatible with the expressed or implied will of Congress, his power is at its lowest ebb, for then he can rely only upon his own constitutional powers minus any constitutional powers of Congress over the matter. Courts can sustain exclusive presidential control in such a case only by disabling the Congress from acting upon the subject. Presidential claim to a power at once so conclusive and preclusive must be scrutinized with caution, for what is at stake is the equilibrium established by our constitutional system.

Id. at 635-38 (Jackson, J., concurring) (footnotes omitted).

136. See, e.g., *Dames & Moore v. Regan*, 453 U.S. 654, 668-69 (1981).

137. KOH, *supra* note 1, at 112.

138. See HENKIN, *supra* note 1, at 17-43.

"empowers Congress to declare war," but also "serves as a limitation on executive war-making power, placing certain acts off limits for the President."¹³⁹

3. *Judicial Abdication*

Although scholars may differ in their critique of current war powers practice, they agree on their most concrete recommendation for reform: an active, intrusive judiciary. Looking doubtfully upon the courts' attempts to shy away from the merits of war powers cases,¹⁴⁰ leading foreign relations scholars argue that the federal courts have "abdicated" their role in our constitutional system of checks-and-balances and unwittingly have contributed to the emergence of an imperial presidency.¹⁴¹

Thomas Franck has put forth a representative argument against the political question doctrine. He concludes that the judiciary has failed in its responsibility to apply the rule of law to foreign affairs.¹⁴² To be sure, Franck accurately credits Chief Justice Marshall for articulating the doctrine in *Marbury v. Madison*: "[T]he president is invested with certain important political powers, in the exercise of which he is to use his own discretion, and is accountable only to his country in his political character, and to his own conscience."¹⁴³ Almost two centuries later, according to Franck, judges and lawyers justify the doctrine on four grounds. First, the Constitution gives the President the primary role in foreign affairs to speak as the single organ of the nation, and therefore the courts should not interfere in cases where they might embarrass the President or disrupt the conduct of international relations. Second, foreign affairs cases involve issues where no legal standards are available. Third, foreign affairs cases require the production of evidence that is too complex, technical, unobtainable, or just plain foreign for an American judge to use. Fourth, prudentially, the courts do not want to intervene in foreign affairs for fear that the other branches will ignore the courts' order, thereby reducing the prestige and power of the federal courts.¹⁴⁴

To Franck, such arguments in favor of the political question doctrine are fundamentally mistaken because they violate another of Chief

139. GLENNON, *supra* note 1, at 17.

140. See, e.g., *Lowry v. Reagan*, 676 F. Supp. 333 (D.D.C. 1987), *aff'd*, No. 87-5426 (D.C. Cir. Oct. 17, 1988) (per curiam).

141. See, e.g., FISHER, *supra* note 1, at 87; FRANCK, *supra* note 3, at 3-9, 8 ("A foreign policy exempt from judicial review is tantamount to governance by men and women emancipated from the bonds of law.").

142. See generally FRANCK, *supra* note 3.

143. *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 165-66 (1803).

144. FRANCK, *supra* note 3, at 45.

Justice Marshall's great dictums: "It is, emphatically, the province and duty of the judicial department to say what the law is."¹⁴⁵ By avoiding foreign affairs (and more specifically war powers) cases on political question grounds, judges have exempted the President from "the normal judicial umpiring process" that checks his actions at home.¹⁴⁶ "Carried to its logical extreme, this doctrine holds that the political authorities are suit-proof as long as they purport to act in pursuance of their 'foreign affairs' power."¹⁴⁷ Moreover, Franck claims that many of the cases where the Court has said that the political question doctrine applies do not really involve foreign affairs, or do so only tangentially. Rather, "judicial abdication in foreign-affairs cases has entered the jurisprudence primarily through rhetorical extravagance in cases with little or no foreign content rather than by a juridical practice of rigid abstinence in real foreign-affairs disputes."¹⁴⁸

Franck also argues that judges are not applying the political question doctrine faithfully. Rather, judges apply the doctrine selectively, seemingly by their own whim or political tastes. When they do apply the doctrine, Franck claims that judges are merely indulging their slavish obedience to the President in all things foreign. Echoing a thesis put forward in the 1970s by Henkin,¹⁴⁹ Franck concludes that judges are really deciding the cases on the merits in favor of the executive branch or the government, and are merely using the doctrine as cover for their actions. "[T]he jurisprudence has a powerful whiff of hypocrisy: Judges say they will abstain but fail to do so; judges proclaim the separation of powers but almost always decide in favor of the government"¹⁵⁰

What is to be done? Franck and others agree that courts should throw out the political question doctrine instead of political question cases.¹⁵¹ They take *Youngstown* as a model and argue that courts can decide war power or foreign relations cases just as easily as they can decide any other separation of powers case, such as *Bowsher v. Synar*¹⁵² or *INS v. Chadha*.¹⁵³ If the courts refuse to hear war powers cases, then critics recommend that Congress must force them to do so by including provisions in foreign affairs statutes requiring courts to take jurisdic-

145. *Marbury*, 5 U.S. (1 Cranch) at 176.

146. FRANCK, *supra* note 3, at 4.

147. *Id.*

148. *Id.* at 21.

149. See generally Louis Henkin, *Is There a "Political Question" Doctrine?*, 85 YALE L.J. 597 (1976).

150. FRANCK, *supra* note 3, at 30.

151. See, e.g., ELY, *supra* note 1, at 55-56; KOH, *supra* note 1, at 221-24.

152. 478 U.S. 714 (1986).

153. 462 U.S. 919 (1983).

tion.¹⁵⁴ For example, Professor Ely recommends amending the War Powers Resolution to allow soldiers or members of Congress to bring suit in federal court to enforce its provisions.¹⁵⁵ Ely's provision would also specifically prohibit courts from dismissing the case on the grounds of political question or other justiciability doctrines. Professor Koh goes one step farther by proposing that Congress pass a series of "framework" statutes in each foreign affairs area "that would *override the abstention doctrines* that the courts have wrapped around themselves."¹⁵⁶ In this way, these scholars tell us, courts will stop, in Chief Justice Marshall's words, committing "treason to the constitution" by not taking jurisdiction when they should.¹⁵⁷

Scholars, thus, have provided a critique of current relationships between the three branches in the war powers area, which draws on original intent analysis and separation of powers concerns. The comprehensive historical analysis below, however, reveals that current war powers practices are, in fact, more compatible with the Framers' original design than these scholars have suspected.

II

THE BRITISH LEGACY

This Part locates the Constitution's textual allocation of war powers within the legal, political, and institutional history of the eighteenth century. It seeks a wider lens than the traditional focus on the legislative history of the War Powers Clause and on a few statements by individual Framers. It also seeks to advance our understanding of war powers by establishing the war clauses' relationship to the overall structure of the Constitution and the fabric of history and politics that gave meaning to the Constitution's sparse language. Examining how the executive and legislative branches shared war powers in Great Britain, the colonies, and the newly independent states will provide the context for understanding what the Framers hoped to accomplish in Philadelphia in 1787. If the Framers intended change, we may better appreciate its extent through careful study of the previous state of affairs. If the delegates to the Constitutional and ratifying conventions sought to continue the working political system they inherited, then the outlines of British and early

154. However, such a statute might be unconstitutional, because it would seek to extend the jurisdiction beyond the limits of Article III. *Cf. Lujan v. Defenders of Wildlife*, 504 U.S. 555 (1992) (Congress cannot extend standing beyond limits of Article III). As originally understood, the Constitution does not contemplate judicial interference in inter-branch disputes over war powers. *See infra* text accompanying notes 548-559.

155. ELY, *supra* note I, at 135.

156. KOH, *supra* note I, at 182.

157. *Cohens v. Virginia*, 19 U.S. (6 Wheat.) 264, 404 (1821).

American practice will help us to define the arrangements created by the Constitution.

Examining the Constitution's antecedents reveals a war-making framework that contrasts sharply with the theories of today's scholarship. The relationships between the executive and legislative branches in Great Britain, the colonies, and the states during the Revolution and under the Articles of Confederation are the progenitors of today's war powers practice. In these earlier contexts, the legislative branch did play an important role in the decision to go to war, but not because it had the power to "authorize" war in the way that Congress authorizes, for instance, highway construction. Rather, legislatures of the eighteenth century controlled executive actions leading to war by using their appropriations power. The Constitution's provisions did not break with the tradition of their English, state, and revolutionary predecessors, but instead followed in their footsteps.¹⁵⁸

Before interpreting the events surrounding the ratification of the Declare War Clause, we first must explore the historical and legal background of war powers in the Anglo-American world of the seventeenth and eighteenth centuries. The English Constitution provides the starting point, for the Framers were Englishmen who consistently referred to the system of their former nation when they designed their own government. American practice during and after the Revolutionary War under the Continental Congress, the state governments, and the Articles of Confederation also provides a useful understanding of the genesis of the war clauses. Only against this background of history and tradition can we comprehend the Framers' design and the current debate over the meaning of the war clauses.

A. English Constitutionalism and War

In adopting a new Constitution, the Framers consciously acted in the context of the British Constitution, under which they had lived as English colonists. As Bernard Bailyn has so elegantly shown, the American Revolution was in part an effort by the revolutionaries to reclaim their rights as Englishmen from a King and Parliament that had denied them their full political and civil privileges.¹⁵⁹ Although they threw off the weight of British political control, the Framers did not reject immediately the British system of government. The British

158. In this regard, this section of the Article is consistent with the work of Professors Raven-Hansen and Banks. See WILLIAM C. BANKS & PETER RAVEN-HANSEN, *NATIONAL SECURITY LAW AND THE POWER OF THE PURSE* (1994). But whereas they argue that the power of the purse is a permissible means for the legislature to participate in foreign affairs, this Article suggests that the spending power may be the *only* means for legislative control over war.

159. See generally BERNARD BAILYN, *THE IDEOLOGICAL ORIGINS OF THE AMERICAN REVOLUTION* (1967).

Constitution provided a storehouse of political and legal concepts that the Framers drew upon in constructing their own framework of government. Terms such as "Commander in Chief," "executive Power," "declare War," "granting Letters of Marque and Reprisal," or "raise and support Armies," have roots in the history of the British Constitution. Studying British constitutional history will clarify their meaning. Furthermore, the political history tracing the interaction between the Crown and Parliament will provide insight as to the type of relationship the Framers expected the President and Congress to share.

Unlike our written Constitution, the British Constitution refers to unwritten principles, expressed sometimes by statute or by accepted practice, that define the relationship between the executive and the legislature and between the government and the People. By the late eighteenth century, the British Constitution had undergone more than a century of struggle and change over the allocation of authority between Crown and Parliament, especially in the area of foreign affairs and war. Thus, discovering the structure of war powers established by the Framers requires us to review English constitutional history from the Stuarts through the Glorious Revolution of 1688. Our inquiry takes two approaches: first, it examines the eighteenth-century American's understanding of the British Constitution; and second, it discusses the history of the political struggle between the King and Parliament, a story familiar to any educated colonist and revolutionary.

As this bifurcated analysis suggests, the British Constitution provided two important precedents and models for the Framers. First, it set out the formal roles that the Crown and Parliament were to play in war. In short, the English system gave the executive leadership in the initiation and conduct of war, while the legislature was relegated primarily to funding the wars and impeaching ministers. Second, within these boundaries, the British Constitution provided the two branches with substantial leeway to shape a dense network of "subconstitutional" understandings, relationships, and practices governing war powers. This free-fire zone permitted Parliament to gain a substantial role in decisions on war, even though its formal powers extended only to appropriations. Both of these elements—formal power and real-life practice—would make a substantial impression on England's colonists in North America.

1. The Allocation of War Powers in the English Constitution and Eighteenth-Century Political Thought

An examination of the theoretical approach to war powers by the political thinkers of the eighteenth century is a useful starting point. In setting up their system of government, the Framers often directly relied upon political theory. They turned to such thinkers for both an ideal

model of government and for an understanding of the Anglo-American past.¹⁶⁰ An examination of these works will show that, under the political theory of the day, certain types of war functions were considered to be best exercised by particular branches of government. The executive power was viewed as the most effective part of the government for commencing and waging war, while the legislature was seen as best suited for handling fiscal affairs.

On questions concerning government and law, eighteenth-century Americans turned to three writers in particular—John Locke, William Blackstone, and Montesquieu. Although their ideas were filtered through the lens of English “country” opposition ideology,¹⁶¹ their descriptions of the English Constitution guided the Framers’ approach to government power, separation of powers, and war powers. As the Framers sought to establish the separation of powers in the federal Constitution, it was only natural that they referred to the political theorists of their day.

Locke divided the powers of government into three types: legislative, executive, and federative. Within the legislative sphere rested the “power in every commonwealth” to promulgate the laws, while the executive, a “power always in being,” bore the responsibility to “see to the execution of the laws that are made.”¹⁶² Locke defines the federative power as “contain[ing] the power of war and peace, leagues and alliances, and all the transactions with all persons and communities without the commonwealth,”¹⁶³ which we today think of as the foreign relations power. He decided that the executive and federative power were “really distinct in themselves” because the former concerned itself with “the execution of the municipal laws of the society within itself,” while the latter pertained to “the management of the security and interest of the public without.”¹⁶⁴ “[Y]et,” Locke concluded, “they are always almost united” because the federative power “is much less capable to be directed by antecedent, standing, positive laws, than the executive.”¹⁶⁵ To separate the two powers would lead to “disorder and ruin,” Locke predicted, because “the force of the public

160. It is not unreasonable to assume that the thoughts of these writers on war would influence the thoughts of the Framers, as they did in so many other areas of political thought. See John C. Yoo, Note, *Marshall's Plan: The Early Supreme Court and Statutory Interpretation*, 101 YALE L.J. 1607, 1609-10 (1992).

161. English country ideology, developed by critics of the Crown in the early 18th century, asserted that the King and Parliament had become corrupted by wealth and ambition and no longer represented the people. See BAILYN, *supra* note 159, at 34-54.

162. JOHN LOCKE, *THE SECOND TREATISE OF GOVERNMENT* §§ 143-45 (J.W. Gough ed., 3d ed. 1966).

163. *Id.* § 146.

164. *Id.* § 147.

165. *Id.*

would be under different commands."¹⁶⁶ Yet the powers were distinct, because managing foreign affairs did not involve the execution of laws, but rather the performance of the different function of conducting international relations.¹⁶⁷

In addition to these powers, Locke's executive also wielded the "prerogative." Locke argued that the executive employed the prerogative in cases of emergency "to act according to discretion for the public good, without the prescription of the law, and sometimes even against it."¹⁶⁸ "Many things there are which the law can by no means provide for, and those must necessarily be left to the discretion of him that has the executive power in his hands, to be ordered by him as the public good and advantage shall require."¹⁶⁹ Such power rested in the hands of the executive, Locke believed, because the legislature was sometimes too numerous or slow to act or could not anticipate unforeseen situations.¹⁷⁰ Further, in Locke's eyes, the King must have the prerogative because he represented the interests of the Community. Although potentially of great benefit to the Community, executive prerogative raised the "old question" of how to judge when the prerogative came into conflict with the Legislative power.¹⁷¹ In such disputes, Locke wrote, "there can be no judge on earth."¹⁷² Thus, when the executive and legislature oppose one another, the branches either must work out a political compromise, or they must "appeal to heaven."¹⁷³

Locke's articulation of the separation of powers as the classification and allocation of powers by function was not the only approach. Some early eighteenth-century thinkers derived a doctrine of checks and balances that began with ideas of mixed government.¹⁷⁴ The Parliament and King would use their powers both to pursue the People's interests and to preserve themselves against the other branch's encroachments. By the 1730s, these theories of mixed government had begun to eclipse purely functional accounts of the separation of powers.¹⁷⁵

166. *Id.* § 148.

167. This point is well made in M.J.C. VILE, *CONSTITUTIONALISM AND THE SEPARATION OF POWERS* 60-61 (1967).

168. LOCKE, *supra* note 162, § 160.

169. *Id.* § 159.

170. *Id.* § 160.

171. *Id.* § 168.

172. *Id.*

173. *Id.*

174. See W.B. GWYN, *THE MEANING OF THE SEPARATION OF POWERS: AN ANALYSIS OF THE DOCTRINE FROM ITS ORIGIN TO THE ADOPTION OF THE UNITED STATES CONSTITUTION* 82-99, 138-41 (1965).

175. GORDON S. WOOD, *THE CREATION OF THE AMERICAN REPUBLIC, 1776-1787*, at 151 (1969).

The Framers received these theories through Montesquieu's *The Spirit of Laws*. Montesquieu accepted a functional approach to the separation of powers, but he also saw the need for checks and balances to allow the system to work.¹⁷⁶ Following Locke's distinction between the legislative, federative, and executive powers, Montesquieu divined "three sorts of power: the legislative; the executive in respect to things dependent on the law of nations; and the executive, in regard to things that depend on the civil laws."¹⁷⁷ The last of the three would be, in part, what we understand as the judicial power. The second is a vision of an executive power wholly rooted in war and foreign affairs: "By the [executive power, the prince or magistrate] makes peace or war, sends or receives embassies, establishes the public security, and provides against invasions."¹⁷⁸

Although Montesquieu separated the functions of government into different branches, he also sought to give the executive and legislature controls over one another. In military affairs, Montesquieu argued that the executive should possess exclusive control over the army: "once an army is established, it ought not to depend immediately on the legislative, but on the executive power; and this from the very nature of the thing; its business consisting more in action than in deliberation."¹⁷⁹ The legislature did, however, exercise two checks on executive authority. First, if in disagreement with the executive the legislature could terminate the funding for the military. Wrote Montesquieu in praise of the British practice of annually voting military appropriations:

If the legislative power was to settle the subsidies, not from year to year, but for ever, it would run the risk of losing its liberty, because the executive power would no longer be dependent; and when once it was possessed of such a perpetual right, it would be a matter of indifference, whether it held it of itself, or of another. The same may be said, if it should come to a resolution of intrusting, not an annual, but a perpetual command of the sea and land forces to the executive power.¹⁸⁰

Second, the legislature could check the executive's military policies by terminating authorization for the army: "The legislative power should have a right to disband [a standing army] as soon as it pleased."¹⁸¹

176. See GWYN, *supra* note 174, at 111-13; VILE, *supra* note 167, at 90.

177. MONTESQUIEU, *THE SPIRIT OF LAWS* bk. XI, ch. 6, para. 1 (David W. Carrithers ed., 1977).

178. *Id.* para. 2.

179. *Id.* para. 62.

180. *Id.* para. 60 (footnote omitted). However, Montesquieu errs by suggesting that Parliament voted the executive the authority of "command" annually. After the Restoration, Parliament actually acknowledged that it could not interfere with the Crown's authority as Commander in Chief. See *infra* text accompanying notes 230-233.

181. MONTESQUIEU, *supra* note 177, para. 61.

Thus, in discussing war, as in separation of powers theory generally, Montesquieu carried Locke further by marrying functional separation with checks and balances. Like Locke, Montesquieu saw no role for the judiciary in overseeing this self-regulating system of executive-legislative relations.¹⁸²

These thoughts were reinforced in the minds of the Framers by Blackstone's *Commentaries on the Laws of England*, with which they were intimately familiar.¹⁸³ Blackstone incorporated Locke and Montesquieu's theories on the separation of powers and the nature of the executive prerogative into a system of constitutional law. Like Locke, Blackstone defined the royal prerogative as that "discretionary power of acting for the public good."¹⁸⁴ As to the prerogative's limits, he observed that if it "be abused to the public detriment, such prerogative is exerted in an unconstitutional manner."¹⁸⁵ Blackstone had a narrower view of the prerogative than Locke. Locke conceived of the prerogative as doing good without or in violation of the law, while Blackstone envisioned executive discretion as operating only when "the positive laws are silent."¹⁸⁶ Nonetheless, both English writers conceived of a constitutional environment that did not attempt to divide government power among the branches by employing fixed lines. Neither thinker appears to have believed that judicial intervention was necessary to regulate the system of checks and balances.

Providing a broad catalogue of executive power and duties, the *Commentaries* conclude that the power over foreign relations properly belongs to the executive. Such authority fell to the King both because he serves as the "delegate or representative of his people,"¹⁸⁷ and because "[i]t is impossible that the individuals of a state, in their collective capacity, can transact the affairs of that state with another community equally numerous as themselves."¹⁸⁸ According to Blackstone, "[w]hat is done by the royal authority, with regard to foreign powers, is the act of the whole nation: what is done without the king's concurrence is the act only of private men."¹⁸⁹ Blackstone's reasoning led to the conclusion that the King has the sole power to make treaties, for "it is by the law of nations essential to the goodness of a league, that it be made by the sovereign power; and then it is binding upon the whole commu-

182. See VILE, *supra* note 167, at 93.

183. See *Missouri v. Jenkins*, 115 S. Ct. 2038, 2068-69 (1995) (Thomas, J., concurring); Yoo, *supra* note 160, at 1609-12; see also Wood, *supra* note 175.

184. 1 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND *244.

185. *Id.*

186. *Id.*

187. *Id.* at *245.

188. *Id.*

189. *Id.*

nity: and in England the sovereign power, *quoad hoc*, is vested in the person of the king."¹⁹⁰

Blackstone envisioned an even more absolute power for the executive during wartime. The English jurist defended the King's powers in matters of peace and war on international and natural law principles, rather than on history and tradition:

[T]he king has also the sole prerogative of making war and peace. For it is held by all the writers on the law of nature and nations, that the right of making war, which by nature subsisted in every individual, is given up by all private persons that enter into society, and is vested in the sovereign power: and this right is given up not only by individuals, but even by the [e]ntire body of people, that are under the dominion of a sovereign. It would indeed be extremely improper, that any number of subjects should have the power of binding the supreme magistrate, and putting him against his will in a state of war.¹⁹¹

Primacy in making war and peace required that the executive possess the lion's share of the war powers. Thus, Blackstone states that the King is the "generalissimo, or the first in military command, within the kingdom."¹⁹² As with the treaty power, this aspect of the war power devolves to the King because of his role as the sovereign representative and protector of the People and because "united strength in the best and most effectual manner" is exercised by a monarch.¹⁹³ His capacity as "general of the kingdom" also gives the King "the sole power of raising and regulating fleets and armies."¹⁹⁴ On this point Blackstone went into something of a frenzy, perhaps due to the memories of Parliament's attempt during the Civil Wars to wrest military control from the King. Military command, Blackstone claims, "ever was and is the undoubted right of his majesty, and his royal predecessors," and completely outside the jurisdiction of Parliament.¹⁹⁵

Another aspect of the executive's prerogative in foreign affairs was the power to declare war. Because the Declare War Clause has played such a pivotal role in the war powers debate, a separate section that follows discusses Blackstone's understanding of the declare-war power in the larger context of eighteenth-century international law and legal theory.¹⁹⁶

190. *Id.* at *249 (footnote omitted).

191. *Id.*

192. *Id.* at *254.

193. *Id.*

194. *Id.*

195. *Id.*

196. *See infra* text accompanying notes 200-207.

In the face of such absolute royal prerogative, Blackstone left little to Parliament in war and foreign affairs. He acknowledged Parliament's dominant role in domestic legislation. Parliament has the "sovereign and uncontroll[ab]le authority in making, confirming, enlarging, restraining, abrogating, repealing, reviving, and expounding of laws, concerning matters of all possible denominations, ecclesiastical, or temporal, civil, military, maritime, or criminal."¹⁹⁷ Moreover, only Parliament can approve the imposition of taxes, which are needed for funding and supplying the army. In terms of explicit foreign relations powers, Blackstone appeared to permit Parliament only the tool of impeachment, which it could use after the King and his ministers had entered into an unwise treaty or war. Thus, "the constitution . . . hath here interposed a check" on the treaty power, because Parliament could impeach "ministers [who as from criminal motives] advise or conclude any treaty, which shall afterwards be judged to derogate from the honour and interest of the nation."¹⁹⁸ Likewise, the Crown's ministers would be restrained in exercising the war power by "the same check of parliamentary impeachment, for improper or inglorious conduct, in beginning, conducting, or concluding a national war."¹⁹⁹ Unlike our modern system, then, the British Constitution of the mid-eighteenth century, according to Blackstone, explicitly provided for legislative influence in war and foreign affairs primarily by giving Parliament the power to punish Crown ministers for failed enterprises. It also implicitly recognized Parliament's plenary authority over the purse.

2. *The Declare-War Power in the English Constitution and Eighteenth-Century Political Thought*

As we have seen, critics of presidential war-making rely heavily on the Constitution's allocation of the power to "declare war" to Congress. These critics, however, have misinterpreted the meaning of a declaration of war. Interpreting "declare" war to mean "authorize" or "commence" is a twentieth-century construct inconsistent with the eighteenth-century understanding of the phrase. This Section provides an overview of the theories that would have been familiar to the Framers, including those of Blackstone, Grotius, and Vattel. Examination of these sources demonstrates that a declaration of war was significant for its juridical purposes—for altering the formal legal status *between* nations—but not for the domestic constitutional question of commencing hostilities.

197. *Id.* at *156.

198. *Id.* at *249.

199. *Id.* at *250.

Under Blackstone's version of the British Constitution, the monarch did not need to declare war to begin hostilities against another nation.²⁰⁰ Such a requirement would have served little purpose, in light of the Crown's other prerogatives in the field of war. According to Blackstone, the declaration of war plays two roles: it protects British citizens by notifying other nations that the citizens' hostile actions have received state approval, and it serves to legally bind the People to the King's decision to wage war.

[The reason] why according to the law of nations a denunciation of war ought always to precede the actual commencement of hostilities, is not so much that the enemy may be put upon his guard, (which is matter rather of magnanimity than right) but that it may be certainly clear that the war is not undertaken by private persons, but by the will of the whole community; whose right of willing is in this case transferred to the supreme magistrate by the fundamental laws of society. So that, in order to make a war *completely effectual*, it is necessary with us in England that it be *publicly declared and duly proclaimed* by the king's authority; and, then, all parts of both the contending nations, from the highest to the lowest, are bound by it.²⁰¹

A declaration of war only perfected, or made "completely effectual," hostilities between two nations, which otherwise could take any form that constitutes an "incomplete state of hostilities."²⁰² When the British monarch exercised his sole authority on questions of war and peace, he could issue a declaration of war either before or after "the actual commencement of hostilities." Although part of the war powers, the authority to declare war was not necessary to begin or to conduct hostilities.

From a legal perspective, the declaration performed an important function in distinguishing between limited hostilities and an all-out conflict. It was clearly understood in the eighteenth century that a "declared" war was only the ultimate state in a gradually ascending scale of hostilities between nations. For example, Blackstone described letters of marque and reprisal as creating "only an incomplete state of hostilities" that could eventually produce "a formal denunciation of war."²⁰³ Any unauthorized hostilities committed by private citizens,

200. For example, Blackstone states that the King shall have the authority to grant letters of marque and reprisal, which were a limited form of naval warmaking that occurred in the absence of a declaration of war. See *infra* text accompanying notes 203-206.

201. 1 BLACKSTONE, *supra* note 184, at *249-50 (emphasis added). The term "denunciation" had a meaning equivalent to what we understand as a "declaration."

202. *Id.* at *250. In 1800, the Supreme Court approved this distinction between a "perfect" war, legally perfected by a declaration of war, and an "imperfect" war. See *Bas v. Tingy*, 4 U.S. (4 Dall.) 37, 39-40 (1800).

203. 1 BLACKSTONE, *supra* note 184, at *250.

therefore, would not constitute war, but would be the actions of "pirates and robbers."²⁰⁴

Blackstone, however, recognized that a nation could authorize private citizens to wage war against another state. Hence Blackstone described the executive's authority to issue letters of marque and reprisal as "nearly related to, and plainly derived from, [the prerogative] of making war."²⁰⁵ Recognized by the law of nations, such letters authorized their bearers to "seize the bodies or goods of the subjects of the offending state" to satisfy some oppression or injury received earlier²⁰⁶—a particularly violent form of international quasi-in-rem jurisdiction, as it were. But the plaintiffs received formal protection from piracy or robbery laws because the letter of marque and reprisal gave their conduct the sanction of state approval.

In describing the various forms of international hostilities, Blackstone drew on the writings of international law scholars of the seventeenth and eighteenth centuries. For example, Blackstone's description of a declaration of war borrowed liberally from international law treatises, often without citation. International law scholars agreed that a declaration of war was unnecessary either to begin or to wage a war, but rather was a courtesy to the enemy. Declarations derived from the ancient practice of sending heralds to the enemy capital to announce that a state of war existed between the two nations.²⁰⁷ According to Grotius, a declaration of war notified the enemy of the injury suffered and specified the conditions for redress or surrender.²⁰⁸ A declaration also served notice on allies of the enemy that they might become accessories to the war.²⁰⁹ A declaration constituted something of a complaint in the international dispute resolution process of the seventeenth and eighteenth centuries.

According to these scholars, a declaration of war played a dual legal purpose. First, it notified the enemy that a state of war existed between them. If a nation warned its enemy of future hostilities, its later actions would receive the protection of international law.²¹⁰ A declaration announced that hostile actions by its soldiers were taken under national aegis, and thus did not constitute piracy or robbery. Grotius commented:

204. *Id.* at *249.

205. *Id.* at *250.

206. *Id.*

207. See 2 EMMERICH DE VATTTEL, *THE LAW OF NATIONS* 21-22 (trans. 1759).

208. 3 GROTIUS, *THE RIGHTS OF WAR AND PEACE* ch. III, pt. VII (A.C. Campbell trans., 1901).

209. Grotius and Vattel drew their conclusions from the history of the Romans, who sent ambassadors to declare their intent to go to war to redress an injury. See, e.g., 2 VATTTEL, *supra* note 207, at 21-22.

210. See 3 GROTIUS, *supra* note 208, at ch. III, pt. VI.

[A] more satisfactory reason [for requiring declarations] may be found in the necessity that it should be known for *certain*, that a war is not the *private* undertaking of bold *adventurers*, but made and sanctioned by the *public* and *sovereign* authority on both sides; so that it is attended with the effects of binding all the subjects of the respective states”²¹¹

Given this purpose, a declaration would have little use unless the warring nation announced the inauguration of hostilities to the other state and to its own citizens. According to Vattel, “[t]he declaration of war must be known to the state against whom it is made. This is all which the natural law of nations requires.”²¹² Once the declaration issued, the warring nations lawfully could attack the other’s citizens and territory and seize the contraband goods of neutrals. Vattel remarked: “Without such a public declaration of war, it would be difficult to settle in a treaty of peace, those acts which are to be accounted the effects of the war, and those which each nation may consider as wrongs, for obtaining reparations.”²¹³

Second, declarations played a domestic legal role by informing citizens of an alteration in their legal rights and status. Vattel wrote:

It is necessary for a nation to publish the declaration of war for the instruction and direction of its own subjects, in order to fix the date of the rights belonging to them from the moment of this declaration, and relatively to certain effects which the voluntary law of nations attributes to a war in form.²¹⁴

Declarations instructed citizens of their new relationship with the enemy state, and informed them that they could take hostile actions against the enemy without fear of sanction. With a declaration of war in hand, citizens of the contending nations could “annoy” the persons or property of the enemy and lawfully keep captured vessels. Grotius, for example, devoted one of the chapters of his *De Jure Belli ac Pacis* to “On the Right of Killing an Enemy in Lawful War and Committing Other Acts of Hostility.”²¹⁵ According to Grotius, a citizen of a nation formally at war if captured “cannot be treated as a robber, malefactor, or murderer . . . for being found in arms.”²¹⁶

Thus, a declaration of war served the purpose of notifying the enemy, allies, neutrals, and one’s own citizens of a change in the state of relations between one nation and another. In none of these situations did a declaration of war serve as a vehicle for domestically *deciding on*

211. 3 *id.* pt. XI.

212. 2 VATTEL, *supra* note 207, at 22.

213. 2 *id.* at 23.

214. 2 *id.*

215. 3 GROTIUS, *supra* note 208, at ch. IV.

216. 3 *id.* pt. III.

or *authorizing* a war. The seventeenth and eighteenth-century writers on international law never implied that a nation had to issue a declaration of war before waging hostilities. As we shall see, hostilities in the absence of a declaration of war were the norm, rather than the exception, of seventeenth and eighteenth-century Anglo-American history.²¹⁷ While attacking without a declaration might violate international law, the treatise writers did not claim such action would violate domestic law.

3. *The Lessons of British History: The Sinews of War*

As citizens of the British empire, the Framers not only operated in the intellectual context of eighteenth-century British and international legal thought, but they also were clearly aware of recent British history. In thinking on and debating questions of constitutional law, the Framers constantly referred to recent British history, which was, after all, their history as well. This was no less true of war powers than it was, for example, of the freedom of the press.²¹⁸ In this regard, Blackstone's description can provide only an incomplete glimpse of the war power in eighteenth-century Britain and thus of the Framers' understanding of the war power. Even though Sir William Holdsworth, the British legal historian, declares that Blackstone's *Commentaries* "is by far the best account of the position of the prerogative in the public law of the eighteenth century," he notes that "his account is only a sketch; and it fails to take account of the inanner in which, even when he was writing, some parts of the prerogative were being enlarged, others curtailed, and others rendered more precise."²¹⁹ Further, Blackstone limited his discussion to the formal legal arrangement of the war power, which tended to overemphasize the power of the executive. Missing was any description of the working relationships and political procedures created within the formal boundaries of the constitution. Presently, this Article will attempt to fill in that gap.

Examining how the political system of war powers actually operated will provide vital context for our inquiry, because the Framers were as well aware of British political history as they were of Blackstone's *Commentaries*. In adopting elements of the British Constitution's checks and balances, the Framers reasonably could expect those elements to produce a relationship between the President and Congress similar to the one that they thought existed between Crown and Parliament. Conversely, it is not unreasonable to construe the Framers' rejection of a specific distribution of power in the British Constitution as

217. See *infra* text accompanying notes 235-238.

218. See *McIntyre v. Ohio Elections Comm'n*, 115 S. Ct. 1511, 1525-30 (1995) (Thomas, J., concurring) (reviewing history of Press Clause).

219. 10 WILLIAM HOLDSWORTH, A HISTORY OF ENGLISH LAW 340-41 (1938).

a corresponding renunciation of that aspect of the British political system.

During the seventeenth century, the British Constitution underwent a series of crises revolving around the military and the war power.²²⁰ In a series of struggles that began with the Stuarts in the 1620s, continued into the Protectorate of Cromwell and the Restoration, and stabilized with the Glorious Revolution of 1688, the Crown and Parliament fought for the upper hand in foreign affairs. From the ascension of James I to the beheading of his son, Charles I, the executive and legislature specifically struggled over the issue of funding. The Protectorate saw a period of formal parliamentary supremacy in war powers, but the Restoration of the Stuarts in 1660 returned to the King his formal powers, while Parliament retained its sole control over appropriations. Parliament's funding authority gave it a powerful voice in foreign affairs, one that it enhanced in the Glorious Revolution by placing restrictions on the King's ability to raise armies in peacetime. By the dawn of the eighteenth century, the conflicts between Crown and Parliament yielded a stable constitutional system which gave the executive discretion in matters of war, with the legislature playing a substantial role due to its control over appropriations.

When James I became the first Stuart monarch in 1603, tradition had given the King the power to make war and peace, to conclude treaties, and to control the army and navy. However, Parliament's power over the purse rendered the King's prerogative to raise armies and navies an empty one, unless the Crown could find other sources of funding. Parliament's "exclusive control over finance enabled it to criticize all the acts of the executive government, to stop projects of which it disapproved, to force the executive to adopt policies of which it approved,

220. See generally JOHN BREWER, *THE SINEWS OF POWER: WAR, MONEY AND THE ENGLISH STATE, 1688-1783* (1989). Uncited works which have been of some assistance in this Section include FRANCIS R. FLOURNOY, *PARLIAMENT AND WAR: THE RELATION OF THE BRITISH PARLIAMENT TO THE ADMINISTRATION OF FOREIGN POLICY IN CONNECTION WITH THE INITIATION OF WAR* (1927); HENRY HORWITZ, *PARLIAMENT, POLICY AND POLITICS IN THE REIGN OF WILLIAM III* (1977); COLIN R. LOVELL, *ENGLISH CONSTITUTIONAL AND LEGAL HISTORY* (1962); RICHARD MIDDLETON, *THE BELLS OF VICTORY: THE PITT-NEWCASTLE MINISTRY AND THE CONDUCT OF THE SEVEN YEARS' WAR, 1757-1762* (1985); MARIE PETERS, *PITT AND POPULARITY: THE PATRIOT MINISTER AND LONDON OPINION DURING THE SEVEN YEARS' WAR* (1980); 4 MARK A. THOMSON, *A CONSTITUTIONAL HISTORY OF ENGLAND* (1938); J.R. WESTERN, *THE ENGLISH MILITIA IN THE EIGHTEENTH CENTURY: THE STORY OF A POLITICAL ISSUE 1660-1802* (1965); Stephen B. Baxter, *The Conduct of the Seven Years War, in ENGLAND'S RISE TO GREATNESS, 1660-1763*, at 323 (Stephen B. Baxter ed., 1983); Jeremy Black, *The Revolution and the Development of English Foreign Policy, in BY FORCE OR BY DEFAULT?: THE REVOLUTION OF 1688-1689*, at 135 (Eveline Cruickshanks ed., 1989); Jennifer Carter, *The Revolution and the Constitution, in BRITAIN AFTER THE GLORIOUS REVOLUTION 1689-1714*, at 39 (Geoffrey Holmes ed., 1969); G.C. Gibbs, *Parliament and Foreign Policy in the Age of Stanhope and Walpole*, 77 *ENG. HIST. REV.* 18 (1962); Edward R. Turner, *Parliament and Foreign Affairs, 1603-1760*, 34 *ENG. HIST. REV.* 172 (1919).

and to supervise the methods adopted to carry them out."²²¹ James I, however, sought to follow an independent foreign policy without interference from Parliament.

To effectuate such a policy, James I followed the strategy of some of his predecessors and preferred to rely on the Crown's revenues. Nonetheless, disputes over the Crown's peacetime revenues, and, more importantly, the onset of the costly Thirty Years' War on the Continent, forced James I to seek parliamentary support. In 1621 and again in 1624, Parliament effectively forestalled James I's plans to fight in the German wars by approving only meager funds for the army. Further, Parliament encouraged an unwilling James I to break England's treaties and initiate hostilities against Spain by voting funds contingent only for such a war.²²² James I broke off relations with Spain and a naval war began in earnest in 1624, even though no declaration of war had been issued. Parliament supported this undeclared war with funds, even though England did not officially declare war until September of 1625.²²³

Cooperation broke down, however, when Parliament sought to intervene in the military conduct of the war by impeaching ministers responsible for reverses on the field of battle. Charles I's ascension to the throne in 1625 only led to further deterioration in relations between the King and Parliament. Like his father, Charles sought to avoid parliamentary involvement in foreign affairs by seeking independent funding sources for his policies. By 1629, Charles had dissolved Parliament and was raising funds by selling Crown lands, by imposing a "ship-money" levy on maritime communities to pay for the navy, and by requiring forced loans to the Crown.²²⁴

After Parliament won the subsequent Civil War in 1647 against the Crown, the revolutionaries sought to institutionalize legislative participation in matters of war and peace. Proposals for governmental reform suggested that the constitution provide for a King's Council which

221. 10 HOLDSWORTH, *supra* note 219, at 585.

222. See Subsidy Act, 1624, reprinted in THE STUART CONSTITUTION 1603-1688, at 76-77 (J.P. Kenyon ed., 1966) [hereinafter THE STUART CONSTITUTION]; see also DAVID L. KEIR, THE CONSTITUTIONAL HISTORY OF MODERN BRITAIN SINCE 1485, at 187-88 (9th ed. 1969).

223. See KEIR, *supra* note 222, at 188-89; THE STUART CONSTITUTION, *supra* note 222, at 58.

224. A merchant challenged the Crown's ship-money tax, arguing that it lacked parliamentary approval. But unlike our Supreme Court in *Youngstown*, the majority of the judges confirmed the King's power. They reaffirmed the King's sole executive authority "to make war and peace" as well as to impose taxes without the common consent of Parliament. See BERNARD SCHWARTZ, THE ROOTS OF FREEDOM: A CONSTITUTIONAL HISTORY OF ENGLAND 148-49 (1967). Charles I gave up the practice of obtaining forced loans when he called Parliament into session in 1628 to obtain war funds. In exchange for the funds, the King accepted the Petition of Right, which condemned the practice. PETITION OF RIGHT (1628), reprinted in THOMAS P. TASWELL-LANGMEAD, ENGLISH CONSTITUTIONAL HISTORY FROM THE TEUTONIC CONQUEST TO THE PRESENT TIME 501 (A.L. Poole ed., 9th ed. 1929).

would decide on war only with "the Advice and Consent of Parliament," or that the government vest all legislative authority in a new national assembly that would exercise all powers of state, including that of "making of War and Peace."²²⁵ Even though the subsequent beheading of Charles I left all executive powers in the hands of Cromwell the "Lord Protector," Parliament still continued to propose written constitutions which required legislative approval in decisions concerning foreign affairs and war.²²⁶

The Instrument of Government, which in 1653 designated Cromwell as the Lord Protector and established a council of advisers to hold office for a permanent term, gave the executive the sole authority to communicate with foreign nations. But the Instrument also required him to seek the "consent of the major part of the Council" on matters of war and peace.²²⁷ The Instrument also constrained the executive's control over the military forces by permitting the Lord Protector to "dispose and order" the militia, army, and navy only "by consent of Parliament," and when Parliament was not sitting, by a majority vote of the Council.²²⁸ The Instrument made clear that the executive could not raise money to pay for "the present wars" without the approval of Parliament, except in emergency. When even this Constitution proved unworkable, Parliament then wrote another framework of government, The Humble Petition and Advice of 1657, which reproduced the mechanism of joint control over the armed forces.²²⁹ Although the Framers were well aware of this history, they never mentioned these examples when allocating war powers in our Constitution.

The restoration of the Stuarts in 1660 represented a rejection of the English experiment with republican government. Charles II's return also signaled the restoration of the Crown's prerogatives over war and peace, over the conduct of diplomatic relations, and over the making of treaties.²³⁰ Further, Parliament passed a statute returning to the King "the sole supreme government, command and disposition of the militia and of all forces" and abjuring Parliament's right to the same.²³¹

However, if the Civil Wars had ended the debate over control over the armed forces, they also had locked into place Parliament's sole

225. See Bestor, *supra* note 2, at 551.

226. The practical effect of these suggestions would have been almost nil, since the Parliament by this time had been purged of all but the most radical supporters of Cromwell.

227. THE INSTRUMENT OF GOVERNMENT (1653), *reprinted in* THE STUART CONSTITUTION, *supra* note 222, at 342.

228. *Id.*

229. See THE HUMBLE PETITION AND ADVICE (1657), *reprinted in* THE STUART CONSTITUTION, *supra* note 222, at 350, 354.

230. KEIR, *supra* note 222, at 236.

231. An Act Declaring the Sole Right of the Militia to be in the King, 1661, *reprinted in* THE STUART CONSTITUTION, *supra* note 222, at 374.

control over the funding of national policies. Instead of voting lump sums to the Crown, Parliament began to appropriate funds specifically for the army and to forbid the transfer of money from other accounts for military purposes.²³² It was this balance between executive initiative and planning and legislative control of appropriations that would characterize British foreign relations for at least another century.²³³ Again, American colonists were familiar with this history and understood the resulting allocation of power.

In particular, the Framers would have taken note of the ample opportunities available to Parliament to use its financial power to participate in the development of foreign policy. Consider that from 1660 to 1801 Britain seemed to be at war more often than it was not: 1665-67 (Second Anglo-Dutch War), 1672-74 (Third Anglo-Dutch War), 1689-97 (War of the Grand Alliance), 1702-13 (War of the Spanish Succession), 1718-20 (War of the Quadruple Alliance), 1739-48 (War of the Austrian Succession), 1754-63 (Seven Years' War), 1775-83 (the American Revolution), and 1793-1801 (War with revolutionary France).²³⁴ Continual war demanded continual funding, and important Members of Parliament used their voting power over military appropriations to seek a cooperative arrangement with the Crown in the setting of foreign policy.²³⁵ Only when doubts arose about the Stuarts' flirtations with Catholicism at home and abroad did politicians "seek to use the opportunities that parliamentary control over war finance presented to curtail [the Crown's] power."²³⁶

Although Parliament supported Charles II at the outset of his war against the Dutch, it grew fearful when Charles II signed a treaty with Catholic France to partition the Netherlands, and it used its fiscal powers to force an end to the Dutch war. Parliament then took its own initiative and voted supplies for a war against France in 1677 and 1678, in the hopes that Charles II would adopt an explicit anti-French policy. Parliament even threatened to cut off all funds for the military if the King did not enter a treaty "against the growth and power of the French king."²³⁷ However, Charles II vigorously refused to allow "this fundamental power of making peace and war to be so far invaded."²³⁸

232. See J.S. OMOND, *PARLIAMENT AND THE ARMY, 1642-1904*, at 30-32 (1933).

233. See generally FREDERICK S. ALLEN, *THE SUPREME COMMAND IN ENGLAND, 1640-1780* (1966); JEREMY BLACK, *BRITISH FOREIGN POLICY IN THE AGE OF WALPOLE 1701-1742* (1985).

234. JEREMY BLACK, *A SYSTEM OF AMBITION?: BRITISH FOREIGN POLICY 1660-1793*, at 18 (1991).

235. *Id.* at 19.

236. *Id.* For a more critical view of Parliament, see ALLEN, *supra* note 233, at 127-43 (accusing Parliament of using its funding powers to usurp the "supreme command" over the military).

237. COMMONS ADDRESS (May 25, 1677), reprinted in *THE STUART CONSTITUTION*, *supra* note 222, at 399.

238. KING'S REPLY (May 28, 1677), reprinted in *id.* at 400-01.

After the Glorious Revolution of 1688, Parliament's role, although still rooted in its control over finances, extended beyond simply thwarting royal initiatives. The Bill of Rights, imposed upon William and Mary in 1689 as the price for their throne, removed from the royal prerogative the power to raise and keep a standing army in peacetime.²³⁹ Thereafter, the decision to raise a standing army required statutory authorization. After 1688, Parliament provided authorization and funding through annual Mutiny Acts.²⁴⁰ Thus, Blackstone was only partially correct when he wrote that the King had the prerogative to raise and regulate armies and navies; the King could do so, but only with the cooperation of Parliament.

Parliament's financial power had become so institutionalized and accepted that it constituted a potential veto over decisions on war and peace. In part, Parliament owed its continuing presence in foreign affairs to its own permanent presence in the British political system. As part of the post-revolutionary settlement, the King no longer could rule without calling the legislature into session at least once every three years.²⁴¹ Parliament became the forum where political groups—representing both the Crown's ministers and various parties—sought to define and present the national interests to domestic and international audiences.²⁴² As a historian of the period concludes, "[t]o this extent the Glorious Revolution gave England and then Britain a parliamentary foreign policy, a policy that was often expounded and debated in Parliament for political reasons that were not related solely to Parliament's fiscal powers."²⁴³ Or as a contemporary of the day argued before the House of Commons in 1739, "according to the old maxim of our Constitution, the king is invested with the sole power of making peace and war; but from the late conduct of some gentlemen in this House, I begin to doubt whether this ought to be allowed as a maxim in our constitution."²⁴⁴ The speaker, the Secretary of War, believed this to be the case because "[t]here are some amongst us who, of late years, have taken upon them to prescribe to his majesty not only when, but how he is to make both peace and war."²⁴⁵

239. See BILL OF RIGHTS (1689), reprinted in 1 SOURCES AND DOCUMENTS OF UNITED STATES CONSTITUTIONS 134 (William F. Swindler ed., 1982).

240. See KEIR, *supra* note 222, at 268.

241. See Triennial Act, 1684 reprinted in E. NEVILLE WILLIAMS, THE EIGHTEENTH-CENTURY CONSTITUTION 1688-1815, at 49 (1960).

242. See BLACK, *supra* note 234, at 44.

243. *Id.* at 46.

244. 11 COBBETT'S PARLIAMENTARY HISTORY OF ENGLAND 155 (1812).

245. *Id.*

Parliament also influenced decisions on war and peace by use of its impeachment powers.²⁴⁶ If Parliament believed that the Crown had pursued an unwise foreign policy or war, it could accuse the prime minister and other officials of a criminal offense as vague as that of derogating from the dignity and interests of the nation. Parliament, for example, impeached Charles II's ministers Clarendon in 1667 and Danby in 1678, because they engaged in an unsuccessful or unpopular foreign policy—one, however, that wholly represented the wishes of the King.²⁴⁷ To be sure, Parliament could exercise this power only after the fact, but it gave the Commons a voice in the selection of ministers and executive policy, especially as the Crown came to adopt cabinet-style organization after the turn of the century.²⁴⁸ Thus, by the middle of the eighteenth century, the Crown had difficulty conducting policies in opposition to the Commons, even though the King formally still retained the sole prerogative of selecting his advisers.²⁴⁹

4. *The Lessons of British History: The Declaration of War*

British practice also provides support for this Article's interpretation of the function of a declaration of war. In two of Britain's major military engagements in the seventeenth and eighteenth centuries—the entry into the Thirty Years War against Spain in 1624, and the struggle with France during the Seven Years' War beginning in 1756—the King did not declare war until more than a year after offensive operations had begun.²⁵⁰ In fact, in the many wars fought after the Restoration (the Second and Third Anglo-Dutch Wars, King William's war, the War of the Spanish Succession, the War of the Austrian Succession, and the Seven Years' War), England declared war *only once* before or at the commencement of hostilities.²⁵¹ This period also witnessed numerous minor conflicts in which England never declared war at all.²⁵² If the British of the seventeenth and eighteenth centuries (which included the

246. See generally RAOUL BERGER, *IMPEACHMENT: THE CONSTITUTIONAL PROBLEMS* 7-102 (1973).

247. Clarendon presided over the Second Dutch War of 1665-67, which saw a Dutch fleet blockade the Thames and burn the English fleet in the Medway. Parliament impeached Danby when Montague, a member of Parliament and former ambassador to France, revealed in the Commons that Charles had offered to dissolve Parliament if Louis XIV of France paid him six million francs (at a time when Parliament had voted funds for an anti-French policy). Dissatisfied with Charles and Danby, Louis XIV had bribed Montague to disclose the information. See 6 HOLDSWORTH, *supra* note 219, at 176-77, 184-85.

248. See generally Black, *supra* note 220.

249. See 10 HOLDSWORTH, *supra* note 219, at 591.

250. See THE STUART CONSTITUTION, *supra* note 222, at 58 (Thirty Years War); 1 JAMES KENT, *COMMENTARIES ON AMERICAN LAW* 53-54 (2d ed. 1832) (Seven Years' War).

251. See 5 COBBETT'S PARLIAMENTARY HISTORY OF ENGLAND 234-35 (1809) (declaration beginning King William's War of 1689).

252. See generally J.F. MAURICE, *HOSTILITIES WITHOUT DECLARATION OF WAR* (1883).

American colonists) believed a declaration of war played an authorizing function for hostilities, they certainly failed to practice what they preached.

The declarations of war published in the British colonies confirm that the views of international legal scholars and the lessons of British practice were understood throughout the Empire's possessions. These declarations usually catalogued the offenses committed by the other nation (usually France) in an effort to show that a state of war already existed, with Britain's own declaration playing the happy role of merely recognizing the ongoing state of hostilities.²⁵³ For example, William and Mary devoted most of their May 7, 1689 declaration of war against France to a recitation of French actions—seizing English possessions in the Americas, attacking English ships, persecuting English nationals in France, and seeking to foment rebellion against the new monarchy—which had the effect of commencing the war between the two nations.²⁵⁴ The March 29, 1744 declaration against France similarly narrated a litany of French provocations and attacks on British possessions—going so far as to describe in detail captured French documents ordering commanders to attack British settlements in a time of peace, and a French declaration of war against Britain and her allies—to show that war already existed.²⁵⁵ Britain's declaration of the Seven Years' War on May 17, 1756, while giving the pretexts for the King's decision, characterized previous hostile actions by both nations as already a "war."²⁵⁶ Underscoring their formal nature, all three declarations were devoted toward describing the new legal status certain actions would gain during wartime: hostile attacks by British commanders were permitted; communications with the French King were illegal; French ships captured were lawfully prize ships; wartime materials were contraband; and French subjects helping the British cause would receive protection.²⁵⁷ In these documents, the British King recognized the wrongs committed by the French, their impact in creating a state of war, and the domestic legal ramifications that flowed therefrom.

Thus, the usual British course toward war involved months, if not years, of direct armed conflict without a declaration of war. Many of these wars remained vivid in the minds of the Framers, whose fathers

253. However, one must discount for the propensity in international politics to claim that every war is a defensive one.

254. See DECLARATION AGAINST THE FRENCH KING (May 7, 1689), reprinted in BRITISH ROYAL PROCLAMATIONS RELATING TO AMERICA, 1603-1783, at 147 (Clarence S. Brigham ed., 1911) [hereinafter BRIGHAM].

255. See DECLARATION OF WAR AGAINST THE FRENCH KING (Mar. 29, 1744), reprinted in BRIGHAM, *supra* note 254, at 196.

256. See DECLARATION OF WAR AGAINST THE FRENCH KING (May 17, 1756), reprinted in BRIGHAM, *supra* note 254, at 203-06.

257. See *supra* notes 254-256.

fought in them as subjects of the British Empire. The colonies themselves were often a substantial part of the theater of war and, in any event, they were valuable wartime assets of the Crown. Thus, we can expect the Framers to have remembered the full year of British naval attacks against the French and Spanish that preceded Queen Anne's declaration of the War of the Spanish Succession on May 4, 1702.²⁵⁸ The War of the Austrian Succession, which England declared against Spain on October 13, 1739, and against France on March 29, 1744, would have remained even more vivid in their minds.²⁵⁹ Months before the 1739 declaration, British naval commanders in North America began offensive operations against Spanish forces and settlements. Almost a year before the 1744 declaration, the entire Empire celebrated the battle of Dettingen, in which King George II himself led British troops to victory over the French.²⁶⁰

If any event impressed on the Framers the idea that declarations of war were unnecessary to conduct hostilities, it was the Seven Years' War. Not only was that war the most recent, and the one in which George Washington saw his first significant military action, it was also the first conflict between the Great Powers that began in America. England did not declare war on France until May 17, 1756.²⁶¹ Nonetheless, American and British troops had engaged in direct conflict with French troops as early as July 3, 1754, when French troops defeated colonial forces under Major George Washington in the disputed Ohio Valley.²⁶² One year later (but still eleven months before a declaration of war), the French scored a stunning victory at the battle of Fort Duquesne over two regiments of British regulars led by the unskilled commander in chief of British North America, General Braddock. Americans remembered the date of the battle well, for Washington had served as aide-de-camp to Braddock and, in revolutionary myth, had led the Virginia militia courageously in Indian-style fighting tactics while the British had died like cowards.²⁶³ Even in the early decades of the nineteenth century, American legal scholars, such as Chancellor Kent, still remembered that the

258. See 6 COBBETT'S PARLIAMENTARY HISTORY OF ENGLAND 16-17 (1810); MAURICE, *supra* note 252, at 13.

259. See 11 COBBETT'S PARLIAMENTARY HISTORY OF ENGLAND 1-3 (1812) (George II's declaration of war against Spain); 13 *id.* 688-91 (George II's declaration of war against France).

260. See DOUGLAS E. LEACH, ARMS FOR EMPIRE: A MILITARY HISTORY OF THE BRITISH COLONIES IN NORTH AMERICA, 1607-1763, at 210 (1973); MAURICE, *supra* note 252, at 19.

261. LEACH, *supra* note 260, at 380-81.

262. See *id.* at 340-41.

263. According to Washington, the Virginia militiamen had "behav'd like Men and died like Soldiers," while "the dastardly behaviour of the English Soldier's expos'd all those who were inclin'd to do their duty to almost certain Death." *Id.* at 368.

Seven Years' War had broken out in America several years before England formally declared war.²⁶⁴

5. *Summary of the British Model*

This review of English constitutional history reveals the positive political system that grew out of the formal legal boundaries described by Blackstone. The eighteenth-century English monarch was commander in chief of the armed forces and possessed exclusive power to enter into treaties, to declare war, and to raise and regulate the army and navy. Although formal power was allocated to the monarch, Parliament exerted its influence in these areas through its sole control over the public fisc and through its power to impeach ministers. Parliament could end wars by threatening to eliminate supplies for the army. It could try to force the King into war by voting funds for wars it wanted the Crown to initiate. It could hold the Crown accountable for decisions concerning treaties and war by impeaching the King's ministers for foreign policy failures. A foreign observer of the eighteenth-century British Constitution summarized the system nicely:

The king of England . . . has the prerogative of commanding armies, and equipping fleets; but without the concurrence of his parliament he cannot maintain them. He can bestow places and employments; but without his parliament he cannot pay the salaries attending on them. He can declare war; but without his parliament it is impossible for him to carry it on. In a word, the royal prerogative, destitute as it is of the power of imposing taxes, is like a vast body, which cannot of itself accomplish its motions; or, if you please, it is like a ship completely equipped, but from which the parliament can at pleasure draw off the water, and leave it a-ground—and also set it afloat again, by granting subsidies.²⁶⁵

These operating relationships, expressed in both formal constitutional law and politics, provided a starting point when our Framers drafted our Constitution. Steeped in the British political history of their day, the Framers could see before them the long gray line of Stuart Kings, impeached ministers, divisive wars both foreign and domestic, and unruly Parliaments. Naturally, then, when the Framers allocated war powers between the President and Congress, they used as their baseline the separation of powers they believed to exist between King and Parliament.

264. See 1 KENT, *supra* note 250, at 54.

265. J.L. DE LOLME, *THE CONSTITUTION OF ENGLAND* 72 (1821).

III WAR AND EARLY AMERICA

The Framers were influenced not only by the theory and practice of British war-making, but also by their own experiences with American government prior to 1787. This Section will discuss war powers as illuminated by the colonial charters, state constitutions, and the Articles of Confederation. Although Blackstone and the Articles of Confederation have been the primary focus of scholarly attention,²⁶⁶ colonial charters and state constitutions deserve a central place in the historical debate over war powers. The colonies, and later the states, provided the Framers with a shared system of reference with which to understand the workings of government. Colonial governments provided examples of legislative participation in military affairs through the appropriations power. State governments provided working examples of a separate executive branch, which the Articles of Confederation lacked. The states each constituted independent nations capable of waging war or making peace on their own, and as independent states, chose different allocations of the war powers.²⁶⁷ Finally, as the most significant governmental legal documents of their day, state constitutions provide the most relevant legal context for construing the meaning of the federal Constitution.

The states' experiences prior to the drafting of the Constitution provided evidence to the Framers of both the dangers and the advantages of a strong executive. On the one hand, the revolutionaries, in part, had rebelled against the power of the royal governors. On the other hand, the Framers had witnessed the excesses of the post-revolutionary state legislatures and the crippling of the independence and authority of their executive branches. By studying the evolution of the state constitutions, we can better understand the Constitution and war powers as part of the Framers' attempt to cure legislative excess by erecting a unitary, independent executive in the form of the presidency. In this effort, the Framers borrowed from the examples of governors they thought had performed particularly well, and rejected those executives whose power remained subordinated in all respects to their assemblies. When understood in the context of the Anglo-American constitutional traditions of executive leadership in war and of legislative fiscal control, the Constitution's allocation of war powers becomes yet clearer.

266. Charles Lofgren, Abraham Sofaer, Raoul Berger, and Arthur Bestor, whose works are most often mentioned as historical support for a reduced presidential role in warmaking, fail to examine the state constitutional examples. See generally LOFGREN, *supra* note 114; SOFAER, *supra* note 14; Berger, *supra* note 13; Bestor, *supra* note 2.

267. One could say that the states were thirteen nations brought together by a common enemy.

A. Colonial Government

Although they would come to suspect the institution, the colonists had an intimate familiarity with executive government. To a surprising degree, colonial government—whether royal, corporate, or proprietary—mirrored the formal institutional arrangements of the British Constitution. Each colony had an executive governor, appointed by the Crown for an indefinite term, a representative legislature, and some type of council or upper house.²⁶⁸ In most cases, the formal powers of the colonial governors exceeded those of the monarchy back home. For example, colonial governors possessed the authority to veto colonial legislation, to dissolve the legislature, and to appoint and dismiss judges at will, all powers which the King had not exercised since before the turn of the eighteenth century.²⁶⁹

As in these areas, so too it was in the arena of war. Colonial charters gave the governors full control over the raising and deployment of the military, which most often took the form of the militia. Royal commissions authorized colonial governors

to arm, muster, and command all persons residing within his province; to transfer them from place to place; to resist all enemies, pirates, or rebels; if necessary, to transport troops to other provinces in order to defend such places against invasion; to pursue enemies out of the province; in short, to do anything properly belonging to the office of commander-in-chief.²⁷⁰

Massachusetts' Charter contained a typical colonial provision for making war. It vested in "the Governor of our said Province" the "full Power by himselfe" to "traîne instruct Exercise and Goveerne the Militia," "to assemble in Martiall Array and put in Warlike posture" the inhabitants, and to lead the militia "to Encounter Expulse Repell Resist and pursue by force of Armes," and "to kill slay destroy and Conquer" any person or group that attempted to invade or annoy the colony.²⁷¹ The Governor also had the sole power to impose and administer martial law, to fortify strongholds, and to stockpile weapons.²⁷²

Interestingly, one of the few formal checks placed on the governor's military discretion was imposed by the declaration of war. For

268. See BERNARD BAILYN, *THE ORIGINS OF AMERICAN POLITICS* 63 (1970).

269. See *id.* at 67-69.

270. EVARTS B. GREENE, *THE PROVINCIAL GOVERNOR IN THE ENGLISH COLONIES OF NORTH AMERICA* 98-99 (1907).

271. CHARTER OF MASSACHUSETTS BAY (1691), reprinted in 3 *THE FEDERAL AND STATE CONSTITUTIONS, COLONIAL CHARTERS, AND OTHER ORGANIC LAWS* 1884 (Frances N. Thorpe ed., 1909) [hereinafter THORPE]; see also CHARTER OF MARYLAND (1632), reprinted in 3 *id.* at 1682; CHARTER OF GEORGIA (1732), reprinted in 2 *id.* at 776; CHARTER OF CONNECTICUT (1662), reprinted in 1 *id.* at 534-35.

272. CHARTER OF MASSACHUSETTS BAY (1691), reprinted in 3 THORPE, *supra* note 271, at 1884.

example, some governors could not impose martial law without a declaration of war from England.²⁷³ This again highlights the role of the declaration of war in eighteenth-century Anglo-American constitutional law as fundamentally one of defining legal relationships, especially at home. Only after a declaration of war could the governor take the domestic steps, such as infringing temporarily on colonists' rights or liberties, needed to fight a war.

These provisions also show that the governor's war powers had limits imposed by his subordinate position in the British governmental hierarchy. Governor Dinwiddie of Virginia, for example, could not very well declare war on France without the approval of the King. It does not appear that the declaration had to precede military operations, for a historical study uncovers only three declarations of war in the colonies,²⁷⁴ even though the colonists engaged in almost constant hostilities with various Indian tribes (and other European settlers and troops) throughout the pre-Revolutionary period.²⁷⁵ The declaration of war's main purpose lay not in authorizing military operations, but in triggering the governor's exercise of his domestic powers, such as the authority to impose martial law.

An absence of formal limits did not prevent the same type of political processes that checked the British monarch from constraining the colonial governors. Although this structure of government produced relative harmony in England by the mid-eighteenth century, it spawned the exact opposite in the colonies. According to Professor Bailyn, "[t]here was bitter, persistent strife within the provincial governments almost everywhere," particularly between the different branches of government.²⁷⁶ As their brethren did in England, colonial legislators used their broad powers over the purse to inject themselves into all manner of policy making, including military and diplomatic affairs.²⁷⁷ Assemblies passed legislation to man and equip the military, to define militiaman duties, and even to conduct military and diplomatic affairs with the Indians. Governors depended upon the assemblies for "temporary acts for the enforcement of the simplest military obligations," such as legislation defining how long a militiaman had to serve and what weapons he should have.²⁷⁸ The history of the southern colonies is replete with

273. See *supra* note 271.

274. Some governors exercised a limited power to declare war against the Indians. In 1722 and 1755, the governor of Massachusetts issued such a declaration with the advice of his council. New Hampshire's executive did likewise in 1745. GREENE, *supra* note 270, at 107-08.

275. *Id.* at 107-09. In fact, it appears that the colonies were almost constantly at war with one foe or the other, whether it be Indians or the French. See generally LEACH, *supra* note 260.

276. See BAILYN, *supra* note 268, at 63-64.

277. See WOOD, *supra* note 175, at 154.

278. GREENE, *supra* note 270, at 101.

examples of legislatures using their powers to man, equip, and maintain the military, and to specify how, when, and where the governor could exercise force.²⁷⁹

Virginia provides an example of the manner in which colonial legislatures mimicked the English Parliament's use of its funding powers to influence military affairs. In passing appropriations for the military, Virginia's House of Burgesses regularly specified the number of soldiers to be called up, their duty stations, their officers, their pay, and their quota of ammunition.²⁸⁰ The House even went so far as to direct the governor how to command the force. To keep checks on the governor's use of the army, the legislature established a special committee to advise the governor on military operations. By 1676, the Virginia legislature had assumed "a large part of the responsibility for all military operations within the colony."²⁸¹ As in England, the appropriations power bestowed upon the representative assemblies the ability to participate in issues of war and peace even in a frontier environment that could have otherwise encouraged deference to executive power.

In addition to the spending power, the colonists resorted to an added check on the executive branch because of the peculiar position of the governor in the structure of the British imperial system. Although the governor formally held the upper hand in the colonies, he, too, was subject to the higher authority of the Crown and its ministers in England. By the 1750s, the colonies had developed close communications with the political leadership in the mother country, links they used to appeal and overturn decisions by the colonial governors.²⁸²

B. The War Powers in the New State Constitutions

Despite checks on the governors' powers, the colonists turned against executive authority when they rebelled against Great Britain. The new state constitutions both placed explicit restrictions on the executive power and diluted the structural unity and independence of the executive as an institution. But these frameworks of government were significant not because they served as models for the 1787 Constitution, but because they contained mistakes to be avoided. As such, they provide valuable foils for interpreting our Constitution's war clauses.

Accepting the tenets of English Whig radicalism, the colonists believed that Great Britain, following the life cycle of other great empires, was abandoning freedom and liberty to become a land of tyranny.²⁸³

279. See JACK P. GREENE, *THE QUEST FOR POWER: THE LOWER HOUSES OF ASSEMBLY IN THE SOUTHERN ROYAL COLONIES 1689-1776*, at 297-309 (1963).

280. *Id.* at 303.

281. *Id.*

282. See BAILYN, *supra* note 268, at 90-91.

283. See WOOD, *supra* note 175, at 32-34; see also BAILYN, *supra* note 159.

According to Whig thought, the English Constitution, as defined in the settlement of the 1688 Glorious Revolution, required that the three parts of government—Crown, Lords, and Commons—maintain their independence from one another. George III had sought to overturn this balance by extending his influence and patronage into Parliament. When the British government attempted after 1763 to place tighter controls on the colonies, the colonists saw the fulfillment of these predictions of tyranny.²⁸⁴ Taxation without representation, the stationing of troops in Boston, and the institution of vice-admiralty courts were viewed by colonists as attempts to subvert the British Constitution and crush democracy in North America.²⁸⁵

1. *Early Efforts to Rein in Executive Power*

Antipathy toward the Crown found a powerful expression in the first constitutions drafted by the newly independent states. These documents not only show that the revolutionaries wanted to rein in executive power, but also demonstrate *how* they sought to do so. In this respect, the mechanisms chosen by the revolutionaries contrast sharply with the provisions of the Constitution of 1787. States began by eliminating the independence and unity of the governor's office. For example, in all but one state, the legislators elected the governor (often one of their own), which made the governor directly accountable to the assembly rather than to the People.²⁸⁶

States also limited the term and eligibility of the governor in an effort to reduce his power and influence. Most states either provided for the annual election of the governor, restricted the number of terms a governor could serve, or both. As the Maryland Constitution declared, "a long continuance, in the first executive departments of power or trust, is dangerous to liberty; a rotation, therefore, in these departments, is one of the best securities of permanent freedom."²⁸⁷ States also eliminated the structural unity of the executive branch in an attempt to undermine executive power. Pennsylvania undertook the most radical

284. See Wood, *supra* note 175, at 36-43.

285. Thus, the Declaration of Independence portrays all the "abuses and usurpations" visited on the colonies as the personal actions of George III. As part of its list of grievances, the Declaration included claims that the King "has kept among us, in times of peace, Standing Armies without the Consent of our legislature," and that he "has affected to render the Military independent of and superior to the Civil Power." THE DECLARATION OF INDEPENDENCE paras. 13-14 (U.S. 1776).

286. See DEL. CONST. art. 7 (1776), reprinted in 1 THORPE, *supra* note 271, at 563; MD. CONST. art. XXV (1776), reprinted in 3 *id.* at 1695; N.J. CONST. art. VII (1776), reprinted in 5 *id.* at 2596; N.C. CONST. art. XV (1776), reprinted in 5 *id.* at 2791. New York provided for the direct election of the governor, an important exception which influenced the Framers of the federal Constitution. See *infra* text accompanying notes 312-320.

287. MD. DECLARATION OF RIGHTS art. XXXI (1776), reprinted in 3 THORPE, *supra* note 271, at 1689.

reform by replacing the single governor with a twelve-man executive council elected by, and responsible to, the People.²⁸⁸ Other states reformed their executive branches by creating councils of state, which were appointed by the legislature for the purpose of advising the governor before he pursued a course of action.²⁸⁹ The councils often made the governors "little more than chairmen of their executive boards."²⁹⁰

Historians of the presidency and of war powers have focused on these institutional changes to show that the revolutionaries planned to do away with a strong executive government.²⁹¹ These structural modifications, however, do not bear as much significance for our study because the Framers reversed many of them when they created the unitary presidency.²⁹² Instead, we must focus on the *substantive powers* the states gave to their executive branches. Despite the fragmentation of the executive as a unitary institution, the states still left many substantive powers in the hands of the executive branch, which would suggest that the Framers did not wish to alter the accepted allocation of those powers. As Willi Paul Adams observed in his authoritative work on the revolutionary state constitutions,

[t]he striking fact of historical dimension is that the reaction against the colonial governor was so weak that it did not lead to parliamentary government with an executive committee of members of the legislature, but rather that within a decade the American system of presidential government evolved with full clarity and permanence.²⁹³

288. PA. CONST. § XIX (1776), *reprinted in* 5 *id.* at 3086-87.

289. *See, e.g.,* DEL. CONST. art. 8 (1776), *reprinted in* 1 *id.* at 563-64; GA. CONST. art. XXV (1777), *reprinted in* 2 *id.* at 781-82; MD. CONST. art. XXVI (1776), *reprinted in* 3 *id.* at 1695; N.C. CONST. art. XIV (1776), *reprinted in* 5 *id.* at 2791; S.C. CONST. art. V (1776), *reprinted in* 6 *id.* at 3245; VT. CONST. art. XVII (1777), *reprinted in* 6 *id.* at 3744; VA. CONST. para. 9 (1776), *reprinted in* 7 *id.* at 3816-17.

290. WOOD, *supra* note 175, at 138.

291. *See, e.g.,* SOFAER, *supra* note 14, at 16-19.

292. How "unitary" the Framers intended the presidency to be remains a topic of fierce academic debate, one prompted by the reorganization efforts of Presidents Reagan and Bush. For the latest salvos, see generally Steven G. Calabresi & Saikrishna B. Prakash, *The President's Power to Execute the Laws*, 104 YALE L.J. 541 (1994); Calabresi & Rhodes, *supra* note 15 (strong unitary executive); Lessig & Sunstein, *supra* note 15 (weak unitary executive). This question also has bedeviled the Supreme Court since its contradictory opinions in *Myers v. United States*, 272 U.S. 52 (1926), and *Humphrey's Executor v. United States*, 295 U.S. 602 (1935), until more recent times in *Mistretta v. United States*, 488 U.S. 361 (1989), and *Morrison v. Olson*, 487 U.S. 654 (1988). In part, this study suggests that some of these discussions have failed to take account of the historical background against which the Framers acted. In creating the unitary presidency, the Framers were reacting to their experiences with the colonial and state governments, particularly the weak, divided state governors.

293. WILLI PAUL ADAMS, *THE FIRST AMERICAN CONSTITUTIONS: REPUBLICAN IDEOLOGY AND THE MAKING OF THE STATE CONSTITUTIONS IN THE REVOLUTIONARY ERA* 271 (Rita & Robert Kimber trans., 1980).

To be sure, many of the revolutionaries did hope to restrict the substance as well as the structure of executive power. A noted scholar of the presidency has found in the revolutionary constitutions "the common practice of expressly submitting the exercise of either certain enumerated powers, the field of enumerated powers, or even the whole of the executive power to the legislative will."²⁹⁴ Perhaps Thomas Jefferson was the most ambitious in terms of strictly controlling the power of the executive, whose role was captured by Jefferson's title for him: the "Administrator."²⁹⁵ In his draft of the Virginia Constitution, Jefferson enumerated the powers that the executive could *not* exercise: the Administrator could not dismiss the legislature, regulate the money supply, set weights and measures, establish courts or other public facilities, control exports, create offices, or issue pardons—powers that traditionally belonged to the King.²⁹⁶ When it came to war powers, Jefferson's draft stated that the Administrator could *not* "declar[e] war or peace[,] issu[e] letters of marque or reprisal[,] rais[e] or introduc[e] armed forces[, or] build[] armed vessels . . . forts or strongholds."²⁹⁷ Although the draft still left to the Administrator any remaining "powers formerly held by [the] king," there would seem little residual Commander-in-Chief powers left due to the prohibition on the executive from "introducing armed forces."²⁹⁸

Unfortunately for Jefferson, the constitution writers of most states rejected his approach. Instead of declaring that the Administrator could not wage war or make peace, the states either gave the governor the exclusive power to decide when to use the militia, or required that he consult the council before calling forth the military. Even Jefferson's native state put aside his suggestions. Although it had Jefferson's proposal before it, the Virginia constitutional convention of 1776 adopted George Mason's alternative, which allowed the governor to "embody the militia with the advice of the privy council, and when embodied, let the gov[ernor] alone have the direction of the militia, under the laws of the country."²⁹⁹ The convention also deleted Jefferson's enumeration of war powers that were forbidden to the executive.

Undeterred, Jefferson offered his language as a constitutional amendment, but the other members of the convention rejected it in favor of a provision permitting the governor, with the advice of a council

294. CHARLES C. THACH, JR., *THE CREATION OF THE PRESIDENCY, 1775-1789: A STUDY IN CONSTITUTIONAL HISTORY* 29 (1922).

295. Thomas Jefferson, *First Draft of the Virginia Constitution*, art. II (1776), reprinted in 1 *THE PAPERS OF THOMAS JEFFERSON* 337, 341 (Julian P. Boyd ed., 1950).

296. 1 *id.* at 342.

297. 1 *id.*

298. 1 *id.*

299. The Mason Plan as Revised by the Committee art. IX (1776), reprinted in 1 *id.* at 369, 371.

of state, to "exercise the Executive powers of Government."³⁰⁰ Although Virginia's approach of introducing consiliar approval, which resembled that of many other states, placed structural checks on the governor's power, it was not a substantive limitation on the executive branch's power to make war. The privy council itself was part of the executive branch. Although a dead end, Jefferson's scheme was widely circulated, and it provided an example of how the Framers could have created a legislature-first approach to war—if they had chosen to do so.

In drafting their new constitutions, states generally rejected Jefferson in favor of John Adams, who for once had his day over his friend and future rival. In his *Thoughts on Government*, which became the blueprint for many of the state constitutions, Adams suggested that the states should adopt bicameral legislatures and create a governor "who, after being stripped of most of those badges of domination called prerogatives, should have a free and independent exercise of his judgment, and be made also an integral part of the legislature."³⁰¹ Adams considered war-making authority and the control of the armed forces not as "badges of domination," but as legitimate prerogatives of the executive power. Adams recommended to the states that the "Governor should have the command of the militia, and of all your armies."³⁰²

In the area of war powers, as in other respects, Adams advised the states to reproduce the forms and powers of the English Constitution, after adjusting the branches of government to be more responsive to popular sovereignty. Thus, Adams' plan called for the presence of a governor, a commons, and a mediating senate, but in no way enumerated the powers each body was to exercise. If we think of the allocation of war powers among the British and colonial governments as the background upon which the state constitutions were drawn, then state silence would seem to indicate an acceptance of the British approach. In other words, if the states had wanted to reject the traditional model of Anglo-American war-making, which was composed of executive initiative, legislative appropriations, and judicial absence, then their constitutions would have followed the lines suggested by Jefferson. Instead, the

300. The Constitution as Adopted by the Convention (1776), reprinted in 1 *id.* at 377, 380. We should note that the constitution forbade the executive from exercising "any power or prerogative by virtue of any Law, statute, or Custom, of England." VA. CONST. para. 9 (1776), reprinted in 7 THORPE, *supra* note 271, at 3816-17.

301. John Adams, *Thoughts on Government* (1776), reprinted in 4 PAPERS OF JOHN ADAMS 65, 89 (Robert J. Taylor ed., 1979). Adams originally wrote *Thoughts on Government* in response to requests from representatives of North Carolina, Virginia, and New Jersey, who had come to him for advice on how to frame their new governments. See 4 *id.* at 65-73. Others then published the proposal as a pamphlet, in which form it reached many of the other state constitutional conventions. 4 *id.*

302. 4 *id.* at 90.

revolutionaries decided to mimic the British forms of government, as recommended by Adams.

Thus, while the revolution may have represented a rebellion against the presence of the Crown, it was not an assault on the relationship between executive and legislative powers in war. As under the royal governors, the common practice of the states either assumed that the governors had broad war-making authority, or explicitly gave them such power in terms reminiscent of the British Constitution and the colonial charters. Unlike the federal Constitution, the state constitutions chose not to enumerate the powers of their legislatures, and instead allowed them to exercise their traditional power to fund and supply, rather than authorize, war. Although some states such as Maryland initially introduced the innovation of prohibiting the raising of a standing army without the consent of the legislature,³⁰³ these provisions merely continued a principle first set out in the English Bill of Rights of 1689. As Alexander Hamilton noted, such provisions were redundant with the state legislatures' plenary power to raise and fund the armies: "[I]t was superfluous, if not absurd, to declare that a matter should not be done without the consent of a body, which alone had the power of doing it."³⁰⁴

While they remained silent as to legislative war powers, the state constitutions retained the substantive military powers of the governor. Although the states experimented radically with the structure of the executive branch, they left relatively unchanged the traditional allocation of powers between the legislative and executive branches. The framers of the state constitutions did not alter the existing arrangement in war powers, but rather retained the pre-revolutionary system of independent executive war-making. Like New York and New Jersey, for example, Georgia vested the "supreme executive power" in the governor and declared that he "shall be captain-general and Commander in Chief over all the militia, and other military and naval forces belonging to this State."³⁰⁵ Seen in this light, state constitutions represented a continuation, rather than a break, from the example of the British Constitution and the practice of the royal colonial governors.

To be sure, the state constitutions were not exact duplicates of the British framework. Nonetheless, an examination of the manner in which the states addressed the allocation of war-making powers bears out the intent to continue the general British patterns. Of the different modifi-

303. MD. DECLARATION OF RIGHTS art. XXVI (1776), reprinted in 3 THORPE, *supra* note 271, at 1688.

304. THE FEDERALIST No. 26, at 167 (Alexander Hamilton) (Jacob E. Cooke ed., 1982).

305. GA. CONST. art. XXXIII (1777), reprinted in 2 THORPE, *supra* note 271, at 782; see also N.J. CONST. art. VIII (1776), reprinted in 5 *id.* at 2596; N.Y. CONST. art. XVIII (1777), reprinted in 5 *id.* at 2632.

cations the states made, the most common was a provision that explicitly called upon the governor to consult with others before deciding to deploy the military. These clauses usually required that before calling forth the militia the governor had to receive approval from a council of state appointed by the legislature but part of the executive branch. In a typical example, Delaware's war clause declared that its "president, with the advice and consent of the privy council, may embody the militia, and act as captain-general and commander-in-chief of them, and the other military force of this State, under the laws of the same."³⁰⁶

The fact that these consultation provisions were included illustrates the common understanding among the framers of the state constitutions that the governor generally had no pre-existing duty to consult with the legislature before sending the state into war. Correspondingly, if the Framers of the federal Constitution had wanted the President to consult with either the legislature or within the executive before embarking on a military venture, they easily could have borrowed from these state provisions and required the President to consult with the Senate (as some in the Constitutional Convention proposed) or some other body.

The states also recognized the checks on the executive imposed by the citizens, particularly through their participation in the militia. Composed of armed, everyday citizens, the militia not only often served as a state's only military force, it also played an important role in revolutionary ideology as a locus of republican values. Framers of the state constitutions hoped that the militia both would bring the People together and would provide them with a means of resisting oppressive government actions.³⁰⁷ As a result, they took steps to increase the voice of the People directly in military affairs. First, some state constitutions either prohibited or warned against the raising of a standing army. Virginia's provision is representative: "That a well-regulated militia, composed of the body of the people, trained to arms, is the proper, natural, and safe defence of a free State; that standing armies, in time of peace, should be avoided, as dangerous to liberty" ³⁰⁸ Second,

306. DEL. CONST. art. 9 (1776), reprinted in 1 THORPE, *supra* note 271, at 564; see also MD. CONST. art. XXXIII (1776), reprinted in 3 *id.* at 1696; N.C. CONST. art. XVIII (1776), reprinted in 5 *id.* at 2791; PA. CONST. § 20 (1776), reprinted in 5 *id.* at 3087-88; VT. CONST. art. XVIII (1777), reprinted in 6 *id.* at 3745; VA. CONST. para. 14 (1776), reprinted in 7 *id.* at 3817.

307. On the republican nature of the militia, see Akhil R. Amar, *The Bill of Rights as a Constitution*, 100 YALE L.J. 1131, 1162-64 (1991); David C. Williams, *Civic Republicanism and the Citizen Militia: The Terrifying Second Amendment*, 101 YALE L.J. 551 (1991).

308. VA. DECLARATION OF RIGHTS § 13 (1776), reprinted in 7 THORPE, *supra* note 271, at 3814; see also MD. DECLARATION OF RIGHTS art. XXVI (1776), reprinted in 3 *id.* at 1688; MASS. DECLARATION OF RIGHTS art. XVII (1780), reprinted in 3 *id.* at 1892; N.H. DECLARATION OF RIGHTS art. XXV (1784), reprinted in 4 *id.* at 2456; N.C. DECLARATION OF RIGHTS art. XVII (1776), reprinted in 5 *id.* at 2788; PA. DECLARATION OF RIGHTS art. XIII (1776), reprinted in 5 *id.* at 3083; VT. DECLARATION OF RIGHTS art. XV (1777), reprinted in 6 *id.* at 3741.

some state constitutions permitted the militia to elect many of their own officers, making them representatives of the People rather than appointees responsible to the governor.³⁰⁹ Third, two states, Massachusetts and New Hampshire, required that the governor receive the militia's approval before leading them outside state limits.³¹⁰

These provisions revealed the revolutionaries' belief that a democratic check on the war powers emanated from the People themselves by virtue of their relationship with the executive as citizen-soldiers. The army and militia acted as a republican institution that not only fought the wars, but also participated directly in executive decision making. Such arrangements obviated the need for legislative input in military matters beyond questions of funding, for legislators could play only an imperfect role as representatives of the People.

In many ways, the early state constitutions could have formed the foundation for a Constitution that limited executive war powers. Early proposals sought to prohibit the executive branch from beginning wars or from introducing armed forces. These suggestions were rejected in favor of continuing the traditional allocation of war-making authority. Instead of placing substantive limits on the executive's war power, the Framers decided to alter the structure of the executive itself. Later state constitutions discarded these structural experiments and reinstituted a unified, vigorous executive, thereby leaving executive war powers for the most part in the hands of the governor.

2. *Executive Power Reborn: New York, Massachusetts, and New Hampshire*

After the initial wave of state constitution-making, other states provided for a strong, unitary executive branch that afforded the governor a wide degree of authority and structural independence. These examples demonstrated that an independent and unitary executive could exercise a wide degree of freedom in matters of war and peace. The New York constitution, for example, received wide praise among the Framers on account of its powerful executive.³¹¹ Enacted in the spring of 1777, the New York constitution benefitted from the errors of other state constitutions, and also perhaps from the British occupation of a large portion of the state, which created a sense of emergency and danger among the state's leaders. Rejecting the structural handcuffs placed on the executive by other states, New York vested "the supreme executive power

309. See, e.g., N.J. CONST. art. X (1776), reprinted in 5 THORPE, *supra* note 271, at 2596.

310. MASS. CONST. art. VII (1780), reprinted in 3 *id.* at 1901; N.H. CONST. (1784), reprinted in 4 *id.* at 2463-64. However, these provisions seem to codify a similar ban on the King of England preventing him from leading the militia outside of England.

311. See THACH, *supra* note 294, at 34-35.

and authority of this State" in a single, popularly elected governor. No privy council was created to look over his shoulder,³¹² nor did any limitation exist on the number of terms a governor could serve.³¹³

New York's governor had not only ample structural independence, but also the same broad war powers as his colleagues in other states. The constitution vested him with the position of "general and commander-in-chief of all the militia, and admiral of the navy of this State,"³¹⁴ and remained silent as to the assembly's authorities, which left to the legislature its customary role in making funding decisions. During the Revolutionary War, George Clinton, the state's first governor, sent the militia on his sole authority to reinforce General Gates' campaign against British forces under Burgoyne, a move of which he later notified the legislature in his first inaugural address.³¹⁵ Throughout the war, Clinton (himself a military officer) worked closely with General Washington and his subordinates to coordinate operations against the British.³¹⁶ Although it expressed its views when appropriating funds for the war effort, the legislature generally obeyed Clinton's wishes. He encountered such success in running the war and the state that the voters returned him to office for eighteen consecutive years, even though for most of the war New York City remained in the hands of the enemy.³¹⁷

New York's example was significant not because it granted the executive broader substantive war powers than the other states; New York's allocation of powers remained fairly unexceptional. It was only when these common substantive powers were combined with a structurally independent and unitary governor that vigorous executive government emerged. These lessons did not go unnoticed by the Framers.

New York's experience influenced not only the later constitution-writing efforts of Massachusetts and New Hampshire, but also the work of the Philadelphia Convention.³¹⁸ During the struggle for ratification, "Publius" expressed the thoughts of many when he declared that the New York constitution "has been justly celebrated both in Europe and in America as one of the best of the forms of government established in

312. N.Y. CONST. art. XVII (1777), *reprinted in* 5 THORPE, *supra* note 271, at 2632. Although it did not establish a privy council, the New York Constitution did create two more specialized councils: the Council of Revision, which exercised the veto power, and the Council of Appointment, which advised on appointments. N.Y. CONST. arts. III, XXIII (1777), *reprinted in* 5 *id.* at 2628, 2633-34.

313. N.Y. CONST. art. VIII, *reprinted in* 5 THORPE, *supra* note 271, at 2632 (providing for a three-year term for the governor).

314. N.Y. CONST. art. XVIII (1777), *reprinted in* 5 *id.*

315. *See* E. WILDER SPAULDING, *HIS EXCELLENCY GEORGE CLINTON: CRITIC OF THE CONSTITUTION* 95-98, 114-18 (1938); THACH, *supra* note 294, at 37-38.

316. *See* SPAULDING, *supra* note 315, at 99-141.

317. *See* THACH, *supra* note 294, at 37.

318. *See* CLINTON ROSSITER, 1787: THE GRAND CONVENTION 59, 65 (1966); THACH, *supra* note 294, at 34-38.

this country."³¹⁹ As Charles Thach has concluded, "here was a strictly indigenous and entirely distinctive constitutional system, and, of course, executive department, for the consideration of the Philadelphia delegates."³²⁰ As we will see, the Framers took New York to heart and proceeded to marry an independent, unitary President to the substantive war powers exercised by King, colonial governor, and state executive.

The post-1777 state constitutions carried forward, rather than rejected, the progress in New York. Massachusetts, which adopted its constitution in 1780, and New Hampshire, which ratified a similar document in 1784, both provided for strong executive power in war:

The president of this state for the time being, shall be commander in chief of the army and navy, and all the military forces of the state, by sea and land; and shall have full power by himself . . . to train, instruct, exercise and govern the militia and navy; and for the special defence and safety of this state to assemble in martial array, and put in warlike posture, the inhabitants thereof, and to lead and conduct them, and with them to encounter, expulse, repel, resist and pursue by force of arms, as well by sea as by land, within and without the limits of this state; and also to kill, slay, destroy, if necessary, and conquer by all fitting ways, enterprize and means, all and every such person and persons as shall, at any time hereafter, in a hostile manner, attempt or enterprize the destruction, invasion, detriment, or annoyance of this state; and to use and exercise over the army and navy, and over the militia in actual service, the law-martial in time of war, invasion, and also in rebellion, declared by the legislature to exist . . . and in fine, the president hereby is entrusted with all other powers incident to the office of captain-general and commander in chief, and admiral³²¹

These war powers provisions not only gave the governor the commander-in-chief power, they also assumed that the governor had authority to make war. Second, these provisions do not just limit executive war-making authority to defensive responses to attack, they also explicitly provide for offensive operations under the direct authority of the executive, who may use any means he sees fit ("kill, slay, destroy, if necessary, and conquer by all fitting ways, enterprize and means") to achieve his war aims. Given the governor's duty to secure the safety of the state, these military provisions placed in the executive's hands the responsibility and incentive to act first.

319. THE FEDERALIST No. 26, *supra* note 304, at 167 (Alexander Hamilton).

320. THACH, *supra* note 294, at 43.

321. N.H. CONST. (1784), *reprinted* in 4 THORPE, *supra* 271, at 2463-64; *see also* MASS. CONST. art. VII (1780), *reprinted* in 3 *id.* at 1901.

Massachusetts and New Hampshire's provisions also indicate the role of a declaration of war as a judicial announcement, rather than a legislative authorization for executive action. The power to declare war is vested in the legislature, but only acts as a triggering device for the governor's authority to declare martial law.³²² The significance of the declaration of war is, thus, its authorization to the executive to take certain national security measures *at home*.

The history behind Massachusetts' 1780 constitution demonstrates the shared understanding that the executive branch should wield strong war-making powers. In 1778, a convention had recommended a constitution for popular ratification that permitted the governor to exercise the military power only "according to the laws . . . or the resolves of the General Court," and which prohibited him from marching the militia out of the state without Senate approval.³²³ However, the People rejected the proposed document, supplied their reasons, and sent proposals for a new constitution.

These criticisms and concerns were best expressed by the people of the town of Essex in the "Essex Result."³²⁴ Written mainly by Theophilus Parsons,³²⁵ the Result had a profound effect on the Framers' thinking about the separation of powers and individual rights.³²⁶ One historian of the period describes the document as "an essay in political theory and constitutional practice comparable to *The Federalist* in the sophistication of its argument (and in its political outlook)."³²⁷

The Essex Result rejected the weak executive of the proposed constitution and called instead for an executive branch composed of an independent, directly elected governor and a privy council elected by the legislature, with the power to veto legislation.³²⁸ The Result sharply criticized the proposed constitution for undermining the governor's powers as "Captain-General" of the army and navy: "The executive power is to act as Captain-General, to marshal the militia and armies of the state,

322. It seems apparent that a governor could wage war without imposing martial law, and none of these constitutions indicate otherwise. The discussion of early English and colonial wars indicates that martial law was rarely imposed.

323. The Rejected Constitution of 1778 (Mass.), reprinted in *THE POPULAR SOURCES OF POLITICAL AUTHORITY: DOCUMENTS ON THE MASSACHUSETTS CONSTITUTION OF 1780*, at 190, 197 (Oscar & Mary Handlin eds., 1966) [hereinafter HANDLIN]. For another valuable documentary source for this period, see generally *MASSACHUSETTS, COLONY TO COMMONWEALTH: DOCUMENTS ON THE FORMATION OF ITS CONSTITUTION, 1775-1780* (Robert J. Taylor ed., 1961).

324. *The Essex Result* (1778), reprinted in THEOPHILUS PARSONS, *MEMOIRS OF THEOPHILUS PARSONS* 359 (1859) [hereinafter PARSONS].

325. Parsons later became Chief Justice of the Massachusetts Supreme Court.

326. See THACH, *supra* note 294, at 44-54; Jeff Rosen, Note, *Was the Flag Burning Amendment Unconstitutional?*, 100 YALE L.J. 1073, 1076-77 (1991).

327. ADAMS, *supra* note 293, at 91.

328. PARSONS, *supra* note 324, at 395-97.

and, for her defence, to lead them on to battle."³²⁹ Divided authority would be foolish: "Was one to propose a body of militia, over which two Generals, with equal authority, should have the command, he would be laughed at."³³⁰ "Let the Governor alone marshal the militia, and regulate the same, together with the navy," the Result concluded.³³¹

The writers of the Result recognized that the executive might try to expand his overall authority through the exercise of his war power.³³² Despite this concern, however, they decided that the governor's ability to respond quickly to emergencies justified centralizing all military decisions in his hands: "Should Providence or Portsmouth [towns outside of, but near, Massachusetts] be attacked suddenly, a day's delay might be of most pernicious consequence. Was the consent of the legislative body, or a branch of it, necessary, a longer delay would be unavoidable."³³³ The Result recommended that the governor receive the approval of the privy council before marching the army outside the state, and that within ten days after doing so he "convene the legislative body, and take their opinion."³³⁴ Even if the legislature disapproved, however, the governor could still press on if "the general good requires it, and then he will be applauded."³³⁵

Most of the Essex Result proposals, including those for an independent executive with strong legislative and military powers, made their way into the Massachusetts Constitution.³³⁶ It provided the intellectual bridge between the New York Constitution and the Massachusetts Constitution, which itself provided the model for the New Hampshire Constitution and for the federal Constitution.³³⁷ In sending the 1780

329. *Id.* at 380.

330. *Id.*

331. *Id.* at 396.

332. As they put it, "[h]e has the sword, and may wish to form cabals amongst his officers to perpetuate his power." *Id.*

333. *Id.* The Result's mention of Providence, Rhode Island, and Portsmouth, New Hampshire, is telling because these cities lie outside Massachusetts, which strongly implies that the governor's authority to act quickly without legislative approval was not purely defensive. Although attacks on those cities would present a clear danger to Massachusetts, the governor would be acting offensively if he chose to send troops outside the state.

334. *Id.*

335. *Id.* The Essex Result also recommended allowing the legislature to remove "any militia officer at pleasure" as an additional check on the executive's war powers. *Id.*

336. As a prominent Massachusetts judge wrote of the Result, it was an intellectual landmark that stood "beyond any other political document of that day, a clear exposition of the principles upon which the organic laws of a free state should be founded,—the very principles essentially adopted in forming the Constitution of Massachusetts." HARRY A. CUSHING, *HISTORY OF THE TRANSITION FROM PROVINCIAL TO COMMONWEALTH GOVERNMENT IN MASSACHUSETTS* 223 (AMS Press 1970) (1896). For the history of the Massachusetts Constitution of 1780, see ADAMS, *supra* note 293, at 86-93; Samuel E. Morison, *The Struggle over the Adoption of the Constitution of Massachusetts, 1780*, 50 *PROC. MASS. HIST. SOC'Y* 353 (1917).

337. THACH, *supra* note 294, at 44-54.

Constitution to the People for ratification, the Massachusetts constitutional convention further underscored the executive's primacy in war. The framers of the draft linked the governor's military authority to his veto powers as the twin underpinnings of the separation of powers and of the People's safety:

The Legislative, the Judicial and Executive Powers naturally exist in every Government: And the History of the rise and fall of the Empires of the World affords us ample proof, that when the same Man or Body of Men enact, interpret and execute the Laws, property becomes too precarious to be valuable, and a People are finally borne down with the force of corruption resulting from the Union of those Powers. *The Governor is emphatically the Representative of the whole People, being chosen not by one Town, or County, but by the People at large. We have therefore thought it safest to rest this Power in his hands; and as the Safety of the Commonwealth requires, that there should be one Commander in Chief over the Militia, we have given the Governor that Command for the same reason . . .*³³⁸

The Massachusetts Constitution previewed several of the themes that would become prominent in the federal Constitution. The President is seen as the representative and protector of the People, and his sole command over the military without formal legislative control is crucial to the separation of powers and the public safety. Following the ideals set forth in the Essex Result, the influential Massachusetts constitution envisioned a system in which the executive first took action in war, and then sought approval after the fact from the legislature and the People. Of course, the legislature also would retain the ability to participate before the fact by using its appropriations power to refuse to fund the military.

To the reformers who would attend the Philadelphia convention, the Massachusetts document "came to stand for the reconsidered ideal of a '*perfect constitution*.' . . . [It] seemed to . . . have recaptured the best elements of the British constitution that had been forgotten in the excitement of 1776."³³⁹ Its enumeration of the Commander in Chief's powers, combined with the explanatory sidebar of the Essex Result, illustrates the contemporary understanding of the proper and most effective relationship between the executive and legislature in matters of war. Massachusetts' example also is particularly compelling because it responded to a proposal that the legislature approve all military operations. Rejecting such an approach, the writers of the Essex Result and of

338. ADDRESS OF THE CONVENTION (Mar. 1780), reprinted in HANDLIN, *supra* note 323, at 434, 437-38 (emphasis added).

339. WOOD, *supra* note 175, at 434.

the 1780 Constitution have given us a full explication of, and explanation for, the customary system of executive initiative in war.³⁴⁰

3. *A Path Not Taken*

As states embarked on the modification of their new constitutions, only one, South Carolina, chose to impose substantive, rather than structural, limitations on the executive's war powers. In its 1776 constitution, South Carolina decided to rein in the war-making powers of the executive branch, even though it designated the executive as the "the president and commander-in-chief."³⁴¹ South Carolina declared "[t]hat the president and commander-in-chief shall have no power to make war or peace, or enter into any final treaty, without the consent of the general assembly and legislative council."³⁴² Two years later, South Carolina made the restriction even clearer by declaring "[t]hat the governor and commander-in-chief shall have no power to *commence* war, or conclude peace, or enter into any final treaty" without legislative approval.³⁴³ Unlike her sister states, South Carolina required formal legislative approval of the executive's decisions on war and peace, and prohibited the executive from beginning hostilities without the assembly's consent.

Although South Carolina's allocation of powers was not the one adopted by the Framers, it is helpful to our interpretive exercise in two ways. First, it indicates that the common understanding of war powers did not require the executive to receive formal legislative approval to commence hostilities. In the absence of such an understanding, there would have been little need for South Carolina to include explicit language shifting power to the assembly.³⁴⁴ In other words, if the revolutionary Americans commonly believed that a legislative endorsement was necessary for war, then South Carolina's Constitution simply would

340. New Hampshire followed a pattern similar to Massachusetts'. New Hampshire's Constitution of 1784 came about as a reaction to poor military and domestic management by the state's supreme legislative body. Calling for a new constitution, New Hampshire's citizens demanded a unified executive with broad military powers similar to the governor of Massachusetts. Several New Hampshire addresses and pamphlets in favor of a stronger executive appeared to borrow quite liberally from the Essex Result, which apparently was taken as the legislative history for the Massachusetts Constitution. See THACH, *supra* note 294, at 48-49.

341. S.C. CONST. art. XXVI (1776), reprinted in 6 THORPE, *supra* note 271, at 3247.

342. 6 *id.*

343. S.C. CONST. art. XXXIII (1778), reprinted in 6 *id.* at 3255 (emphasis added).

344. It is arguable that the South Carolina Constitution did not even represent the wishes of its own people. The first permanent constitution drafted after the Declaration of Independence, the constitution was drafted and approved by the sitting state legislature, rather than by a convention of the people. See ADAMS, *supra* note 293, at 70-72. In contrast, the New York Constitution was drafted by a new legislative body specifically elected for the purpose, see *id.* at 83-86, while the Massachusetts Constitution was ratified by "[t]he first true constitutional convention in Western history." *Id.* at 92.

have remained silent, or it would have adopted the boilerplate language of the state charters, and left it at that.

Second, South Carolina's war clause provides yet another example of a path not taken by the Philadelphia delegates. If the Framers had wanted to prevent the President from commencing war without congressional approval, as many legal scholars believe today, they could have adopted a provision not unlike South Carolina's (or Jefferson's, for that matter). Article I, Section 8, or Article II, Section 2, could have included a provision which stated that "the President shall have no power to commence war, or conclude peace, without the consent of Congress."

In sum, the state constitutions are a significant, but overlooked part of the history of war powers. The accepted scholarly conclusion that the states reduced the independence of the executive branch fails to capture the subtleties in the change in executive power. The change embodied in these state constitutions was one of structure rather than of substance. Despite the revolutionaries' adoration of the legislatures as representatives of the People, when it came to war the states were nearly unanimous that war-making authority should remain in the hands of the executive, leaving the legislature to exercise its power through its traditional role as keeper of the treasury. Early efforts to rein in executive power took the form of structural, rather than substantive, alterations in the nature of the state governors. South Carolina's radically different constitution is the exception that proves the rule: it was the only state to restrain the executive's war powers by placing decision-making authority in war in another branch of government. If the Framers of 1787 had wanted to adopt either South Carolina's system, or a system requiring consultations with other bodies such as a council or Senate, they had a clear example to follow.

C. The Articles of Confederation and the Prelude to Constitutionalism

This Section offers a re-examination of the Articles of Confederation that suggests that the example of the Continental Congress is not inconsistent with the interpretation of war powers presented here. Assuming the Continental Congress to be a legislature, scholars commonly rely on the Articles to prove that war and foreign affairs were primarily "legislative" in character. A closer examination of the Articles will demonstrate that the Congress performed a primarily executive function, and that war and foreign affairs properly rested within the jurisdiction of such a body. In this sense the Articles represented a continuation of, rather than a rejection of, the British tradition.

Drafted in 1777 and ratified in 1781, the Articles of Confederation created the only national government Americans would know until 1788. Understandably, the Articles have become a focal point for his-

torical studies of war powers because they supplied many of the antecedents for various powers found in the Constitution. Since the Articles vested all national powers in the Continental Congress, including those over war and peace, historians often assume that the Framers believed the war powers to be legislative in nature. Arthur Bestor, for example, finds in the Articles evidence of a common belief that foreign policy decisions were "to be arrived at through legislative deliberation—the very antithesis of the idea of vesting the power of war and peace in executive hands."³⁴⁵

In examining the Articles of Confederation, one should not place too much emphasis on its allocation of war powers, because what the document establishes resembles more of a treaty organization than a national government. As Chief Justice John Marshall described the Articles, "[t]he confederation was, essentially, a league; and congress was a corps of ambassadors, to be recalled at the will of their masters."³⁴⁶

Focusing on the Congress' primary difficulties in raising revenue, the traditional approach to studying the Articles has focused on issues of federalism.³⁴⁷ The Articles, however, also make for an interesting study of the separation of powers, or lack thereof, particularly in the war powers context. Scrutinizing the predecessor to the Constitution shows that Congress under the Articles served as an executive, rather than a legislative, body. As the provisional government of the independent states, Congress assumed the former imperial powers of the King, while the state assemblies retained their authority over legislative powers such as taxation. The Articles provide support for the conclusion that war was primarily an executive, rather than legislative, function.

The drafters of the Articles vested all war powers in the Continental Congress. Article 9 stated that Congress had "the sole and exclusive right and power of *determining* on peace and war."³⁴⁸ Congress also had the sole authority

[of] entering into treaties and alliances . . . of establishing rules for deciding in all cases what captures on land or water shall be

345. Bestor, *supra* note 2, at 568; see also Berger, *supra* note 13, at 33.

346. John Marshall, "A Friend of the Constitution Essays," ALEXANDRIA GAZETTE, June 30-July 16, 1819, reprinted in JOHN MARSHALL'S DEFENSE OF MCCULLOCH V. MARYLAND 155, 199 (Gerald Gunther ed., 1969); see also Akhil R. Amar, *The Consent of the Governed: Constitutional Amendment Outside Article V*, 94 COLUM. L. REV. 457, 465 (1994) ("[The Continental Congress] was merely an international assembly of ambassadors, sent, recallable, and paid by state governments with each state casting a single vote as a state.").

347. John Jay, Alexander Hamilton, and James Madison devoted the first thirty-one papers of the *The Federalist* to criticizing the faults of the Articles' system. Concerns about foreign policy issues were likewise central to the Framers. See FREDERICK W. MARKS III, INDEPENDENCE ON TRIAL: FOREIGN AFFAIRS AND THE MAKING OF THE CONSTITUTION 3-51 (1986).

348. ARTICLES OF CONFEDERATION art. 9 (1777) (emphasis added).

legal, and in what manner prizes taken by land or naval forces in the service of the United States shall be divided or appropriated; of granting letters of marque and reprisal in times of peace.³⁴⁹

Article 9 also vested Congress with the authority to appoint and commission all military officers and the powers "to build and equip a navy; to agree upon the number of land forces, and to make requisitions from each State for its quota."³⁵⁰

The Articles required that nine states assent before Congress could "engage in a war," "grant letters of marque and reprisal" in peacetime, enter into treaties, fund an army and navy, or appoint a commander in chief.³⁵¹ At the same time, the Articles prohibited the states from exercising war powers individually, subject to certain exceptions. Article 6 declared that "[n]o state shall engage in any war" without congressional consent, unless it was "actually invaded by enemies," or it knew of an Indian attack so imminent that seeking congressional approval would result in dangerous delay.³⁵² No state could "grant commissions to any ships or vessels of war, [or] letters of marque or reprisal, except it be after a declaration of war by the United States," unless it "be infested by pirates."³⁵³ No state could maintain warships or standing armies without congressional permission during peacetime.

At first glance, it might appear that Article 9's catalogue of powers demonstrates an intent to vest all war powers in a legislature. This reading might suggest an understanding of war powers as legislative, or at least not executive, in nature. Some legal historians have argued that the drafters of the Articles reacted against the British allocation of war authority to the executive, and that they located the war powers in the legislature specifically to prevent the creation of a despotic executive.³⁵⁴

However, the Congress of the Articles was not the Congress of the Constitution. The Continental Congress did not play the role of a legislative body as we understand it today. Rather, the Congress had judicial, legislative, and executive functions more typical of a treaty organization than a sovereign government. The structure of Article 9, which enumerated Congress' powers, bears this out. It begins by giving Congress traditional executive powers—such as the powers to decide on war and peace and appoint government officials. It then gives Congress judicial powers, declaring that it shall act as an appellate court of last resort for inter-state disputes. Only after listing the executive and judi-

349. *Id.*

350. *Id.*

351. *Id.*

352. *Id.* art. 6.

353. *Id.*

354. See FISHER, *supra* note 1, at 2-3; Berger, *supra* note 13, at 32-33; Bestor, *supra* note 2, at 568.

cial powers does Article 9 proceed to those legislative powers most analogous to the Constitution's Article I, Section 8. Thus, the latter portion of Article 9 gives Congress the authority to coin money, fix weights and measures, establish post offices, and appoint officers and make rules to regulate the military. Article 9 vested executive, legislative, and judicial powers in Congress because Congress was all three branches of government wrapped up in one.

We should think of the Continental Congress as an executive and administrative body first, and as a legislature second. Congress did not have powers that the revolutionaries normally associated with a legislature, such as the authority to regulate trade or to levy taxes.³⁵⁵ These powers remained with the individual states, which retained "every Power, Jurisdiction and right" not expressly delegated under the Articles. Instead of acting as a legislature, the Continental Congress replaced the King as the imperial executive authority in the colonies. As one historian has concluded, "the executive and administrative responsibilities that had been exercised by or under the aegis of the king's authority were confided to the successor to his authority, the Congress."³⁵⁶

Thus, when the Congress exercised its war powers, it acted as an executive branch, rather than as a legislature—at least this was the understanding that the Framers of the Constitution shared.³⁵⁷ This explains why the Framers of the Articles used Blackstone's language describing the King's prerogatives in war and foreign affairs when they allocated powers to Congress. Conversely, the legislative powers held by Parliament remained firmly in the hands of the state assemblies.³⁵⁸ "[T]he legislative powers of Parliament tended to devolve upon the states, while the executive powers of the crown passed to Congress, which we should probably conceptualize as more of a plural executive

355. See generally THE FEDERALIST NOS. 11-13, *supra* note 304, at 65-83 (Alexander Hamilton).

356. JERRILYN GREENE MARSTON, KING AND CONGRESS: THE TRANSFER OF POLITICAL LEGITIMACY, 1774-76, at 303 (1987); see also JENNINGS B. SANDERS, EVOLUTION OF THE EXECUTIVE DEPARTMENTS OF THE CONTINENTAL CONGRESS 1774-87 (1935); Eugene R. Sheridan & John M. Murrin, *Introduction to CONGRESS AT PRINCETON: BEING THE LETTERS OF CHARLES THOMSON TO HANNAH THOMSON, JUNE-OCTOBER 1783*, at xxxiv-xxxviii (Eugene R. Sheridan & John M. Murrin eds., 1985).

357. For example, in the Constitutional Convention, Charles Pinckney of South Carolina said that he "was for a vigorous Executive but was afraid the Executive powers of [the existing] Congress might extend to peace & war &c which would render the Executive a Monarchy, of the worst kind, towit an elective one." 1 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 64-65 (Max Farrand ed., 1911) [hereinafter FARRAND].

358. MARSTON, *supra* note 356, at 304. The ineptness of the Congress in exercising what meager legislative powers it had rose to such levels that it often could not acquire a quorum to vote. See RICHARD B. MORRIS, THE FORGING OF THE UNION 1781-1789, at 91-95 (1987).

than a legislature," observe historians Eugene Sheridan and John Murrin.³⁵⁹

Hence, the story of the Continental Congress is a tale of failed attempts to organize its executive, not legislative, power. Problems arose not only because of the weaknesses of Congress' substantive powers in foreign relations, but also because of defects in its internal structure. At first, Congress conducted its war and foreign policies by committee, which led to haphazard and sometimes disastrous results.³⁶⁰ Recognizing that the key to reform lay in structural changes, Congress in 1781 created executive departments under the control of individual ministers for war, foreign affairs, navy, and finance.³⁶¹ But even executive reorganization failed to cure matters, as Congress still lacked the legislative authority to tax and to fund armies directly. It was these defects that would lead to demands for a new Constitution.

The story of the Articles also sheds light on the meaning of a declaration of war. Although it did not expressly grant Congress the authority to declare war, the Articles appear to assume that the war-declaring power was subsumed in the general power to decide on questions of war and peace. Other parts of the Articles show that the revolutionaries viewed this power primarily as one that defined the legal status of, and relationships between, American citizens and those of hostile nations under international law. Nor did the Articles contain an explicit provision requiring a declaration of war before the federal government could begin military operations.³⁶²

Consider, for example, that the declaration of war did play an important purpose in restricting the military operations of the independent states. Article 6 states:

[N]or shall any State grant commissions to any ships or vessels of war, nor letters of marque or reprisal, *except it be after a declaration of war* . . . against the kingdom or State, and the subjects thereof, against which war has been so declared, and under such regulations as shall be established by the United States in Congress assembled . . .³⁶³

This prohibition on state naval action without a declaration of war bears some interpretive significance for our study. First, like South

359. Sheridan & Murrin, *supra* note 356, at xxxiv. Richard Morris portrays a Congress, that for all its bungling, vigorously exercised the executive powers of the sovereign United States. See MORRIS, *supra* note 358, at 95-110.

360. See generally GEORGE C. WOOD, CONGRESSIONAL CONTROL OF FOREIGN RELATIONS DURING THE AMERICAN REVOLUTION 1774-1789 (1919).

361. See JACK N. RAKOVE, THE BEGINNINGS OF NATIONAL POLITICS: AN INTERPRETIVE HISTORY OF THE CONTINENTAL CONGRESS 198-205 (1979).

362. See ARTICLES OF CONFEDERATION art. 9 (1781).

363. *Id.* art. 6 (emphasis added).

Carolina's Constitution, it serves as an example of a path not taken by the Framers. If the delegates to the Constitutional Convention had wanted to prohibit the President from initiating hostilities with another nation, they could have borrowed Article 6 and adjusted it to apply to the federal executive as well. Second, Article 6 suggests that the drafters of the Articles understood the declaration of war's core purpose to be one relevant to international law. The declaration acted as a permission slip for the states to initiate hostile activities, but only against identified enemies. Without a declaration of war, international law would consider such naval attacks as acts of piracy, rather than as legitimate combat under the laws of war. In short, the declaration of war clothed what would have been an illegal act by the states—sending warships against another nation—with a legal status in international law.

Article 6 is also significant because it presents a neat contrast with Article 9's grant of war powers to Congress. Article 9 gave Congress the authority to decide on war and peace as well as the power to raise an army and navy. However, Article 9's provision, unlike Article 6's restrictions on the states, did not require Congress to issue a declaration of war before it initiated hostilities. Nor did Article 9 require a declaration of war before Congress raised a military force or authorized naval attacks. If the Articles' drafters had wanted to make a declaration of war an exclusive trigger for military operations, they certainly knew how to do it, for they included such a provision in Article 6's prohibitions on the states.

In conclusion, we might fairly say that the Articles were part of the tradition of war powers that began in England in the 1620s and continued through to the American states in the 1780s. From the seventeenth-century struggles between King and Parliament emerged a stable system supported by two pillars: executive initiative in the commencement and management of war, and legislative participation by means of the funding and impeachment powers. Courts did not interfere in war powers issues because the declaration of war substituted for a judicial declaration of a state of war. As a fundamental element of the British Constitution, this arrangement naturally characterized the institutional relationship between the royal governors and colonial assemblies. Once freed from the English yoke, the newly independent states experimented with efforts to curtail the structural independence of the executive branch, but left intact the substantive allocation of war powers between the branches.

This history formed the relevant context for the Framers who gathered in Philadelphia in the summer of 1787. They saw the dangers created when legislative controls weakened the executive, and they witnessed in New York, Massachusetts, and New Hampshire the promise of

an independent, unitary governor wedded to the traditional Anglo-American system of war powers. They also had before them the alternative paths, such as requiring legislative approval of military action or consultation with a council before engaging in war. Now that we comprehend what the Framers inherited from their English and colonial experiences, and imagine what they could have done differently, we can begin to understand what they eventually established in the new Constitution.

IV

THE NEW CONSTITUTION

Meeting in Philadelphia in the summer of 1787, the delegates to the Constitutional Convention devoted more of their energies toward creating a strong national government than toward detailing its precise internal organization. Beyond establishing the existence and general functions of the three branches, the Framers did not set down in writing the exact allocation of authority between the executive, legislative, and judicial branches. This silence might indicate that the Framers intended to leave to future Presidents, Congressmen, and Justices the freedom to work out the separation of powers for themselves. Alternatively, silence might indicate an intent to continue practices and relationships between the branches that were so widely understood as to need no specific description. This Section will show that both interpretations partially explain the Framers' approach. In establishing war powers, the Framers intended to adopt the traditional system they knew—executive initiative in war combined with a legislative role via the spending power. Yet, this very arrangement left the precise boundaries of war powers unfixed and subject, in each case, to the exercise of each branch's constitutional powers. In effect, the Framers demarcated a gray area in which the President and Congress could either cooperate in war or engage in an inter-branch brawl to achieve their desired goals.

In reinterpreting the Constitution's meaning, this Section examines several overlooked debates and reveals a more subtle approach to the separation of powers issues than has been put forth before by contemporary war powers scholarship. This Section also analyzes the arguments—both in the state conventions and in the press—that took place during the Constitution's ratification. We examine the Antifederalist-Federalist debates on the Constitution in a dynamic fashion to provide a clearer model of war powers.

This Section demonstrates a framework different from the straw man of unchecked executive discretion. Under the Framers' ideal, war would begin by the joint decision of President and Congress, each complementing the other branch's powers to ensure the efficient decision

on, and conduct of, war. However, the Framers realized that war could spring forth by accident or emergency, or in the midst of dissension among the branches. Because they did not intend the Constitution to be a suicide pact, the Framers permitted the executive to undertake the initiative in war, subject to legislative review during the appropriations process.

A. *The Constitutional Text in Context*

Our analysis begins with the constitutional text. In order to understand what the Constitution requires, we must place its text in the legal context of its day. Those who ratified the Constitution would not have understood its provisions in a vacuum, but instead would have compared and contrasted the document with both their legal understanding of the words and their understanding of how these provisions operated in the world of the eighteenth century. This Section concludes that the war powers provisions of the Constitution are best understood as an adoption, rather than a rejection, of the traditional British approach to war powers.

1. *The Declare War Clause*

The Framers included the declaration of war in the Constitution as a device to facilitate the federal government's representation of the nation in international affairs, and to make clear that the declaration of war was a power of the national government, not the state governments. As we have seen, a declaration of war performed a primarily juridical function under eighteenth-century international law, and it was this understanding that the Framers drew upon in giving Congress the authority to declare war. Critics, however, have misinterpreted it as primarily a separation of powers vehicle.

As we have seen, in the eighteenth-century mind, a *declaration* of war was not the same thing as a domestic *authorization* of war. In fact, a declaration of war was understood as what its name suggests: a declaration. Like a declaratory judgment, a declaration of war represented the judgment of Congress, acting in a judicial capacity (as it does in impeachments), that a state of war existed between the United States and another nation. Such a declaration could take place either before or after hostilities had commenced. While the power to "declare" war adds to Congress' store of powers, it does little to alter the relative domestic authorities of the executive and legislative branches. Its primary function was to trigger the international laws of war, which would clothe in legitimacy certain actions taken against one's own and enemy citizens.

This was the meaning attributed to a declaration of war by seventeenth and eighteenth-century scholars on the laws of nations. The works of Hugo Grotius,³⁶⁴ Emmerich de Vattel,³⁶⁵ Jean Jacques Burlamaqui,³⁶⁶ and Samuel Pufendorf³⁶⁷ exerted a greater influence on the minds of the Framers than the articles of today's "publicists" do on today's lawyers. In part, the revolutionary generation relied on English and continental legal authorities due to the disorganized nature of the colonial and early American legal systems.³⁶⁸

We can also understand the appeal of international law to Americans then—perhaps in contrast to today—when we consider America's place in the world of 1787. As *The Federalist* shows, the Framers remained ever-conscious of their nation's relative youth and vulnerability on the world stage. John Jay, the most prominent and respected of the Publius triumvirate, devoted his inaugural installments of *The Federalist* to the possibility that the European powers would divide and conquer the new nation, or frustrate its attempts to grow in territory and commerce.³⁶⁹ As the impressment controversy with Great Britain later would reveal, the new American nation often had to turn to international law, rather than military strength, to support its national interests.³⁷⁰ Two hundred years ago, Americans were the Melians more often than the Athenians.³⁷¹

In this context, it is not surprising that Madison, in *The Federalist* No. 41, made no mention of separation of powers concerns when discussing the Declare War Clause. Rather, the Clause was designed to allow the national government to provide "[s]ecurity against foreign danger," "one of the primitive objects of civil society."³⁷² Because protection against foreign danger "is an avowed and essential object of the American Union," Madison continued in No. 41, "[t]he powers requisite for attaining it, must be effectually confided to the federal

364. See GROTIUS, *supra* note 208.

365. See 2 VATTEL, *supra* note 207.

366. See J.J. BURLAMAQUI, *THE PRINCIPLES OF NATURAL AND POLITIC LAW* (trans. 1817).

367. See SAMUEL PUFENDORF, *OF THE LAW OF NATURE AND NATIONS* (1688).

368. See Yoo, *supra* note 160, at 1610-11; see also WILLIAM E. NELSON, *AMERICANIZATION OF THE COMMON LAW: THE IMPACT OF LEGAL CHANGE ON MASSACHUSETTS SOCIETY, 1760-1830* (1975); WOOD, *supra* note 175, at 298-302. In reading the ratification debates, one cannot help but be impressed by the Framers' intimate knowledge of the classical authors such as Tacitus, Livy, Cicero, and Sallust as well as more recent writers such as Blackstone, Locke, and Montesquieu.

369. See *THE FEDERALIST* Nos. 2-5, *supra* note 304, at 8-27 (John Jay). On the Framers' national security concerns and the passage of the Constitution, see MARKS, *supra* note 347, at 3-51.

370. For a wonderful and rich account of the American problems with impressment and international law, see generally Ruth Wedgwood, *The Revolutionary Martyrdom of Jonathan Robbins*, 100 YALE L.J. 229 (1990).

371. See 5 THUCYDIDES, *THE PELOPONNESIAN WAR* ch. 7 (trans. 1951).

372. *THE FEDERALIST* No. 41, *supra* note 304, at 269 (James Madison).

councils.³⁷³ Declaring war under international law was one vital national security power that any truly national government had to possess.

There is ample evidence that European theories of international law made their way into American thought and practice. As mentioned earlier, Blackstone, the colonists' foremost legal authority, often directly borrowed from the likes of Grotius and Vattel. Federalists and Antifederalists alike repeatedly referred to and discussed international law theories and concepts. The revolutionary state constitutions and the Articles of Confederation referred specifically to the declaration of war.³⁷⁴

The Framers turned to international law to define phrases such as to "declare war" because it was international law (and international politics) which gave these powers meaning. Consistent with Chief Justice John Marshall's holding in *The Schooner Charming Betsy*³⁷⁵ that international law serves as a canon for statutory construction, it is appropriate to use international law as a canon of construction in the constitutional context. For example, in explaining the piracy clause to the Virginia ratifying convention in 1788, James Madison described that the clause incorporated international law understandings.³⁷⁶

American jurists in the decades following the ratification of the Constitution continued to interpret the declaration as a notification mechanism that defined the wartime rights of citizens and neutrals. Writing after 1789, Chancellor Kent described the declaration of war thus:

[S]ome formal public act, proceeding directly from the competent source, should announce to the people at home, their new relations and duties growing out of a state of war, and which should equally apprise neutral nations of the fact, to enable them to conform their conduct to the rights belonging to the new state of things. . . . Such an official act operates from its date to le-

373. *Id.* Scholars of war powers often neglect the surrounding context of *The Federalist No. 41*, and are instead transfixed by the language stating the necessity of the Declare War Clause. Unfortunately, this practice of selective quotation makes the Clause appear to be a separation of powers provision, when its context clearly shows it to be a federalism provision.

374. See *supra* text accompanying notes 283-363.

375. 6 U.S. (2 Cranch) 64, 118 (1804); see Ralph G. Steinhardt, *The Role of International Law as a Canon of Domestic Statutory Construction*, 43 VAND. L. REV. 1103, 1135-79 (1990).

376. 3 ELLIOT, *supra* note 119, at 531.

In compositions of this kind, it is difficult to avoid technical terms . . . I will illustrate this by one thing in the Constitution. There is a general power to provide courts to try felonies and piracies committed on the high seas. *Piracy* is a word which may be considered as a term of the law of nations. *Felony* is a word unknown to the law of nations, and is to be found in the British laws, and from thence adopted in the laws of these states. It was thought dishonorable to have recourse to that standard. A technical term of the law of nations is therefore used, that we should find ourselves authorized to introduce it into the laws of the United States.

galize all hostile acts, in like manner as a treaty of peace operates from its date to annul them.³⁷⁷

In his *Commentaries on the Constitution*, Justice Story similarly discussed the declaration of war for its impact on *domestic* legal relationships.³⁷⁸

Thus, Americans of the eighteenth century would have understood that the power to declare war dealt with setting the formal, legal relationship between two nations, and not with authorizing real hostilities. Once war was declared, a citizen of the United States could seize a ship flying French colors regardless of the state of relations between the two nations. However, if Congress has not declared a state of hostilities, the citizen must return the ship and pay damages; if a declaration has issued, he may sell the ship as a prize.³⁷⁹ But in neither case is a declaration of war necessary to "authorize," *ex ante*, the seizure of the ship.

Of course, in legitimating hostilities, this core function of a declaration of war could be thought to "authorize" war by justifying federal wartime policies. Because the declaration of war has a primary domestic effect of notifying the citizens of their new rights and obligations, it grants the government a different standard of conduct in relation to those rights and duties. Thus, a declaration of war would permit the government to treat its citizens in a way that restricted peacetime liberties in favor of a more effective war effort. The Fifth Amendment, for example, generally guarantees the right to an indictment or presentment by grand jury for capital crimes, "except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or

377. 1 KENT, *supra* note 250, at 54. Kent notes that during the French-Indian War of 1756, "vigorous hostilities had been carried on between England and France for a year preceding" any declaration of war. 1 *id.* at 53-54. Kent used the example to point out that going to war and a declaration of war are two different things.

378. According to Story:

[I]n the exercise of such a prerogative as declaring war, despatch, secrecy, and vigor are often indispensable, and always useful towards success. On the other hand, it may be urged in reply, that the power of declaring war is not only the highest sovereign prerogative, but that it is, in its own nature and effects, so critical and calamitous, that it requires the utmost deliberation, and the successive review of all the councils of the nation. War, in its best estate, never fails to impose upon the people the most burdensome taxes, and personal sufferings. It is always injurious, and sometimes subversive of the great commercial, manufacturing, and agricultural interests. Nay, it always involves the prosperity, and not unfrequently the existence, of a nation.

2 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 1171 (1873). Justice Story went on to describe the power to declare war as a legislative power, because "[t]he representatives of the people are to lay the taxes to support a war, and therefore have a right to be consulted as to its propriety and necessity." 2 *id.* He also believed that "[t]he executive is to carry it on, and therefore should be consulted as to its time, and the ways and means of making it effective." 2 *id.* I think that Story here is again referring to legislative control over the domestic effects of war, rather than to war-making. In discussing the reason for giving the legislature the power to declare war, Story refers only to a domestic function: raising taxes.

379. See *Little v. Barreme*, 6 U.S. (2 Cranch) 170, 178-79 (1804).

public danger."³⁸⁰ In time of war, Congress may authorize seizure of property belonging to foreigners without the need for compensations as required by the Takings Clause.³⁸¹ During the Quasi-War, Federalists clamored for a declaration of war against France, because it would allow the passage *at home* of broad sedition laws, higher taxes, an expanded peacetime army, and other war measures.³⁸² Thus, a declaration of war had a domestic function, which permitted new government actions in light of the changed legal status of its citizens.³⁸³ A declaration of war did not grant permission for executive action abroad, as we would expect of an "authorization" of war, but only set the stage for the exercise of domestic wartime powers, primarily by Congress.

This interpretation of "declare" war is also compatible with the Framers' understanding of the power to declare as applied in other contexts.³⁸⁴ A declaration did not create or authorize; it recognized. Most Americans in 1787 would have been familiar with the declarations of rights that prefaced their state constitutions. These declarations did not create or authorize rights by positive enactment. Instead, they declared what rights existed and were inherent in the People, such as the right to alter and reform government. Similarly, a declaration of war announced Congress' judgment that a *legal* state of war exists between the United States and another country. The declaration gave legitimacy to hostile acts which would be illegal in a time of peace.

The Framers were also familiar with the declaratory nature of the Declaration of Independence. When the Continental Congress convened in Philadelphia in the summer of 1776, the delegates were not meeting to authorize military action; the machinery of war had already started running.³⁸⁵ Instead, the delegates sought to decide what legal significance they were to give to the break with England. While containing a catalogue of individual rights and of new sovereign powers, the work of the Continental Congress resembles the traditional British declaration of war more than a declaration of rights. Much like a complaint in a civil lawsuit, the Declaration of Independence revisits the

380. U.S. CONST. amend V; *cf. Reid v. Covert*, 354 U.S. 1, 22 (1957) (holding that civilian dependents who accompany military personnel to foreign countries are entitled to a jury trial for capital crimes).

381. See *Brown v. United States*, 12 U.S. (8 Cranch) 110, 127-29 (1814).

382. See RICHARD H. KOHN, *EAGLE AND SWORD: THE FEDERALISTS AND THE CREATION OF THE MILITARY ESTABLISHMENT IN AMERICA, 1783-1802*, at 227-29 (1975).

383. See generally J. Gregory Sidak, *War, Liberty, and Enemy Aliens*, 67 N.Y.U. L. REV. 1402 (1992).

384. See, e.g., John C. Yoo, *Our Declaratory Ninth Amendment*, 42 EMORY L.J. 967, 970-99 (1993).

385. Representatives of the colonies had first met in 1774 to adopt a non-importation policy on British goods. After various colonies called out their militias, hostilities broke out on April 19, 1775, first at Lexington and Concord and later at Bunker Hill. See generally BERNARD BAILYN ET AL., *THE GREAT REPUBLIC* (1977).

"history of repeated injuries and usurpations"³⁸⁶ suffered at the hands of the Crown—the suspension of the laws, the use of bench trials, the taxation without representation—and the failed efforts at reconciliation.³⁸⁷ It lists the remedy sought (independence), the law upon which relief is sought ("the Laws of Nature and of Nature's God"), and the forum (before the "Supreme Judge of the world").³⁸⁸ The Declaration of Independence did not simply mirror British declarations of war, which usually included a detailed list of grievances, what relief was sought, and a description of the hostilities.³⁸⁹ It was also consistent with the contemporary understanding of the nature of war, described by Grotius and other international scholars as a system of interstate dispute resolution,³⁹⁰ in which the declaration served the function of a complaint. War was as much a legal status as an act, with the declaration's primary purpose to define the change in legal relationships between states.

The Framers' belief that a declaration of war was unnecessary when a nation was under attack provides further evidence that declarations of war were legally formal, or even ceremonial, in purpose. Consistent with the theory of international law that a declaration of war was unnecessary for a nation under attack,³⁹¹ future Supreme Court Justice James Iredell, under the pseudonym "Marcus," argued, "What sort of a government must that be, which, upon the most certain intelligence that hostilities were meditated against it, could take no method for its defence, till after a formal declaration, of war, or the enemy's standard was actually fixed upon the shore."³⁹²

Iredell and other Federalists, such as Alexander Hamilton, who made the same argument in *The Federalist No. 25*,³⁹³ saw that an inva-

386. THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776).

387. *Id.* paras. 3-4, 19-20, 30-31.

388. *Id.* paras. 1, 32.

389. See, e.g., 11 COBBETT'S PARLIAMENTARY HISTORY OF ENGLAND 1-3 (1812) (declaration of war against Spain on November 15, 1739).

390. See Benedict Kingsbury & Adam Roberts, *Introduction to HUGO GROTIUS AND INTERNATIONAL RELATIONS* 16 (Hedley Bull et al. eds., 1990).

391. See, e.g., BURLAMAQUI, *supra* note 366, pt. IV, ch. IV, para. XVII, at 361-64.

392. James Iredell ("Marcus"), *A System of Government Which I Am Convinced Can Stand the Nicest Examination: Answers to Mason's "Objections,"* NORFOLK & PORTSMOUTH J., Mar. 12, 1788, reprinted in 1 DEBATE ON THE CONSTITUTION, *supra* note 16, at 384, 392-93.

393. THE FEDERALIST No. 25, *supra* note 304, at 161 (Alexander Hamilton) ("As the ceremony of a formal denunciation of war has of late fallen into disuse, the presence of an enemy within our territories must be waited for as the legal warrant to the government to begin its levies of men for the protection of the State."). Hamilton's views on the war powers changed before and after the adoption of the Constitution. Compare 1 FARRAND, *supra* note 357, at 292 (Hamilton's proposed frame of government in the Constitution Convention) with Alexander Hamilton, *Pacificus No. 1*, reprinted in 15 PAPERS OF ALEXANDER HAMILTON, *supra* note 123, at 33. However, his view that defensive wars required no declaration of war remained consistent. See Alexander Hamilton, *The Examination No. 1*, reprinted in 25 *id.* at 444, 453-57.

sion, or even the threat of attack, converted peacetime into wartime just as easily as a declaration of war. Under international law, by its act of invasion, the offensive nation effectively transformed the legal relationship between the two nations into one of war, rendering a declaration of war by the defending nation superfluous. A declaration of war only recognized the existing state of war, and was unnecessary for the commencement of hostilities by the invaded nation. In defending the federal government's power to counter hostilities by others without a declaration of war or actual attack, the Framers' thoughts reflected the teachings of the international law of the time.

A declared "war" bore a specific meaning which we today would associate with total war. Burlamaqui called such wars "perfect". wars because they "entirely interrupt the tranquility of the state, and lay[] a foundation for all possible acts of hostility."³⁹⁴ "Imperfect" wars were less than total wars,³⁹⁵ like the covert or limited wars, such as the Vietnam and Korean conflicts.

The Framers' understanding that declarations of war were not required to authorize combat was expressed during the ratification period. For example, Alexander Hamilton noted in *The Federalist*, "The ceremony of a formal denunciation of war has of late fallen into disuse"³⁹⁶ Other Framers, both Federalist and Antifederalist, echoed Hamilton's judgment that declarations of war had become obsolete in an era of great power conflict.³⁹⁷ This understanding endured beyond the framing of the Constitution. In 1833, Joseph Story wrote that "formal declarations of war are in modern times often neglected, and are never necessary."³⁹⁸ To read the Declare War Clause as requiring Congress to issue an outmoded declaration of war before the nation could commence hostilities would have seemed foolhardy, if not misguided, to an American of the eighteenth century.

Interpreting "declaration" to mean a judgment of a current status of relations, not an authorization of war, provides a new understanding of Congress' role in war, one which is not purely legislative. We should conceptualize the war clause as vesting the legislature with a *judicial* function, which involves a capacity for judgment in the manner of a

394. BURLAMAQUI, *supra* note 366, pt. IV, ch. III, para. XXX, at 333. In the early case of *Bas v. Tingy*, the Supreme Court held that such limited wars did not require a declaration of war by Congress. 4 U.S. (4 Dall.) 37, 39-40 (1800). According to the Court, Congress could decide to wage such wars if it chose to without a declaration, although none of the Justices examined whether the President could do so as well. 2 *id.* At the very least, this evidence of the original understanding suggests that the declaration of war clause did not operate in less than "total" war situations.

395. BURLAMAQUI, *supra* note 366, pt. IV, ch. III, para. XXX, at 333.

396. THE FEDERALIST No. 25, *supra* note 304, at 161 (Alexander Hamilton).

397. See, e.g., Brutus, *Essay X*, N.Y. J., Jan. 24, 1788, reprinted in 2 STORING, *supra* note 114, at 413, 415; Iredell, *supra* note 392, at 393.

398. 2 STORY, *supra* note 378, at § 1185.

court, rather than the enactment of positive law in the style of a legislature. Formally vesting one branch of government with powers that another branch inherently ought to exercise did not trouble the Framers. They gave the President the right to veto legislation, which they thought of as a legislative power; they gave the President and the Senate the power to enter into treaties, which they also believed to be a legislative function.³⁹⁹ Thus, in discussing the treaty power, Publius argued that "whatever name be given to the power of making treaties . . . certain it is that the people may with much propriety commit the power to a distinct body from the legislature, the executive or judicial."⁴⁰⁰ It is this formal mixing of powers that underlies Madison's famous argument in *The Federalist No. 47* that the departments of government might have a "partial agency in, or . . . controul over the acts of each other."⁴⁰¹

Thinking of Congress as exercising judicial functions comes more easily when we consider that Article I already vests the legislature with the power of impeachment. Impeachment requires the Senate to act as nothing less than a court of first and last resort.⁴⁰² As the Supreme Court implicitly recognized in *Nixon v. United States*,⁴⁰³ the Constitution vests Congress with a judicial function in impeachment, thereby precluding the federal courts from subsequent review. Although the Court in *Nixon* did not make the connection suggested here, and instead relied upon the political question doctrine, it reached the correct result because the Constitution already vests *all* judicial power over impeachments to Congress. In other words, the Court could not permit itself to review impeachment proceedings because to do so would vest Article III courts with appellate jurisdiction in derogation of the Senate's own judicial powers.

Analogizing to impeachment supports the legitimacy of the Article III courts' refusal to review war powers cases. Because the Constitution has vested Congress with the entire judicial power to decide whether the United States is in a state of war, no role for the courts is warranted. To be sure, the courts may still adjudicate cases that involve the ramifications of the nation's wartime or peacetime status, such as insurance cases that have wartime clauses.⁴⁰⁴ But the Constitution's allocation of the power "to declare war" in Congress divests the courts of any judicial

399. See THE FEDERALIST NO. 73, *supra* note 304, at 494-99 (Alexander Hamilton) (executive may exercise legislative veto power); No. 64, at 432-38 (John Jay) (executive and Senate may exercise legislative treaty power).

400. THE FEDERALIST NO. 64, *supra* note 304, at 436 (John Jay).

401. THE FEDERALIST NO. 47, *supra* note 304, at 325 (James Madison) (emphasis omitted).

402. See CHARLES L. BLACK, JR., IMPEACHMENT: A HANDBOOK, 9-14 (1974).

403. 113 S. Ct. 732, 735-39 (1993).

404. For example, American courts have decided insurance cases which demand the interpretation of war-risk clauses. See John H. Ely, *Suppose Congress Wanted a War Powers Act That Worked*, 88 COLUM. L. REV. 1379, 1409 & n.88 (1988).

power in war, just as the impeachment clause deprives the courts of any involvement in impeachments. The courts simply must accept the actions of the political branches in war matters as valid indications of whether a state of war exists.⁴⁰⁵

2. *Other Constitutional War Powers Provisions*

If we read the text of the Declare War Clause in this way, then other provisions in the Constitution gain in significance for discerning the structure of war powers. The war clauses' juridical function becomes even clearer when we examine the clauses' textual companions in the Constitution.

a. *Other Formal Congressional Powers*

Article I, Section 8, Clause 11 not only gives Congress the power to declare war but also the authority to "grant Letters of Marque and Reprisal, and make Rules concerning Captures on Land and Water." These powers are similar to that of declaring war in that defining "rules of Capture" is a declaratory function, rather than an authorizing one. Letters of marque and reprisal also played a formal legal role in both the English and international law of the time. A government could issue such letters only to private citizens who held a claim against another state and could not obtain compensation. The letters gave legal sanction to attempts at redress by seizing the property of the other nation, and saved capturers from being considered pirates under international law. As Blackstone explained, "letters of marque and reprisal (words in themselves synon[y]mous and signifying a taking in return) may be obtained, in order to seize the bodies or goods of the subjects of the offending state, until satisfaction be made"⁴⁰⁶

Although letters of marque and reprisal first appeared in this form in the Middle Ages, by the late eighteenth century their use appears to have grown to encompass low-level conflicts between nations. The English King could issue general, as well as limited, letters of marque, which were given to armed trading ships and privateers to attack foreign ships. Letters of reprisal referred generally to the use of force as retaliation for an injury caused by a foreign nation.⁴⁰⁷ Letters of marque and reprisal thus came to refer to a mechanism of sovereign consent to

405. For a more detailed discussion, see *infra* text accompanying notes 548-558.

406. 1 BLACKSTONE, *supra* note 184, at *250-51; see 2 STORY, *supra* note 378, §§ 1175-76 (describing letters of marque and reprisal).

407. Jules Lobel, *Covert War and Congressional Authority: Hidden War and Forgotten Power*, 134 U. PA. L. REV. 1035, 1042-44 (1986); see 1 MATTHEW HALE, *HISTORIA PLACITORUM CORONAE: THE HISTORY OF THE PLEAS OF THE CROWN* 162 (1736).

the use of private force against another nation, but it does not appear that the phrase referred to all forms of imperfect war.⁴⁰⁸

Some scholars, however, have interpreted the war clause to give Congress control over all forms of war, whether they be total and declared, or limited and undeclared.⁴⁰⁹ They read the *marque* and reprisal provision, even though it refers specifically only to *marque* and reprisal letters, as giving Congress control over all forms of hostilities short of a declared war. Surely this goes too far, although it is quite true that Blackstone and the international law scholars viewed such letters as a species of undeclared war.⁴¹⁰ Perhaps the better view is that the Framers intended the Clause to give Congress control over these uses of private force to conduct hostilities, because these situations would produce difficulties under domestic and international law. But reading the Clause more broadly stretches the text too far. Letters of *marque* and reprisal do not clearly refer to the use of the state's own military against another state. If the Framers had intended to place strict regulations on the public use of force in undeclared war situations, we can reasonably have expected them to use more direct, relevant language to express their meaning.

Regardless of the extent of hostilities referred to, the important point remains that letters of *marque* and reprisal conveyed a certain meaning at international law. Holders of letters of *marque* or reprisal had a right, under international law, to attack or seize the person or property of another nation, in order to recover a debt or satisfy an injury.⁴¹¹ Because international law prohibited hostilities waged by private persons, states normally could treat such persons as pirates under international law or as robbers and murderers under municipal law. But if the attacker possessed a letter of *marque* or reprisal, his actions received the protections granted by international law to combatants. According to Blackstone, who sometimes lifted passages on international law verbatim from Grotius, "if any subjects of the realm are oppressed in time of truce by any foreigners, the king will grant *marque* in due form, to all that feel themselves grieved."⁴¹² If the foreigner did not "make due satisfaction or restitution," then "by virtue of these [letters,] [the subject] may attack and seize the property of the aggressor nation, without hazard of being condemned as a robber or pirate."⁴¹³ Thus, the letter

408. See Lobel, *supra* note 407, at 1044-47.

409. LOFGREN, *supra* note 114, at 35-36; REVELEY, *supra* note 2, at 65.

410. See 1 BLACKSTONE, *supra* note 184, at *250 (letters evidenced "only an incomplete state of hostilities, and generally ending in a formal denunciation of war").

411. See 3 GROTIUS, *supra* note 208, at ch. 2, pts. 4-5.

412. 1 BLACKSTONE, *supra* note 184, at *251.

413. 1 *id.*

did not authorize the efforts to recover satisfaction so much as it immunized offensive conduct a letter-holder undertook.⁴¹⁴

b. The President's Powers

The signal innovation of the new frame of government, the presidency, would have caught the eye of any eighteenth-century reader. Many Americans in a society still infused by hierarchical patterns of social, political, and economic relations⁴¹⁵ would have viewed the President as, if not a King, at least a paternal figure vested with the duty of protecting his fellow citizens.

This paternal vision of the President was consistent with the Framers' knowledge that the office would be held first by George Washington, the victorious Commander-in-Chief of the Continental Army, the modern-day Cincinnatus who had laid down his arms after the war and returned to life as a farmer. As Pierce Butler, a delegate to the Philadelphia Convention, wrote afterwards, the powers of the President were

greater than I was disposed to make them. Nor . . . do I believe they would have been so great had not many of the members cast their eyes towards General Washington as President; and shaped their Ideas of the Powers to be given to a President, by their opinions of his Virtue.⁴¹⁶

In discussing this phenomenon, Clinton Rossiter describes Washington's record as pointing "toward unity, strength, and independence in the executive."⁴¹⁷ "We cannot measure even crudely the influence of the commanding presence of the most famous and trusted of Americans,"⁴¹⁸ Rossiter concludes.

The Framers established the President's leadership role in war by vesting the office with the commander-in-chief power. Americans of the Framers' generation would have widely understood the commander-in-chief power as a continuation of the English and colonial tradition in war powers. The state constitutions both expressed this understanding and provided the relevant legal context for interpreting the new federal Constitution. Dissatisfied with the Continental Congress, leading revolutionaries greatly admired the constitutions of New York, Massachusetts, and New Hampshire, which as we have seen, vested the

414. As the Marshall Court found in its international law cases, the nature of the letter produced a significant impact on the rights and liabilities of the parties to numerous maritime disputes. See G. EDWARD WHITE, *THE MARSHALL COURT AND CULTURAL CHANGE, 1815-1835*, at 884-926 (1988).

415. See GORDON S. WOOD, *THE RADICALISM OF THE AMERICAN REVOLUTION* 43-56 (1991).

416. Letter from Pierce Butler to Weedon Butler (May 5, 1788), in 3 FARRAND, *supra* note 357, at 301-02.

417. ROSSITER, *supra* note 318, at 222.

418. *Id.*

governor with expansive powers.⁴¹⁹ In *The Federalist*, Alexander Hamilton noted that the new Constitution owed a large debt to the Massachusetts Constitution of 1780.⁴²⁰ He and his colleagues also expressed high regard for the strong executive leadership exercised by Governor Clinton under the New York Constitution of 1777, which was the model for the Massachusetts Constitution's executive powers.⁴²¹ Massachusetts and New Hampshire's Constitutions, which embraced the concept of a vigorous, independent executive in both war and peace, informed the meaning of the federal Constitution's clauses on executive power for Americans of the eighteenth century.

Thus, the meaning of the "Commander in Chief" language of Article II can be fleshed out by Massachusetts and New Hampshire's description of the Commander in Chief powers of their governors. Both of these state constitutions granted to the Commander in Chief the authority to fully control the military, and to use it to "kill, slay, and destroy" by any appropriate means anyone who attempted or planned to attack or even "annoy[]" the state.⁴²² Alexander Hamilton, in *The Federalist No. 69*, explicitly compared the governors' commander-in-chief powers in those two states with that of the President's. Although Hamilton suggested the possibility that the governors may have had more power than the President because they were commanders in chief of the navy as well as the army, he clearly indicated that the President's command over the army was equal to that of the governors.⁴²³ Reading the proposed Constitution in the context of the state constitutions would have come naturally to an eighteenth-century American, because, at the time, the state texts constituted the only other documents that bore a similar level of legal significance to the Constitution.⁴²⁴

419. See *supra* text accompanying notes 311-340.

420. See THE FEDERALIST No. 69, *supra* note 304, at 464 (Alexander Hamilton).

421. See THACH, *supra* note 294, at 37-40.

422. MASS. CONST. art. VII (1780), reprinted in 3 THORPE, *supra* note 271, at 1901; N.H. CONST. (1784), reprinted in 4 *id.* at 2463-64. See *supra* text accompanying notes 321-323.

423. After cataloguing the powers of the President versus that of the King, Hamilton wrote:

[T]he Constitutions of several of the States, expressly declare their Governors to be the Commanders in Chief as well of the army as navy; and it may well be a question whether those of New-Hampshire and Massachusetts, in particular, do not in this instance confer larger powers upon their respective Governors, than could be claimed by a President of the United States.

THE FEDERALIST No. 69, *supra* note 304, at 465-66 (Alexander Hamilton).

Although it appears otherwise, Hamilton's statement may not actually reveal a belief that the President's power ranks below that of the two governors. As we will see *infra* text accompanying notes 521-523, Hamilton purposely, and I think misleadingly, disparaged the President's powers in an attempt to deflect strong Antifederalist criticism. Furthermore, Hamilton only goes so far as to state that the comparison is an open "question," which, at the very least, indicates that others probably were making the association as well.

424. For examples of such overt comparisons, see, e.g., THE FEDERALISTS No. 69, *supra* note 304, at 464 (Alexander Hamilton); No. 81, at 544-45 (same); No. 83, at 565-66 (same).

Provisions found in the state constitutions that were not included in the Constitution also demonstrate the Framers' intent to create a strong executive in the war powers arena. The Philadelphia delegates decided to sweep state restraints on the executive into the dustbin of history. The Constitution did not establish a council with joint control over the military, nor did it require the President to seek legislative permission before engaging the military. Absent was any clause, such as that adopted by South Carolina, which declared "[t]hat the governor and commander-in-chief shall have no power to commence war, or conclude peace" without legislative approval.⁴²⁵ Also absent were the limitations imposed by legislative appointment of the executive, by limited opportunity for re-election, by lack of a veto power, or by multiple executive officials. Rather, the Framers of the Constitution established a presidency whose unity and energy would give the executive branch "[d]ecision, activity, secrecy, and dispatch."⁴²⁶

A comparison of the state and federal constitutions also would have suggested to an eighteenth-century American that the grants of war powers to Congress mimicked the authorities exercised by the legislatures in England, the colonies, and the states. Congress' powers to "raise and support Armies," to "provide and maintain a Navy," to "make Rules for the Government and Regulation of the land and naval Forces," to "provide for calling forth the Militia," and to "provide for organizing, arming, and disciplining, the Militia,"⁴²⁷ initially would have appeared as transfers of power from the states to the federal government. Closer examination also revealed these powers as checks which prevented the President from raising and supporting his armies independently.⁴²⁸ Thus, while the powers to raise and support armies and to

425. S.C. CONST. art. XXXIII (1778), reprinted in 6 THORPE, *supra* note 271, at 3255.

426. THE FEDERALIST NO. 70, *supra* note 304, at 472 (Alexander Hamilton). As Rossiter has described it, the Constitution created

a President [who] had a source of election legally separated if not totally divorced from the legislature, a fixed term and untrammelled reeligibility, a fixed compensation (which could be "neither increased nor diminished" while he was in office), immunity from collective advice he had not sought (whether tendered by the Court, the heads of executive departments, or a council of revision), and broad constitutional powers of his own. It would be his first task to run the new government: to be its administrative chief, to appoint and supervise the heads of departments and their principal aides, and to "take care" that the laws were "faithfully executed." He was to lead the government in its foreign relations, peaceful and hostile, and he was, it would appear, to be a ceremonial head of state, a "republican monarch" with the prerogative of mercy.

ROSSITER, *supra* note 318, at 221.

427. U.S. CONST. art. I, § 8, cls. 12-16.

428. See 1 WILLIAM W. CROSSKEY, POLITICS AND THE CONSTITUTION IN THE HISTORY OF THE UNITED STATES 423-25 (1953). Crosskey, however, goes too far in arguing that these provisions served *only* a separation of powers role. Clearly, they have both federalism and separation of power purposes. It might be tempting, and even more convincing, to argue that the military powers mentioned in Article I, Section 8 might have been intended to serve *only* a federalism role, but that too would be taking the argument too far.

regulate the military possessed a federalism purpose, they had a separation of powers function as well.

One final aspect of the Constitution's text is relevant for our inquiry. Not only did the Constitution allocate war-making authorities between the branches of the federal government, it also imposed specific prohibitions on the independence of the states in foreign relations. The last paragraph of Article I, Section 10 states: "No State shall, without the Consent of Congress . . . keep Troops, or Ships of War in time of Peace, enter into any Agreement or Compact with . . . a foreign Power, *or engage in War, unless actually invaded, or in such imminent Danger as will not admit of delay.*"⁴²⁹ Given the purpose of a national government, the Constitution logically prevents the states from maintaining a standing military, from entering into international agreements, and from waging war. Some have interpreted Section 10 as implicitly recognizing that the President could wage war unilaterally in the same emergency situations—invasion or imminent danger—that the states could.⁴³⁰

This reading misses the Clause's greater significance for interpreting federal war powers. Section 10 demonstrates that when the Framers wanted to prohibit the initiation of hostilities, they knew how to be quite clear—thus the phrase "No state shall . . . *engage in war.*"⁴³¹ If the Framers intended to require congressional consent before war, they again were perfectly capable of making their wishes known, as evidenced by the second and third paragraphs of Section 10, which begin, "No state shall, without the Consent of Congress."⁴³² Had the Framers intended to prohibit the President from initiating wars, or to require him to receive congressional approval beforehand, they easily could have incorporated a Section 10 analogue into Article II. ("The President shall not, without the Consent of Congress . . .") But the Framers chose not to, and instead left the allocation of war powers intact.

We should resist the temptation to see innovation and novelty in every constitutional clause. Of course, the Framers intended to alter certain aspects of traditional Anglo-American forms of government. But transferring the power to declare war from the executive to the legislature does not necessarily reflect a general desire to reallocate all of the war powers. Instead, we should construe the Constitution's spare language concerning war powers within the context of eighteenth-century British, colonial, and state governments, which had employed a system of executive initiative balanced by legislative appropriation. Ex-

429. U.S. CONST. art. I, § 10 (emphasis added).

430. See, e.g., ELY, *supra* note 1, at 7.

431. U.S. CONST. art. I, § 10 (emphasis added).

432. *Id.*

amined in this light, the Constitution enacts a system that provides for agreement between the branches, but allows for discord as well.

B. The Constitutional Convention and the Allocation of War Powers

Although the intent of those who drafted the Constitution may not be conclusive, especially if that intent is not apparent from the text or was not made known during ratification, such evidence can be relevant in establishing the contemporary understandings of war powers. Statements and arguments made during the drafting of the Constitution support what is evident from the Constitution's text: the war clauses establish a flexible system of war powers that does not give the legislature the predominant role suggested by today's scholars.⁴³³

Delegates came to Philadelphia to repair the defects of the Articles of Confederation, including what they saw as an inability to provide a sufficient defense against invasion.⁴³⁴ This weakness arose not because the Congress was unable to initiate war, but because it had to rely on the good faith of the states to raise and supply the military. The Framers quickly corrected this problem by expanding federal powers in foreign affairs at the expense of the states. The Constitution not only vested the federal government with the power to raise, supply, and lead the national military, but it also divested the states of the ability to maintain peacetime armies and to wage war.

While the Framers made clear that the national government, not the states, should exclusively govern the nation's foreign affairs, when it came to the allocation between the President and Congress, the Framers did not seek to place complete power in one branch. Some Framers initially hoped to place Congress at the forefront in decisions on war, but this approach did not prevail. Rather, the provisions that they adopted contemplated overlapping competencies and powers held by equal, although structurally different, branches.

When the battle over the Constitution shifted from Philadelphia to the states, intelligent and forceful critiques forced the Federalists to express their vision of war in more concrete terms. The Federalist re-

433. This analysis is limited by the reliability of the documentary records we have on the Constitutional Convention. James Madison's notes provide the most complete and objective record of the Convention. Unfortunately, it is likely that Madison was able to record, at best, only ten percent of the speeches made at the Convention, and that his notes also contain expanded versions of ideas that he put forth only in embryonic form during the summer of 1787. James H. Hutson, *The Creation of the Constitution: The Integrity of the Documentary Record*, 65 TEX. L. REV. 1, 34-35 (1986); Richard B. Bernstein, Review Essay, *Charting the Bicentennial*, 87 COLUM. L. REV. 1565, 1604-06 (1987). Aside from ninety percent of the convention speeches, we also have no record of the informal discussions between delegates. The limited nature of the documentary evidence, however, persuades all the more for reliance upon the institutional and political history presented in this Article.

434. See, e.g., 1 FARRAND, *supra* note 357, at 18-19 (speech of Edmund Randolph (May 29, 1787)).

sponded to the Antifederalist attack by defending a system in which the President and legislature would each use their independent powers as they saw fit, and in which the courts and legal sanctions were wholly absent. It was a system that mirrored the British example. As James Madison described it before the Virginia ratifying convention: "The sword is in the hands of the British king; the purse in the hands of the Parliament. It is so in America, as far as any analogy can exist."⁴³⁵

As with other clauses of the Constitution, however, the war powers provisions did not spring forth fully formed like Athena from the head of Zeus. To understand the development of these provisions, we must examine the constitutional debate, not through selective quotations, but rather, through a comprehensive and careful analysis to reveal the twists and turns of the Framers' conversation. After passing through the crucible of the ratification debates, the traditional allocation of war powers remained fundamentally in place.

1. *Early Proposals: The Virginia Plan and Beyond*

When Edmund Randolph of Virginia made the first proposal for a new form of government on May 29, 1787, the delegates did not possess clear plans for war powers. The Virginia plan introduced the innovation of a "National Executive" which would "enjoy the Executive rights vested in Congress by the Confederation," while the "National Legislature" would exercise the "Legislative Rights" of the old Congress.⁴³⁶ In a situation that would seem familiar to modern separation of powers scholars, the Framers did not share an exact definition of executive and legislative powers, with the result that Randolph's language engendered some confusion.

The delegates could agree that the old Congress played both executive and legislative roles and that the English Crown and Parliament shared certain executive and legislative powers. They all concurred that the executive, legislative, and judicial powers should remain distinct and separate. Beyond that, things were murky. James Wilson, for one, believed that the executive should only execute the laws, appoint officials, and exercise powers delegated by the legislature.⁴³⁷ Madison agreed with much of Wilson's approach, but he also believed that "certain powers were in their nature Executive."⁴³⁸

Although unsure about the definitions of executive and legislative powers, many of the Framers apparently believed that the Continental Congress had exercised its war powers when acting in its executive,

435. 3 ELLIOT, *supra* note 119, at 393.

436. 1 FARRAND, *supra* note 357, at 21.

437. 1 *id.* at 66.

438. 1 *id.* at 67.

rather than its legislative, capacity. On June 1, when the Virginia plan's provision to transfer the old Congress' executive powers was discussed, several delegates protested that this would give the executive branch the complete power over war and peace. Charles Pinckney of South Carolina "was for a vigorous Executive but was afraid the Executive powers of [the existing] Congress might extend to peace & war &c which would render the Executive a Monarchy, of the worst kind, towit an elective one."⁴³⁹ John Rutledge supported his fellow South Carolinian, because "he was for vesting the Executive power in a single person, tho' he was not for giving him the power of war and peace."⁴⁴⁰

Although James Wilson supported a single executive for its "energy dispatch and responsibility to the office," he shared Pinckney's concerns and warned that the Convention should not adopt the English division of executive and legislative powers.⁴⁴¹ Wilson "did not consider the Prerogatives of the British Monarch as a proper guide in defining the Executive powers. Some of these prerogatives were of a Legislative nature. Among others that of war & peace &c."⁴⁴² While Madison initially may have agreed with Wilson on the war powers question, his own notes do not reflect it.⁴⁴³ At this point in the debate, then, the Framers seemed to agree that vesting the President with all "executive powers" would give him the power over war and peace. For this reason, several delegates opposed the transferring of all executive power to the President because it would give him authority in war and peace equal to, if not greater than, that enjoyed by the English King.

Despite this vigorous resistance to executive war powers, the delegates chose to defer the question until a later time. Although subsequent proposals deviated from the arrangements of the Virginia plan, they did not reflect a different understanding of the executive and legislative branches' war powers. An alternative plan, placed on the table by William Paterson of New Jersey, suggested that the executive "direct all military operations; provided that none of the persons composing the federal Executive shall on any occasion take command of any troops, so as personally to conduct any enterprise as General."⁴⁴⁴ Paterson's suggestion on this point did not meet with the approval of the Convention, but his plan nonetheless was sent to the Committee of Detail, which was

439. 1 *id.* at 64-65.

440. 1 *id.* at 65.

441. 1 *id.*

442. 1 *id.* at 65-66.

443. Oddly enough, the notes of Rufus King of New York show Madison, rather than Pinckney or Wilson, raising the issue. King records Madison as saying that "executive powers *ex vi termini*, do not include the Rights of war & peace &c. but the powers shd. be confined and defined." 1 *id.* at 70.

444. 1 *id.* at 244.

in charge of translating the various proposals into a draft constitution.⁴⁴⁵ Although Patterson's New Jersey plan contained the weakest executive of all the various schemes, one elected and controlled by Congress, it demonstrates that even those most opposed to executive power believed that the future President should control the military.

In yet another plan of government, Alexander Hamilton put forth a design more similar to the one we have today. In a lengthy speech, he proposed giving the executive, which he called the "Governour," "the direction of war when authorized or begun."⁴⁴⁶ The Senate would possess "the sole power of declaring war."⁴⁴⁷ In his influential work, Professor Lofgren has read Hamilton, perhaps the most pro-executive figure of the Convention, as "inclined to limit severely the executive's role in initiating war" because it appears to require a declaration of war before the President can direct it.⁴⁴⁸ This surely overstates the case. Hamilton could have said that the executive had the direction of war after the Senate had *declared* it. Certainly, as we have seen, the state constitutions and the Articles of Confederation provided examples of constitutive documents which placed such restrictions on the executive power. In any event, the Convention did not adopt anything like Hamilton's explicit restriction on the President's war powers, so it is difficult to conclude that Hamilton's rejected plan represents the Convention's thoughts on war powers.

Indeed, Hamilton recognized that the executive could wage war without a declaration, when war had been *authorized or begun*. Hamilton's language would seem to include more contingencies than a declaration followed by formal hostilities. Furthermore, Hamilton's plan, which was widely ignored by his colleagues, recognized that both the Governor and the Senate would share the powers of the executive branch.⁴⁴⁹ In this respect, Hamilton joined his colleagues in envisioning war powers as an executive power with the Senate acting as an executive privy council, rather than as a legislative body.

These early stages of the Convention did not give rise to a change in the existing allocation of war powers between the executive and the legislature. On July 26, the Convention sent specific resolutions derived from the Virginia plan to the Committee of Detail. The delegates retained the principle that the national legislature would exercise the legislative powers of the old Congress, but they removed the language

445. See 2 *id.* at 157 (James Wilson's Committee of Detail notes).

446. 1 *id.* at 292.

447. 1 *id.*

448. LOFGREN, *supra* note 114, at 13.

449. Hence, Hamilton proposed that both the Governor and Senators should hold their positions for life and, like other federal officials, should be removable by impeachment. See 1 FARRAND, *supra* note 357, at 291-92.

giving the executive branch the Congress' executive powers. In its place, they inserted an enumeration of the executive's power as extending only to executing the laws and appointing officers. The resolutions failed to transfer the old Congress' executive powers, including those of making war and peace, to any institution within the new government.⁴⁵⁰

Once the Committee of Detail began its work, James Wilson sought to win what he could not on the floor.⁴⁵¹ Although Wilson did not chair the committee, he dominated its substantive work by virtue of his respected intellect.⁴⁵² In cooperation with Randolph, the chair of the committee, Wilson promulgated a draft which transformed the Convention's general resolutions into specific enumerations of power. To Congress, Wilson assigned the power "to make War; to raise Armies; to build and equip Fleets."⁴⁵³ To the Senate, Wilson granted the authority to make treaties and to send ambassadors.⁴⁵⁴ To the President, Wilson allocated the power of "Commander in Chief of the Army and Navy of the United States, and of the Militia of the Several States."⁴⁵⁵ The President also received the powers to execute the laws and appoint officials, to call Congress and to recommend legislation, to receive ambassadors, and to grant pardons.⁴⁵⁶

Clearly, Wilson's grants of authority to the executive branch were less generous than the powers historically possessed by British and American executives. Despite this relative loss in power, the President still retained the commander-in-chief powers. Wilson's draft, although it did not necessarily comport with the majority's views, served as the starting point for the significant debate that began on August 17.

2. *Making and Declaring War: The Debate of August 17*

After spending the next two weeks arguing about and voting on various details of the Committee's draft, the Convention turned its

450. See 2 *id.* at 131-32.

451. Clinton Rossiter has described Wilson as "from first to last the best friend of the Presidency in the Convention." ROSSITER, *supra* note 318, at 223. That he may have been, but not when it came to war powers. Even though the Convention would change Congress' power to declare war, Wilson remained steadfast in his belief that the Constitution gave Congress alone the power to make war. See 2 ELLIOT, *supra* note 119, at 528 (speech at Pennsylvania ratifying convention); 2 THE WORKS OF JAMES WILSON 57 (James D. Andrews ed., 1896) (lectures as professor of law) [hereinafter WILSON].

452. Wilson "took upon himself the major responsibility for putting the resolutions of the Convention and the thoughts of his colleagues into the language of fundamental law." ROSSITER, *supra* note 318, at 202. On the respect for Wilson's legal talents among the Framers, see Amar, *supra* note 346, at 474.

453. 2 FARRAND, *supra* note 357, at 168.

454. 2 *id.* at 169.

455. 2 *id.* at 172.

456. 2 *id.* at 171-72.

attention to the Make War Clause. Following a very brief debate,⁴⁵⁷ the Convention changed the clause's grant of power to Congress from the power to "make" war to the power to "declare" war.⁴⁵⁸ Charles Pinckney of South Carolina opened the August 17 debate by arguing that the power to make war should rest in the Senate, because the full legislature's "proceedings were too slow."⁴⁵⁹ Pinckney believed that the Senate was superior for both functional and political reasons. Not only would the Senate be "more acquainted with foreign affairs, and most capable of proper resolutions," but it also should have the power to make war because "[i]t would be singular[ly] [unique] for one[] authority to make war, and another peace."⁴⁶⁰ Pinckney also believed the Senate, more than Congress as a whole, would prove a more appropriate vessel for the war power because it represented the states directly: "[T]he small have their all at stake in such cases as well as the large States."⁴⁶¹

Others went further than Pinckney in their skepticism of Congress and suggested an expansion of the executive role in war-making. Pierce Butler proposed "vesting the power [to make war] in the President, who will have all the requisite qualities, and will not make war but when the Nation will support it."⁴⁶² Like his colleague from South Carolina, Butler wanted to reapportion the war power to the executive for both functional and political reasons. In his view, the executive possessed "the requisite qualities" for war, and he would only make war with the nation's political backing.

Immediately after Butler's comment, Madison and Elbridge Gerry of Massachusetts moved "to insert '*declare*,' striking out '*make*' war; leaving to the Executive the power to repel sudden attacks."⁴⁶³ We can interpret the thrust of Madison's amendment as *at least* expanding the executive's power to respond unilaterally to an attack.

Madison's notes, however, fail to answer two significant questions about his proposed change. Madison does not elaborate on what type of attack would trigger the executive's war-making authority. While an invasion of American soil would seem to qualify, it is unclear if assaults on American forces, citizens, or property overseas could justify unilateral executive war-making as well. Furthermore, Madison does not indicate whether he and Gerry described the purpose of their amendment

457. Professor Lofgren notes that the debate occupies "little more than one page out of the 1,273 which contain the printed records of the Convention." LOFGREN, *supra* note 114, at 7.

458. 2 FARRAND, *supra* note 357, at 318-19.

459. 2 *id.* at 318.

460. 2 *id.*

461. 2 *id.*

462. 2 *id.*

463. 2 *id.*

("to repel sudden attacks") to the whole Convention, or whether they introduced the amendment without explanation.

The subsequent confusion over the amendment suggests that Madison and Gerry did not explain its meaning to the assembled delegates. Perhaps the lateness of the hour—the debate occurred at the equivalent of 5:00 p.m. on a Friday—may have fatigued the renowned note-taker himself. Whatever the reason, the discussion shows quite clearly that the Framers did not possess a clear consensus on the Declare War Clause.

Speaking first, Roger Sherman believed that Madison's amendment was unnecessary. The draft's original version "stood very well. The Executive shd. be able to repel and not to commence war."⁴⁶⁴ Sherman appeared to think that the President already had the power to respond to attacks, and that reducing Congress' power to that of declaring war would permit the Executive to commence wars unilaterally. He argued further that using "make" was "better than 'declare' the latter narrowing the power too much."⁴⁶⁵ Sherman correctly realized that the amendment would remove Congress' monopoly over war, and permit the President to initiate hostilities as well.

Sherman's comments, however, apparently engendered some confusion. Some delegates appeared to have interpreted Sherman as opposing the amendment in order to protect executive power. Sherman's remarks may have suggested that, absent an explicit prohibition, the President possessed the power to declare war in certain circumstances. By substituting "declare" for "make" in the enumeration of Congress' powers, the President would lose this power to Congress. Elbridge Gerry seems to have interpreted Sherman's comments in this way, for he rose next to proclaim that he "never expected to hear in a republic a motion to empower the Executive alone to declare war."⁴⁶⁶

Gerry's statement seems odd. But, if we view Sherman's comment as an attempt to expand presidential power by preserving the Executive's authority to declare war, Gerry's exclamation might make more sense. Gerry could have intended the alteration to narrow the President's authority to engage in hostilities, so that he could not wage unilaterally a formal, declared war. At this point, our understanding of eighteenth-century international law again proves useful. Being familiar with Grotius and other treatise writers, Gerry would have feared any interpretation that gave the President an authority to declare war, because a declaration would represent an immense widening of a conflict at home and abroad. Gerry may have agreed with broad

464. 2 *id.*

465. 2 *id.*

466. 2 *id.*

presidential war-making authority, but he did not want the President to have the power to convert the entire nation's relations from peace to one of total, absolute war.

Further debate involving the allocation of both the war and peace powers also reflects the Framers' shared understanding of the meaning of a declaration of war. Pinckney had argued that the same body, the Senate, should exercise the power of peace and war. Oliver Ellsworth of Connecticut responded that "there is a material difference between the cases of making *war*, and making *peace*. It shd. be more easy to get out of war, than into it. War also is a simple and overt declaration."⁴⁶⁷ In contrast to war's simplicity, said Ellsworth, "peace [is] attended with intricate & secret negotiations."⁴⁶⁸

It is evident that Ellsworth shared the common understanding that declaring war differed from commencing war, neither of which a Framers would have described as "simple and overt." Like Gerry, Ellsworth was concentrating on the legal aspects of war and peace, rather than their operational meanings. Hence, declarations of war are "simple" because they alter legal relationships and *recognize* an existing state of hostilities in one shot. In discussing peace, Ellsworth describes the negotiation of a treaty, again a legal formality that *recognizes* the end of hostilities.

Rising to support Ellsworth, George Mason of Virginia also differentiated between war and peace: he "was for clogging rather than facilitating war; but for facilitating peace."⁴⁶⁹ Mason further said he "was agst giving the power of war to the Executive, because not [safely] to be trusted with it; or to the Senate because not so constructed as to be entitled to it," but then curiously backed the change from make to declare.⁴⁷⁰ Mason's actions comport with his words only if we view him as concurring in the idea that the "make" war language did not preclude the executive from waging a defensive war, or from declaring war. Ellsworth and Mason may have supported the change to "declare" war because it limited the executive's ability to plunge the nation into a total war.

Some amount of confusion also surrounded the taking of the vote on the Madison-Gerry amendment. Madison's notes show that seven states initially voted to adopt the change, with two states against. After the Convention had approved the new language, Rufus King rose to explain that "'make' war might be understood to 'conduct' it which was

467. 2 *id.* at 319.

468. 2 *id.*

469. 2 *id.*

470. 2 *id.*

an Executive function."⁴⁷¹ Madison records that King's critique of the "make" war clause convinced Ellsworth to change Connecticut's vote to yes, although the amendment had already received sufficient support to pass.⁴⁷² However, the official *Journal* of the Convention shows that the Madison-Gerry amendment initially lost by a vote of 4-5, with New Hampshire, Connecticut, Maryland, South Carolina, and Georgia voting against, and then upon a second vote succeeding by the 8-1 tally, with New Hampshire remaining the lone dissenter.⁴⁷³

Max Farrand, the editor of *The Records of the Federal Convention of 1787*, tells us that the printed version of the *Journal* was notoriously unreliable, especially in recording accurate vote tallies.⁴⁷⁴ Farrand concludes that in places where Madison's notes and the *Journal* disagree, Madison's notes are the more reliable source.⁴⁷⁵ Thus, it is likely that the Madison-Gerry amendment initially passed by a vote of 7-2, and later 8-1, after Ellsworth switched.

Although the closing events of August 17 are somewhat unclear, we still can venture some tentative conclusions. Changing the phrase from "make" to "declare" reflected an intent to prohibit Congress from encroaching on the sole executive power to conduct war. Although the amendment only changed Article I, inserting "declare" for "make" seemed to recognize the President's powers in one dimension, and restrict it in another. Madison and Gerry's explanation of their amendment confirms that the Framers implicitly understood that a reduction in congressional war authority would produce a corresponding expansion in executive authority, even though they failed to explain whether the President's new "power to repel sudden attacks"⁴⁷⁶ derived from the executive power or "Commander in Chief" clauses. The change not only increased the minimum level of executive power—repelling sudden attacks—but it also set a limit on its apex as well—declaring war. Adopting the amendment made clear that the President could not unilaterally take the nation into a total war, but that he might be able to engage the nation in hostilities short of that.⁴⁷⁷

471. 2 *id.*

472. 2 *id.*

473. 2 *id.* at 314.

474. 1 *id.* at xvii-xviii.

475. 1 *id.* Lofgren suggests an alternative view of the matter—that Madison's notes are incorrect and that the first vote was in the negative. King's explanation then becomes critical, because it convinces *three* states, Connecticut, Georgia, and South Carolina, instead of just one state, to switch their votes and approve the change. See LOFGREN, *supra* note 114, at 8-9. While provocative, this theory is undermined by Madison's specific statement that King's speech changed only Ellsworth's vote. If other states had switched their votes in reaction to King on such a momentous question, Madison probably would have made note of them as well.

476. 2 FARRAND, *supra* note 357, at 318.

477. The August 17th debate also raises two other often overlooked points. First, some of the delegates did not envision the executive as Wilson's super-magistrate charged only with executing

3. *Peace and the Presidency*

Further insights into the structure of war powers may be gained by examining how the Framers expected the branches to interact in making peace.⁴⁷⁸ Debates at the Convention reveal an understanding that Congress could not effectively end war simply by passing a resolution declaring the cessation of hostilities. The Framers believed that only a peace treaty, signed by the President and ratified by two-thirds of the Senate, formally could terminate a war, and that the President's role as protector and representative of the nation prevented Congress from ending war without his consent. It is telling that the Framers did not give Congress the sole authority to terminate a war, just as they did not give it the sole power to begin one.

Debates in the Convention on the peace power suggest that the delegates believed Congress would rely on politics and its appropriations power to exert its influence over war. In a situation of unilateral presidential war-making, the Framers expected Congress to resort to the appropriations power as the remedy. The initial draft of the Constitution allocated the treaty-making power in the same fashion as our present Constitution. Debate ensued, however, over who should control peacemaking. On September 7, Madison proposed an amendment that would have required only a majority of senators to ratify peace treaties (with presidential approval, of course), to "allow[] these to

the laws passed by Congress. A majority of the Framers probably believed that the President had a "protective power" which permitted him to guard the nation from attack, even in the absence of congressional consent or of a constitutional provision expressly delegating such power. Cf. Henry P. Monaghan, *The Protective Power of the Presidency*, 93 COLUM. L. REV. 1, 67 (1993) (arguing that such protective power is limited to the protection of "personnel, property, and instrumentalities of the government that the President is supposed to administer"). Another group also thought that the President could lay a claim, equal to that of Congress, to representing the wishes of the people, for he would "not make war but when the Nation will support it." 2 FARRAND, *supra* note 357, at 318. Supporters of a representative presidency resisted proposals to vest Congress with the sole power over peace, which the Convention considered after the Madison-Gerry amendment. To be sure, some Framers supported a strong executive hand in peace on the functional ground that the President could conduct peace negotiations in secret. However, supporters of executive peace powers provided as their predominant rationale that the President would better represent the wishes of the people. Congress could not be trusted because it might grow to enjoy the enhanced federal powers concomitant with wartime, or because sectional interests represented in Congress might prolong war at the expense of the national interest. Thus, a motion to give Congress the sole power of making peace failed by 10-0 immediately after the vote to give Congress the power to "declare," rather than "make," war. See 2 *id.* at 319.

478. Some scholars have argued that in the face of inter-branch division over whether to wage war, Congress should either pass a statute over presidential veto essentially "de-authorizing" hostilities or sue in the federal courts for a declaration that the President has acted unconstitutionally. See, e.g., ELY, *supra* note 1, at 54-67; GLENNON, *supra* note 1, at 314-27; KOH, *supra* note 1, at 182-84. However, if the Framers believed that the treaty power was the sole means to end a conflict, then passing a statute over presidential veto could not do the trick, for any treaty at a minimum requires presidential ratification. Congress should have no direct constitutional means to override the President's refusal to sign a treaty.

be made with less difficulty than other treaties."⁴⁷⁹ Madison's proposal was designed to respond to those, such as James Wilson and Rufus King,⁴⁸⁰ who had objected earlier to the super-majority requirement for peace treaties with a remaining Presidential "check" on senatorial power. Madison's amendment passed without dissent.

Madison then altered his course, seeking to eliminate all presidential involvement in peace treaties. He suggested that the delegates renew the requirement of a two-third Senate majority for peace treaties, but without the requirement of presidential approval. "The President," Madison told the Convention, "would necessarily derive so much power and importance from a state of war that he might be tempted, if authorized, to impede a treaty of peace."⁴⁸¹ Madison quite presciently wanted to prevent the President from using his war powers to enhance his overall power and importance vis-a-vis Congress and the People.

Madison's attack on executive war powers, which has a familiar ring to it when compared with the modern criticisms of the presidency, touched off a debate that ultimately rejected his proposal. His sole supporter was, oddly enough, Pierce Butler, who earlier had wanted to give the President all war-making authority. In a truly schizophrenic change of mind from his earlier comments in favor of expanded presidential war powers, Butler now "was strenuous for [Madison's] motion, as a necessary security against ambitious & corrupt Presidents."⁴⁸² He urged his colleagues to remember how the executive in Holland and the Duke of Marlborough in England each had sought "to prolong the war of which he had the management."⁴⁸³

Butler's fellow delegates, however, did not fear that vesting the peacemaking power in the executive would produce an American Marlborough. Nathaniel Gorham of Massachusetts, the former President of the Continental Congress, opposed Madison's proposal because he "thought the precaution unnecessary as the *means of carrying on the war* would not be in the hands of the President, bnt of the Legislature."⁴⁸⁴ Gouverneur Morris responded to Butler by emphasizing the President's role as the protector and representative of the nation. "[T]he power of the President in this case [is] harmless,"⁴⁸⁵ Morris reassured the Convention, and "no peace ought to be made without the concurrence of the President, who was *the general Guardian of the*

479. 2 FARRAND, *supra* note 357, at 540.

480. See 2 *id.*

481. 2 *id.*

482. 2 *id.* at 541.

483. 2 *id.*

484. 2 *id.* at 540 (emphasis added).

485. 2 *id.* at 540-41.

National interests."⁴⁸⁶ Elbridge Gerry even went so far as to argue that peace treaties should receive a super-majority and other treaties less, because "[i]n Treaties of peace the dearest interests will be at stake."⁴⁸⁷ Given this opposition, it is not surprising that Madison's amendment failed by a vote of 8-3, with his own state of Virginia voting against the proposal. This vote demonstrates the Framers' vision of the President as the protector and representative, and the Congress as the fiscal authority that could safeguard against unwise presidential war-making.

Madison had overextended himself and soon lost the gains he had won earlier. On September 8, the day after Madison had succeeded in excluding peace treaties from the two-thirds requirement, the Convention re-examined the Treaty Clause. Rufus King raised the issue because he wanted Madison's amendment deleted, while James Wilson, who had been strangely quiet during the debates on the war and treaty powers, wanted all treaties approved by a simple majority of the Senate.⁴⁸⁸ The debate that ensued, particularly the arguments made by opponents of the two-thirds requirement, is instructive because it reaffirmed that Congress' role in war-making derived from its control over the purse.

Kicking off the discussion, Gouverneur Morris spoke in favor of excepting peace treaties from the two-thirds requirement. He argued that Congress would be hesitant to support necessary wars for fear that it would have difficulty making peace when it chose to do so. For example, he argued that "[i]f two thirds of the Senate should be required for peace, the Legislature will be unwilling to make war for that reason, on account of the Fisheries or the Mississippi, the two great objects of the Union."⁴⁸⁹ Morris thought that Congress would be more willing to support efforts to enter war, if it was easier to end one.

His second criticism of the two-thirds requirement was that congressional control over peace was preferable to the traditional manner of legislative control—"negating the supplies for the war."⁴⁹⁰ Although Morris found the use of appropriations to control both war and peace as "the more disagreeable mode," his views appear to represent the Framers' understanding that Congress' chief institutional weapon was the power of the purse.⁴⁹¹

486. 2 *id.* at 541 (emphasis added).

487. 2 *id.* Gerry, who hailed from Massachusetts, even insinuated that a majority of the Senate, in a tight spot, might sacrifice the very northern or southern states of the nation to achieve peace: "In treaties of peace also there is more danger to the extremities of the Continent, of being sacrificed, than on any other occasions." 2 *id.*

488. 2 *id.* at 547-48.

489. 2 *id.* at 548.

490. 2 *id.* (emphasis added).

491. 2 *id.*

Wilson joined Morris' efforts to oppose the two-thirds requirement for peace, because if the Constitution required a super-majority to ratify a peace treaty, "the minority may perpetuate war, against the sense of the majority."⁴⁹² But Elbridge Gerry then intervened to point out that the Senate could not be trusted for fear of "corrupt[ion] by foreign influence," and apparently convinced the majority of the delegates.⁴⁹³ Despite Wilson's protests, the amendment to eliminate the two-thirds requirement ultimately failed. By an 8-3 vote, the Convention struck the Madison amendment adopted the day before and installed the Treaty Clause we have today. Those who supported the two-thirds requirement prevailed, and their arguments that the legislature could not be trusted carried the day.⁴⁹⁴

The Philadelphia Convention intended to modify, rather than transform, the political relationship between the executive and legislative branches in the realm of war powers. The executive would have full command of the military and would play the leading role in initiating and ending war. But the executive could not wage war without the support of Congress, which could employ its appropriations power to express its disagreement and, if necessary, to terminate or curtail unwise, unsuccessful, or unpopular wars. The Framers revised the inherited order by vesting the power to declare war in the legislature. In their plans, the clause acted as a method of "dual containment": it prevented the President from unilaterally igniting a full-scale war, and it simultaneously barred Congress from encroaching on his exclusive authority to conduct war.⁴⁹⁵ In crafting this design, many of the Framers envisioned a larger role for the President than some originally had hoped for at the beginning of the Convention. Rather than a trumped-up magistrate, the President received the responsibility of guarding the nation and its interests, even if that meant fighting with the legislature to enforce the desires of the People, in war as well as in peace.

If the Declare War Clause bore the interpretation that some scholars believe, then theoretically Congress would be able to terminate executive war-making by declaring war *not* to exist. This interpretation, however, is far from the original understanding of the Clause. Although the Declare War and Appropriations Clauses assign Congress an important

492. 2 *id.*

493. 2 *id.* In addition to Madison's notes, letters by delegates during the ratification process confirm the substance of the debate. See Letter from Hugh Williamson to James Madison (June 2, 1788), in 3 *id.* at 306.

494. See 2 *id.* at 548.

495. The phrase "dual containment" has been used in a different context by Professor Thomas Schwartz. He uses the phrase "dual containment" to describe postwar American foreign policy in Europe, which aimed to contain both the Soviet Union and a resurgent Germany. See THOMAS A. SCHWARTZ, *AMERICA'S GERMANY: JOHN J. MCCLOY AND THE FEDERAL REPUBLIC OF GERMANY* 299 (1991).

role in determining the breadth and intensity of hostilities with another nation, the Framers did not intend Congress to exercise a similar power in beginning or ending conflicts. When discussing both the Declare War Clause and the treaty power, delegates expressed skepticism concerning the ability of a popular body to represent accurately the best interests of the nation, or the People's wishes, when it came to controlling or ending war. Rather, the Framers saw the President as the protector and representative of the nation, and they believed that a decision as significant as peace could not be made without his consent. The Framers were not dupes; they remained fully aware of the dangerous possibility that a President might prolong war in order to expand his own political power. Nonetheless, the Framers maintained that if Congress wished to challenge presidential war-making, it had to turn to "the more disagreeable mode, of negating the supplies for the war."⁴⁹⁶

C. *The State Ratification Debates*

When the Constitution went to the states for ratification, the People found that the power to "declare war" had replaced the "sole and exclusive right and power of determining on peace and war" that had belonged to the old Continental Congress. Although we today have access to the conversations that took place at the Constitutional Convention, the People and their delegates in 1787 and 1788 had no such clear guide.⁴⁹⁷ Without the benefit of Madison's notes, they had to rely upon the constitutional text and their understandings of the language appearing in the Constitution. In light of the eighteenth-century meaning of "declare war" and "Commander in Chief," those who participated in the ratification likely viewed the Constitution as creating a structure in which the President played the primary role in war, and a significant, if not primary, role in determining peace.

The records of the ratification debates in the state conventions and in the newspapers are not as complete as one would desire on such a momentous question. Nonetheless, the nationwide debate over ratification between the Federalists and Antifederalists illuminates the common understanding of the war clauses. We must resist the temptation to pick through the record for quotes that are easily plugged into modern debates. The ratification process was an exchange of arguments and a discussion of ideas between two political groups seeking the best form of national government. Neither the Antifederalists nor Federalists were more "correct" or "true,"⁴⁹⁸ but examining the reasoning of each side

496. 2 FARRAND, *supra* note 357, at 548 (statement of Gouverneur Morris).

497. These conversations did not become available until 1819. Hutson, *supra* note 433, at 2.

498. See Gordon S. Wood, *Ideology and the Origins of Liberal America*, 44 WM. & MARY Q. 628, 632-33 (1987).

regarding constitutional meaning and understanding how their ideas and arguments changed during the crucible of the ratification process aids the interpretive process. The eventual outcome of the debates—the ultimate arguments offered by the Federalists before Antifederalists' criticism—can be accepted as the generally received meaning of the Constitution's war powers system. This message can then be understood within the previously discussed context formed by English, colonial, and early national American history.

The Federalists initially justified the Constitution's allocation of war powers based on the need for a strong national government in a hostile world. Antifederalists, however, argued that this arrangement would produce a tyrannical national government capable of oppressing the states. In light of these predictions, Federalists discarded their earlier claims of exigency. Instead, they developed new arguments drawing on the formal division of powers between Congress and the presidency. They invoked the example of Parliament's funding powers as a check on executive war-making. They also used the rhetorical strategy of exaggerating the powers of the British monarchy in order to make the President's role appear more benign. Although it would have been to their advantage, the Federalists quite noticeably failed to raise the possibilities of judicial review as an additional check on either executive or federal war-making.

1. *The Antifederalist Attack*

Initial Federalist explanations of the war power quickly became an easy target for Antifederalist writers and politicians. Alexander Hamilton argued in an early *Federalist Paper* that the federal government must possess the means to respond to unpredictable events and foreign dangers:

The authorities essential to the care of the common defence are these—to raise armies—to build and equip fleets—to prescribe rules for the government of both—to direct their operations—to provide for their support. These powers ought to exist without limitation: *Because it is impossible to foresee or define the extent and variety of national exigencies, or the correspondent extent & variety of the means which may be necessary to satisfy them.* The circumstances that endanger the safety of nations are infinite; and for this reason no constitutional shackles can wisely be imposed on the power to which the care of it is committed.⁴⁹⁹

In *The Federalist No. 41*, Madison built upon Hamilton's thesis by justifying exclusive federal war powers on a realist approach to international relations:

499. THE FEDERALIST No. 23, *supra* note 304, at 147 (Alexander Hamilton).

With what colour of propriety could the force necessary for defence, be limited by those who cannot limit the force of offence? If a Federal Constitution could chain the ambition, or set bounds to the exertions of all other nations: then indeed might it prudently chain the discretion of its own Government, and set bounds to the exertions for its own safety.

How could a readiness for war in time of peace be safely prohibited, unless we could prohibit in like manner the preparations and establishments of every hostile nation? The means of security can only be regulated by the means and the danger of attack. They will in fact be ever determined by these rules, and by no others.⁵⁰⁰

Madison hoped that the political unity brought by the Constitution itself would deter European interference in America. But if that were not enough, the Constitution had to permit the federal government to take any steps necessary for the national security: "It is in vain to oppose constitutional barriers to the impulse of self-preservation."⁵⁰¹ According to Madison, exigency justified the possibility of tyranny.

Antifederalists met the Federalists' argument head-on. Writing at the same time, the capable Antifederalist writer "Brutus" told the voters of New York that the requirement of an emergency would prove no obstacle to a large federal army: "[T]here will not be wanting a variety of plausible reasons to justify the raising [of an army], drawn from the danger we are in from the Indians on our frontiers, or from the European provinces in our neighbourhood."⁵⁰² If the government needed to safeguard against surprise attacks, Antifederalists argued, let the Constitution provide only for sufficient forces to staff outposts and garrisons during peacetime. This would enable the states to retain their exclusive control over military supply as a popular counterweight to a standing army.⁵⁰³ If the states did not impose these restrictions, Antifederalists warned, the federal government eventually could toss aside the Constitution and impose a dictatorship on the states. Said Brutus:

[T]he evil to be feared from a large standing army in time of peace, does not arise solely from the apprehension, that the rulers may employ them for the purpose of promoting their own ambitious views, but that equal, and perhaps greater danger, is to

500. THE FEDERALIST NO. 41, *supra* note 304, at 270 (James Madison).

501. *Id.*

502. Brutus, *The Dangers of a Standing Army*, N.Y. J., Jan. 17, 1788, reprinted in 2 DEBATE ON THE CONSTITUTION, *supra* note 16, at 40, 43.

503. See, e.g., 3 ELLIOT, *supra* note 119, at 378-81 (statement of George Mason at Virginia ratifying convention) (arguing that state governments should retain the right to arm and discipline their own militias); Brutus, *supra* note 397, at 416 (arguing that the Constitution should provide peacetime standing forces only to staff outposts and garrisons).

be apprehended from their overturning the constitutional powers of the government, and assuming the power to dictate any form they please.⁵⁰⁴

Antifederalists sought to recall the critique of the King's actions set forth in the Declaration of Independence: there, a tyrannical government in London had used a standing army to violate the constitutional rights of the colonists. Even less extreme Antifederalists greatly feared the possibilities of federal military rule. Perhaps the best representative of moderate Antifederalist thought, the "Federal Farmer," acknowledged the need for a federal government with exclusive powers over "all foreign concerns, causes arising on the seas, to commerce, imports, armies, navies, Indian affairs, peace and war."⁵⁰⁵ But, he warned:

The general government, organized as it is, may be adequate to many valuable objects, and be able to carry its laws into execution on proper principles in several cases; but I think its warmest friends will not contend, that it can carry all the powers proposed to be lodged in it into effect, without calling to its aid a military force, which must very soon destroy all elective governments in the country, produce anarchy, or establish despotism.⁵⁰⁶

In comparing British tyranny with federal tyranny, the Antifederalists viewed the American President as the equivalent of the King against whom they had rebelled only a decade earlier. To the Antifederalists, both held the same powers over war and peace. In several widely circulated pamphlets, Antifederalists argued that the textual grants of power to the President mirrored those of the King. Writing under the pseudonym "Cato," an Antifederalist asked, "[W]herein does this president, invested with his powers and prerogatives, essentially differ from the king of Great-Britain[?]"⁵⁰⁷ Similarly, the writer "Old Whig" scolded the Federalists for not "mak[ing] the kingly office he-

504. Brutus, *supra* note 397, at 414.

505. Letter from the "Federal Farmer" to "The Republican" I, *Examine Coolly Every Article, Clause, and Word* (Nov. 8, 1787), reprinted in 1 DEBATE ON THE CONSTITUTION, *supra* note 16, at 245, 252. The Federal Farmer, considered one of the most popular and influential of Antifederalist writers, was long thought to be Richard Henry Lee, but Gordon Wood has rebutted the case for his authorship. See Gordon S. Wood, *The Authorship of the Letters from the Federal Farmer*, 31 WM. & MARY Q. 299 (1974). It may have been Melancton Smith of New York. See Robert H. Webking, *Melancton Smith and the Letters from the Federal Farmer*, 44 WM. & MARY Q. 510 (1987).

506. Letter from the "Federal Farmer" to "The Republican" II, *Examine Coolly Every Article, Clause, and Word* (Oct. 9, 1787), reprinted in 1 DEBATE ON THE CONSTITUTION, *supra* note 16, at 254, 258.

507. Cato, *Essay IV*, N.Y. J., reprinted in 2 STORING, *supra* note 114, at 113, 115. Although the identity of "Cato" is unknown, some have speculated that Cato may have been George Clinton, the governor of New York. 2 *id.* at 102 (preface to Cato's essays).

editary" since they were asking the People "to receive a king."⁵⁰⁸ For, he warned:

[The President] appears to me to be clothed with such powers as are dangerous. To be the fountain of all honors in the United States, commander in chief of the army, navy and militia, with the power of making treaties and of granting pardons, and to be vested with an authority to put a negative upon all laws, unless two thirds of both houses shall persist in enacting it . . . is in reality to be a *king* as much a *King as the King of Great-Britain*, and a King too of the worst kind;—an elective King.⁵⁰⁹

Like Cato, Old Whig asked his readers "what important prerogative the King of Great-Britain is entitled to, which does not also belong to the President during his continuance in office."⁵¹⁰

The Antifederalists were especially troubled by the President's power as Commander in Chief. Antifederalists were familiar with historical examples demonstrating that an army, once given to an executive, was difficult to take away. They remembered English Kings who had maintained their own standing armies during their battles with Parliament. They remained mindful of examples from classical history, especially Julius Caesar's rise to power at the head of his armies.

Most vivid in their memory, however, was the recent example of General George Washington, who had given up the reins of power and returned to private life against the wishes of many of his officers and troops. Antifederalists doubted that future Commanders-in-Chief would display the civic virtue and restraint that made Washington's action instantly famous around the world.⁵¹¹ Old Whig urged his readers:

[L]et us suppose, a future President and commander in chief adored by his army and the militia to as great a degree as our late illustrious commander in chief; and we have only to suppose one thing more, that this man is without the virtue, the moderation and love of liberty which possessed the mind of our late general, and this country will be involved at once in war and tyranny.⁵¹²

With a standing army at hand, the President would encounter little difficulty in using his constitutional powers to impose an unconstitu-

508. An Old Whig, *Essay V*, INDEPENDENT GAZETTEER (Phila.), reprinted in 3 STORING, *supra* note 114, at 34, 38.

509. 3 *id.* at 37.

510. 3 *id.* at 38.

511. See, e.g., 3 ELLIOT, *supra* note 119, at 496 (statement of George Mason at Virginia ratifying convention) (warning that one as disinterested and amiable as George Washington might never command again).

512. An Old Whig, *supra* note 508, at 38.

tional dictatorship. As the Antifederalist writer "Philadelphiensis" pleaded to the voters of Pennsylvania:

Who can deny but the *president general* will be a *king* to all intents and purposes, and one of the most dangerous kind too; a king elected to command a standing army? Thus our laws are to be administered by this *tyrant*; for the whole, or at least the most important part of the executive department is put in his hands.⁵¹³

Philadelphiensis feared that, as Commander in Chief, the President "can at any time he thinks proper, order [any freeman] out in the militia to exercise, and to march when and where he pleases."⁵¹⁴

Luther Martin, a prominent Maryland delegate to the Philadelphia Convention who refused to sign the finished product, read the Commander-in-Chief power as vesting in the President the authority to appoint all military officers.⁵¹⁵ As in classical Rome, an army so personally dependent on its Commander would provide the President with an unstoppable weapon for imposing his wishes on the People. Martin warned in a widely circulated pamphlet that such an army and navy so "dependant [sic] on his will and pleasure, and commanded by him in person, will, of course, be subservient to his wishes, and ready to execute his commands."⁵¹⁶

Anticipating the Federalists' response that the separation of powers would prevent military dictatorship, Antifederalists argued that Congress would prove no obstacle to presidential designs. These critics claimed that recent British history demonstrated how easily the executive could co-opt Parliament. Cato believed the comparison between King and President especially telling when it came to war. He argued that both exercised substantial freedom of action cabined only by the need for financial support:

[With the veto, the President] will have a great share in the power of making peace, coining money, etc. and all the various objects of legislation, expressed or implied in this Constitution: for though it may be asserted that the king of Great-Britain has the express power of making peace or war, yet he never thinks it prudent so to do without the advice of his parliament from whom he is to derive his support and *therefore these powers, in both president and king, are substantially the same: he is the generalissimo of the nation, and of course, has the command*

513. Philadelphiensis, *Essay IX*, INDEPENDENT GAZETTEER (Phila.), reprinted in 3 STORING, *supra* note 114, at 127-28. Philadelphiensis is thought to be the pseudonym of Benjamin Workman, an Irish immigrant who became a tutor in mathematics at the University of Pennsylvania. 1 DEBATE ON THE CONSTITUTION, *supra* note 16, at 1054 (biographical notes).

514. Philadelphiensis, *supra* note 513, at 128.

515. Luther Martin, Information to the General Assembly of the State of Maryland (1788), reprinted in 2 *id.* at 27, 67-68.

516. 2 *id.* at 68.

*and controul of the army, navy and militia: he is general conservator of the peace of the union . . .*⁵¹⁷

Like others in the founding generation, Cato was aware that the exercise of the British monarch's prerogatives in war and peace, as broadly described by Blackstone, was subject to the need for parliamentary funding. Hence, Cato correctly concluded that in the realm of practical politics, the President's authority under the Constitution did not differ in important measure from that of the King. Antifederalists asked how Congress could control the President if the executive in Great Britain had come to such power even in the face of formal parliamentary powers over the purse. In terms of practical politics, the President would have the same authority as the British monarch to plunge the nation into war, or lead it into peace.

Some Antifederalists believed that the Constitution gave the President even more freedom from legislative control than that enjoyed by the Crown. "Tamony," an Antifederalist writer widely published in the key states of Pennsylvania, New York, and Virginia, dismissed Federalist attempts to pass off "the office of president" with "levity" and as "a machine calculated for state pageantry."⁵¹⁸ Rather, Congress' power to fund the military for two years, Tamony believed, would place the President in a more advantageous position than the King, who had to seek military appropriations every year. Said Tamony:

Suffer me to view the commander of the fleets and armies of America, with a reverential awe inspired by the contemplation of his great prerogatives, though not dignified with the magic name of King, he will possess more supreme power, than Great Britain allows her hereditary monarchs, who derive ability to support an army from annual supplies, and owe the command of one to an annual minty law. The American President may be granted supplies for two years, and his command of a standing army is unrestrained by law or limitation.⁵¹⁹

Some Antifederalists even feared that Congress would collude with the President to make him the equivalent of a king.⁵²⁰

517. Cato, *supra* note 507, at 115-16 (emphasis added).

518. Tamony, *Essay*, VA. INDEPENDENT CHRON., Jan. 9, 1788, reprinted in 5 STORING, *supra* note 114, at 145-46.

519. 5 *id.*

520. Perhaps a bit of doggerel will illustrate the intensity of Antifederalist fear of the President and army:

Tho' British armies could not here prevail
Yet British politics shall turn the scale;—
In five short years of Freedom weary grown
We quit our plain republics for a throne;
Congress and President full proof shall bring,
A mere disguise for Parliament and King.
A Standing army!—curse the plan so base;

Implicit in the Antifederalist attack was an understanding of the British Constitution consistent with the one offered in this Article. Practice and political history were the guiding precedents, not Blackstone's open adoration of the royal prerogative. Thus, the Antifederalists recognized that Congress would possess the same check on the President that Parliament exercised against the King—the power of the purse. They doubted, however, whether Congress would put its checking power to good use.

Completely missing from the debate was a discussion of the Declare War Clause, which the Antifederalists never mentioned as another possible obstacle to presidential war-making authority. Perhaps it was not in their interests to acknowledge the Clause because they were intent on exaggerating the President's Article II powers. However, the Antifederalists did not criticize everything in the Constitution, and the more sophisticated writers were not reluctant to praise the provisions they liked. The Antifederalists, it seems, simply did not care about, or even notice, the Declare War Clause. To them, the important point was that the Constitution was reenacting the dangerous allocation of war powers between the executive and legislature that had existed in recent British and American history. Given their conclusion that Parliament and Congress controlled the "sinews of war," and that the King and the President directed the military, they had every reason to believe that the new Constitution would produce a war-making system similar to Britain's.

2. *The Federalist Responses*

Federalists answered this sophisticated challenge by attacking the notion that the American Constitution merely mimicked the British. Ignoring the Antifederalist invitation to discuss the realities of British

A despot's safety—Liberty's disgrace.—
 Who sav'd these realms from Britain's bloody hand,
 Who, but the generous rustics of the land;
 That free-born race, inur'd to every toil,
 Who tame the ocean and subdue the soil,
 Who tyrants banish'd from this injur'd shore
 Domestic traitors may expel once more.

STATE GAZETTE OF SOUTH CAROLINA, Jan. 28, 1788, reprinted in 15 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION 486 (John P. Kaminski et al. eds., 1984) (reprinted in New York, Boston, Philadelphia, New Jersey, and Virginia newspapers).

Antifederalist writers throughout the states hammered home the theme that the President, with "his uncountroulable [sic] power over the army, navy, and militia" and the support of a "dependent" Congress, would be tempted to "give us law at the bayonets[]" point." Republicus, *Essay*, KY. GAZETTE, Mar. 1, 1788, reprinted in 5 STORING, *supra* note 114, at 165, 169; see also A Farmer, *Essay II*, MD. GAZETTE, Feb. 29, 1788, reprinted in 5 *id.* at 16, 25 (contrasting the proposed Constitution's arrangement with the institutional safeguards present in the British system of government, and noting that the protections against the danger of standing troops were greater in England).

politics, the defenders of the Constitution stressed the formal differences between the American and British plans of government. To downplay Antifederalist concerns, the Federalists emphasized the separation of war powers between the branches, exaggerated the powers of the King, and highlighted the relative weakness of the President. In so doing, the Federalists engaged in rhetorical excess and intentionally distorted Antifederalist arguments to permit their easy dismissal.

In *The Federalist No. 69*, Alexander Hamilton directly responded to the concerns of Tamony, Cato, and their associates. Arguing that the Philadelphia Convention had stripped from the executive the power of declaring war and raising armies, Hamilton portrayed the President as something of a second-rate King:

[T]he President is to be Commander in Chief of the army and navy of the United States. In this respect his authority would be nominally the same with that of the King of Great-Britain, but in substance much inferior to it. It would amount to nothing more than the supreme command and direction of the military and naval forces, as first General and Admiral of the confederacy; while that of the British King extends to the *declaring* of war and to the *raising* and *regulating* of fleets and armies; all which by the Constitution under consideration would appertain to the Legislature.⁵²¹

At the end of *No. 69*, Hamilton contrasted more explicitly the powers of the American President with the British monarch:

The President of the United States would be an officer elected by the people for *four* years. The King of Great-Britain is a perpetual and *hereditary* prince. The one would be amenable to personal punishment and disgrace: The person of the other is sacred and inviolable. The one would have a *qualified* negative upon the acts of the legislative body: The other has an *absolute* negative. The one would have a right to command the military and naval forces of the nation: The other in addition to this right, possesses that of *declaring* war, and of *raising* and *regulating* fleets and armies by his own authority.⁵²²

Some have read Hamilton's defense as an acknowledgment that Congress must give its approval to all wars, but even if we were to accept *The Federalist No. 69* as the authoritative explanation of the Constitution (which it is not), this view surely overstates Hamilton's meaning. Hamilton carefully avoided explaining whether the formal powers transferred from King to Congress were actually significant. Hamilton did nothing to undermine the prevailing belief that a declaration of war was

521. THE FEDERALIST NO. 69, *supra* note 304, at 465 (Alexander Hamilton).

522. *Id.* at 470.

unnecessary for waging war—rather, in *The Federalist No. 25*, Hamilton argued the exact opposite.⁵²³ Here, Hamilton emphasized formal constitutional powers and ignored the political process.

Hamilton's *The Federalist No. 69* also engaged in the common Federalist rhetorical trick of inflating the King's actual powers in order to give the American Constitution a more modest appearance. For example, Hamilton claimed that the British monarch had the sole authority to raise and regulate the armies and navies. However, as we have seen, by the middle of the eighteenth century, Parliament had assumed at least co-equal authority in these areas; as a practical matter the Crown could not pursue its military policies without the assent of the legislature.⁵²⁴ Hamilton also implied in *No. 69* that the King could conduct war and foreign policy on his own. But, as we have seen, Parliament had used its funding powers to achieve a powerful voice in these areas as well.

The Federalists continued to make these arguments until the very end of the ratification process. Speaking before the last ratifying convention, which took place in North Carolina, James Iredell overdrew the differences between President and Congress versus King and Parliament. Discussing the President's commander-in-chief powers, Iredell said:

A very material difference may be observed between this power, and the authority of the king of Great Britain under similar circumstances. The king of Great Britain is not only the commander-in-chief of the land and naval forces, but has power, in time of war, to raise fleets and armies. He has also authority to declare war. The President has not the power of declaring war by his own authority, nor that of raising fleets and armies. These powers are vested in other hands. The power of declaring war is expressly given to Congress . . . [Congress has] also expressly delegated to [it] the powers of raising and supporting armies, and of providing and maintaining a navy.⁵²⁵

Both Hamilton and Iredell answered Antifederalist concerns by contrasting Blackstone's formal (and incomplete) description of the allocation of war powers with the American Constitution's more balanced approach.⁵²⁶

The Antifederalists correctly claimed that the Constitution's system did not deviate all that much from the British Constitution as it existed in practice. Thus, the force of Antifederalist arguments—that the Parliament already exercised substantial control via the spending power over war and foreign policy—forced Hamilton to distort the British

523. THE FEDERALIST No. 25, *supra* note 304, at 161 (Alexander Hamilton) ("[T]he ceremony of a formal denunciation of war has of late fallen into disuse . . .").

524. See *supra* text accompanying notes 219-265.

525. 4 ELLIOT, *supra* note 119, at 107-08.

526. See, e.g., THE FEDERALIST No. 69, *supra* note 304, at 465 (Alexander Hamilton).

separation of powers in order to defend the Presidency.⁵²⁷ Federalists never fully confronted the Antifederalists' claim that Congress would satisfy the President's military requests as readily as Parliament had cooperated with the King. Indeed, the Federalists appear to have ceded to the Antifederalists the truth of their arguments, and even failed to emphasize the point that the Antifederalists had conceded: that the executive needed legislative approval in the form of funding for its wars.

3. *The Battle Joined: Ratification Arguments and the Centrality of Funding*

Supporters of the Constitution could not long escape Antifederalists' arguments with replies based on the formal allocation of powers. The Antifederalists had realized that the Constitution left open the patterns of interaction that would occur between the branches during war. In the ratifying conventions, they pressed home the notion that the federal government, and the President in particular, would use military might to oppress the states and the People. In responding, Federalists finally explained that the political relationship between President and Congress—as illustrated by the struggles between King and Parliament—would enhance, rather than detract from, wartime checks and balances. Thus, in responding to the Antifederalists, the Constitution's defenders referred to their common history and legal understandings to establish that the legislature's power of the purse would be the true check on executive war-making.

In the state conventions, Antifederalists criticized the Constitution for failing to separate the "sword and purse" between the state and federal governments. Antifederalists maintained that the federal government could control the military or direct taxation, but not both. Otherwise, the national government would use military might to oppress the states because the Constitution's separation of powers would not prevent tyranny by the executive.

In the early ratifying conventions Federalists began to develop an answer that hinged on congressional control of funding. This argument ripened when placed before the glare of vigorous Antifederalist attacks

527. Hamilton also misrepresented the Antifederalists' arguments and the nature of Parliament-Crown relations in defending the treaty power. Hamilton attributed to the Antifederalists the argument that Parliament ratified treaties made by the King, which implied that the President—who made treaties subject to Senate approval—again exercised powers identical to the monarch's. *Id.* at 467-68. Hamilton then stated that Blackstone proved that the King made treaties alone, and hence the American President was much weaker in that regard because he operated subject to a legislative check. *Id.* But the Antifederalist paper Hamilton appears to refer to, *Cato IV*, only suggests that Parliament plays a role in the treaty process because the King chooses to consult with it because of its fiscal powers. "[F]or though it may be asserted that the King of Great-Britain has the express power of making peace or war, yet he never thinks it prudent so to do without the advice of his parliament from whom he is to derive his support." *Cato*, *supra* note 507, at 115-16.

in the large contested states, such as Virginia. The Federalists conceded that the President *might* come into dictatorial powers using the army, but they claimed that such a dictatorship was unlikely because Congress could cut off funding for the military, or refuse to raise the armies in the first place.

Although this argument first appeared in the New England states in *The Federalist No. 69*, this shift from a focus on constitutional law to a focus on practical politics is demonstrated by a letter from Samuel Holden Parsons, a lawyer, major general, and Federalist leader in Connecticut, to William Cushing, future Supreme Court Justice and Massachusetts Federalist. Parsons wrote to explain Connecticut's ratification, in the hopes of assisting passage in her neighbor, Massachusetts.

I think we involve ourselves in unnecessary doubts about our security against an undue use of the powers granted by the Constitution, by not clearly distinguishing between our present condition and that of the people of Great Britain. There, the supreme executive is hereditary. He does not derive his powers from the gift of the people; at least, if the contrary is true in *theory*, its practical operation is not such. He there holds, as his prerogative, the power of raising and disbanding armies, the right to make war and peace with many other very great and important rights independent of any control. That the armies are *his armies*, and their direction is solely by him without any control. The only security the people there have, against the ambition of a bad king, is the power to deny money, without which no army can be kept up. Here the army, when raised, is the army of the people. It is they who raise and pay them; it is they who judge of the necessity of the measure; tis they who are to feel the burthens and partake the benefits.

....

... It is therefore *our* army and *our* purse, and not the sword or purse of a king.⁵²⁸

Soldiers drawn from the People, Parsons argued, would feel no personal attachment to the President, especially when Congress had called them

528. Letter from Samuel Holden Parsons to William Cushing (Jan. 11, 1788), in 3 JENSEN, *supra* note 114, at 569-70. See also Richard H. Kohn, *The Constitution and National Security: The Intent of the Framers*, in THE UNITED STATES MILITARY UNDER THE CONSTITUTION OF THE UNITED STATES, 1789-1989, at 61, 83 (Richard H. Kohn ed., 1991) (discussing the Federalists' argument that Congress would hold sufficient power over the authorization of standing armies). Cushing was vice-chairman of the Massachusetts ratifying convention and presided during John Hancock's absence until the final week of debate. He voted for ratification, served as a presidential elector for Washington in 1789, and served as an associate Justice of the Supreme Court from 1789 until his death in 1810. Parsons, who had risen rapidly in the ranks of the Continental Army, saw only the early implementation of the Constitution he voted for—he died in November 1789 when his canoe overturned in the rapids of Big Beaver River. See 1 DEBATE ON THE CONSTITUTION, *supra* note 16, at 1001, 1031-32 (biographical notes).

up and paid their salaries. Congress would also check the President through its "power to deny money, without which no army can be kept up."⁵²⁹ These political forces would prevent an executive tyranny.

Antifederalists presented their criticisms throughout the ratification debates, but saved their strongest challenge for Virginia, home to well-known and respected opponents of the Constitution, such as Patrick Henry and George Mason. As part of a larger attack on the Constitution's placement of both the sword and purse in the national government, Henry attempted to undermine the Federalist separation of powers arguments through deceptive rhetoric. He described the President as an unchecked monarch with control over the army, but he also argued against the dangers of placing both the sword and the purse in the hands of Congress.

Henry was concerned about the national government's ability to exercise tyranny over the states, believing that the central government might sacrifice the territorial or commercial interests of individual states at the altar of national policy.⁵³⁰ On June 9, 1788, Henry, when arguing that the national government would oppress the states, stated that the Constitution gave Congress *all* war powers:

I find fault with the paper before you, because the same power that declares war has the power to carry it on. Is it so in England? The king declares war; the House of Commons gives the means of carrying it on. This is a strong check on the king. He will enter into no war that is unnecessary; for the commons, having the power of withholding the means, will exercise that power, unless the object of the war be for the interest of the nation. How is it here? The Congress can both declare war and carry it on, and levy your money, as long as you have a shilling to pay.⁵³¹

529. Letter from Samuel Holden Parsons to William Cushing, *supra* note 528, at 570.

530. In the Virginia ratifying convention, Henry argued that the proposed Constitution would allow the President and Senate to sign a treaty with Spain to give up navigation rights to the Mississippi River more easily than could occur under the Articles of Confederation. "The honorable gentleman [Madison] told you that there were two bodies, or branches, which must concur to make a treaty. Sir, the President, as distinguished from the Senate, is nothing. They will combine, and be as one." 3 ELLIOT, *supra* note 119, at 353.

In a confusing passage, John Marshall attempted to answer Henry's attack on Congress for having the power to both declare and wage war: "Are the people of England more secure, if the Commons have no voice in declaring war? [O]r are we less secure by having the Senate joined with the President?" 3 *id.* at 233. The young Marshall made two mistakes: in assuming that the English Commons had no voice in decisions to declare war, and in reading the Constitution to give the Senate and the President the power to declare war. Although Professor Lofgren has read this comment to imply that Congress should have both powers because it represented the people, *see* LOFGREN, *supra* note 114, at 20, I think the statement is somewhat mysterious and, at best, addresses only the authority to declare war and says nothing about the authority to initiate hostilities.

531. 3 ELLIOT, *supra* note 119, at 172.

Despite Henry's full awareness of British political history and the financial controls Parliament exercised over the Crown, he strategically misconstrued the Constitution to give Congress the powers to declare, fund, and conduct war. He left the President completely out of the equation by interpreting "declare" war to mean "commence" and "wage" war.⁵³² Henry depicted the national power as entirely unchecked and, therefore, easily susceptible to tyranny.

Henry, however, was not only concerned that the national government would impose tyranny on the states and lead the nation into unwise foreign wars. He was also concerned about the dangers the military presented at home. In this context, he put forth the prediction that the President would exercise unchecked war powers. He told the Virginia convention:

If your American chief be a man of ambition and abilities, how easy is it for him to render himself absolute! The army is in his hands, and if he be a man of address, it will be attached to him, and it will be the subject of long meditation with him to seize the first auspicious moment to accomplish his design If we make a king, we may prescribe the rules by which he shall rule his people, and interpose such checks as shall prevent him from infringing them; but the President, in the field, at the head of his army, can prescribe the terms on which he shall reign master, so far that it will puzzle any American ever to get his neck from under the galling yoke. . . . If ever he violates the laws . . . he [may] come at the head of his army, to carry every thing before him [W]here is the existing force to punish him? Can he not, at the head of his army, beat down every opposition? Away with your President! [W]e shall have a king: the army will salute him monarch: your militia will leave you, and assist in making him king, and fight against you: and what have you to oppose this force? What will then become of you and your rights? Will not absolute despotism ensue?⁵³³

Henry's argument here that the monarchy would come at the hands of a President using his constitutional powers to control the military, how-

532. Henry was not the only Framer to make this mistake of reading Congress to have all the powers in war. In the New York ratifying convention, for example, Robert Livingston erroneously stated that the proposed Congress and the old Congress had the same powers: "Congress ha[s] the power of making war and peace, of levying money and raising men; they may involve us in a war at their pleasure" 2 *id.* at 278. This misunderstanding may have occurred due to a failure to read the new Constitution carefully, or from tendency to use the word "Congress" as shorthand for "federal government" when discussing federalism (rather than separation of powers) issues. I think the latter explanation is more likely, given that under the Articles of Confederation, "Congress" was the sole organ of the national government. I think this is borne out later in the New York debates, when the same Robert Livingston referred to "Congress" and the "Union" interchangeably during another discussion of the powers of sword and purse. See 2 *id.* at 386.

533. 3 *id.* at 59-60.

ever, is clearly inconsistent with his June 9th statement that Congress exercised unchecked war powers. However, both arguments were rhetorically useful to Henry in his efforts to show that the national government would tyrannize the states if it exercised control over the military. This understanding of Henry's comments and strategy are made even clearer in the context of the Antifederalists' proposal that the states control their militias.⁵³⁴ This proposal was made immediately following Henry's speech on June 14.

The Federalists' reaction to Henry's onslaught emphasized checks and balances. To answer both Henry's federalism and separation of powers arguments, they stressed that both the President and Congress exercised substantial war powers. Further, they specifically invoked the example of Parliament's financial check on executive war-making as the model for the operation of war powers under the Constitution. Federalist George Nicholas replied to the Antifederalist militia proposal:

Under the new government, no appropriation of money, to the use of raising or supporting an army, shall be for a longer term than two years. The President is to command. But the regulation of the army and navy is given to Congress. Our representatives will be a powerful check here. The influence of the commons, in England, in this case, is very predominant.⁵³⁵

It remained for Madison, who shepherded the Constitution through the Virginia convention, to comprehensively critique the Antifederalist's purse-and-sword theory. Madison began by criticizing Henry's view that the purse and sword had to be held by different governments:

What is the meaning of this maxim? Does it mean that the sword and purse ought not to be trusted in the hands of the same government? This cannot be the meaning; for there never was, and I can say there never will be, an efficient government, in which both are not vested. The only rational meaning is, that the sword and purse are not to be given to the same member.⁵³⁶

All one had to do to see this in operation, Madison chided his colleagues, was to look at the British government—just as Nicholas had urged. “The sword is in the hands of the British king; the purse in the hands of the Parliament. It is so in America, as far as any analogy can exist,” Madison declared.⁵³⁷ Thus, safety was to be found not by giving the states power over the militia or supply, but by relying on Congress to exercise its constitutional powers to check presidential actions—just

534. See 3 *id.* at 384-88.

535. 3 *id.* at 391.

536. 3 *id.* at 393.

537. 3 *id.*

as the people of England could trust Parliament to restrain the Crown. Madison continued:

Would the honorable member say that the sword ought to be put in the hands of the representatives of the people, or in other hands independent of the government altogether? . . . This would be a novelty hitherto unprecedented. The purse is in the hands of the representatives of the people. They have the appropriation of all moneys. They have the direction and regulation of land and naval forces. They are to provide for calling forth the militia; and the President is to have the command, and, in conjunction with the Senate, to appoint the officers.⁵³⁸

Madison did not argue that presidential power would be checked by the Declare War Clause or by the judiciary. Nor did he claim that the Constitution imposed specific and formal rules for the war-making process, as it did for the legislative process. Instead, Madison argued that the branches would develop their war policies through the conflict or cooperation of their plenary constitutional powers.⁵³⁹

The significance of the forum in which Madison argued cannot be overstated. Virginia was a key state, perhaps *the* key state, in the Federalist ratification effort.⁵⁴⁰ Antifederalists chose Virginia as the battleground for their fiercest efforts against ratification. Their final motion to send the Constitution back to the states for amendments lost by a vote of only 88-80.⁵⁴¹ The ratifying convention brought together the ablest minds of both sides: Henry, Mason, Benjamin Harrison, and James Monroe for the Antifederalists; Madison, Edmund Randolph, Henry Lee, and John Marshall for the Federalists. The significance of Virginia in the ratification process and in the Union, and the narrowness of Federalist victory, recommend giving the greatest weight to the justifications for the Constitution entered there.

538. 3 *id.* at 393-94.

539. Hamilton made the same point in the New York ratifying convention. See 2 *id.* at 348-51. However, Federalist Oliver Ellsworth in the Connecticut ratifying convention appears to have thought, like Henry, that Congress had both the power of sword and purse. See 2 *id.* at 195. It appears that Ellsworth was using "Congress" as shorthand for the national government because there is no evidence that any of the other Federalists believed that Congress had the power of the "sword."

Subsequent Antifederalist attempts in Virginia to rein in the President's Commander-in-Chief powers met with a similar response. Continuing to play Henry's tune, Antifederalist George Mason suggested an amendment to prohibit the President from personally leading the army without congressional approval. See 3 *id.* at 496. Nicholas responded that "the army and navy were to be raised by Congress, and not by the President." 3 *id.* at 497. Mason retorted, "Although Congress [is] to raise the army . . . no security arises from that" because Congress would feel compelled to do so in wartime. 3 *id.* at 498. Although Mason remained unconvinced, the Convention agreed with Nicholas and voted down Mason's proposal.

540. Hamilton believed ratification in New York was impossible without Virginia adopting the Constitution first. See 2 *DEBATE ON THE CONSTITUTION*, *supra* note 16, at 1067. There is little doubt that the Union could not have survived without Virginia and New York.

541. 2 *id.* at 1068.

The Virginia debates were also important because Federalists in other states repeated Madison and Nicholas' defense of war powers. When an Antifederalist at the North Carolina Convention argued that the President "could too easily abuse such extensive powers," and stated that he was of the opinion that "Congress ought to have power to direct the motions of the army,"⁵⁴² Richard Spaight, a signer of the Constitution and one of James Iredell's Federalist allies, responded with Madison and Nicholas' arguments. He replied that Congress could always use its constitutional authority to cut off funds for the military if the President went too far:

[I]t was true that the command of the army and navy was given to the President; but . . . Congress, who had the power of raising armies could certainly prevent any abuse of that authority in the President—that they alone had the means of supporting armies, and that the President was impeachable if he in any manner abused his trust.⁵⁴³

Federalists likely put forth similar arguments in New Jersey, Connecticut, and Massachusetts, and they probably repeated them in the several state ratifying conventions for which we have few, if any, records.⁵⁴⁴

Throughout these debates on war and the powers of the President and Congress, the Declare War Clause went quietly unmentioned. In fact, given the Antifederalists' belief that Congress would prove no match for a President armed with the commander-in-chief powers, one would have expected the Federalists to have stressed that only Congress could initiate war—if that indeed had been the true meaning of the Declare War Clause. Instead, the Federalists based their arguments upon the funding power to check the President (and if that failed, upon the last resort of impeachment). In South Carolina, to provide one example, supporters of the Constitution noted that the President was not given the entire war powers, because such would "throw[] into his hands the influence of a monarch, having an opportunity of involving his country in a war whenever he wished to promote her destruction."⁵⁴⁵ But when describing the war powers, Federalist Charles Pinckney noted only that the commander-in-chief power and the power to fund the military were

542. 4 ELLIOT, *supra* note 119, at 114.

543. 4 *id.*

544. See, e.g., A Jerseyman, *To the Citizens of New Jersey*, TRENTON MERCURY, Nov. 6, 1787, reprinted in 3 JENSEN, *supra* note 114, at 146, 148 ("If the *President* should have . . . designs without the concurrence of Congress, he might have the honor of commanding an army as long as they would stay with him, but it is not common for an army to remain long in the field without the prospect of any pay."); Letter from Samuel Holden Parsons to William Cushing, *supra* note 528, at 570.

545. 4 ELLIOT, *supra* note 119, at 263 (Pierce Butler).

separated. No one in the South Carolina debates mentioned the Declare War Clause.⁵⁴⁶

These defenses of the Constitution are consistent with the legal and historical context within which the Framers acted. Federalists construed the Constitution's allocation of powers as giving Congress the purse as the primary check on presidential use of the military. Throughout the debates, declaration of war went unmentioned except as out of fashion. The idea that the President had to receive congressional authorization before using the military was not raised. In addition, no reference was made to the courts as adjudicators of inter-branch disputes over war. Rather, the Framers expected each branch to pursue its goals by relying on its own powers. Congress would exercise influence through its power over funding and its power of impeachment, just as Parliament and the colonial and state legislatures had done. The Framers' design should come as no surprise, because it built upon the foundations of the British and colonial constitutional experiences the Framers' had all shared. The tools given to President and Congress were the very ones used by Parliament to influence and control the Crown's conduct of foreign policy for the previous 100 years—a history familiar to educated Americans of the day.⁵⁴⁷

546. See 4 *id.* at 258 (Charles Pickney) (The President "is commander-in-chief of the land and naval forces of the Union, but he can neither raise nor support forces by his own authority.").

547. Perhaps the only voice on war powers that was inconsistent with this shared understanding was that of James Wilson. Advocates of congressional primacy in war powers quite correctly have placed great reliance on his views. But in light of the above chronicle of the debate between the Federalists and the Antifederalists, James Wilson's views can be seen as exceptional rather than typical. As with any large-scale collective political actions, not all supporters of the Constitution agreed on every point, especially when it came to the faith in checks and balances in war. James Wilson, the leader of the Federalist campaign in the Pennsylvania ratifying convention, was one who doubted the virtues of the British system. Wilson had attempted to convince the Constitutional Convention to minimize any presidential role in the making of war and peace, an effort he continued when the Constitution went to the states. In a speech generally defending the federal government's new powers, Wilson told the Pennsylvania ratifying convention:

This system will not hurry us into war; it is calculated to guard against it. It will not be in the power of a single man, or a single body of men, to involve us in such distress; for the important power of declaring war is vested in the legislature at large: this declaration must be made with the concurrence of the House of Representatives: from this circumstance we may draw a certain conclusion that nothing but our national interest can draw us into a war.

2 *id.* at 528.

Wilson's speech is a favorite among studies supporting greater congressional war power. See, e.g., ELY, *supra* note 1, at 3-5; FISHER, *supra* note 1, at 7-8; LOFGREN, *supra* note 114, at 19; Berger, *supra* note 13, at 36. It suggests that only Congress can involve the nation "in such distress" as war because Congress represents the people, and therefore, the clearest expression of the national interest.

Wilson's explanation of the war powers appears to contradict this Article's interpretation of the war powers as giving the executive the initiative, checked only by the power of the purse. However, I would suggest that Wilson's meaning is more consistent with my interpretation than might at first appear. Wilson's speech appears to refer to the formal aspects of a declaration of war, rather than to the authorizing process for the commencement of hostilities. Wilson's oft-quoted speech took

4. War Powers and Judicial Abstention

Central to the Framers' vision was the ability of each branch to resort to self-help to counter the actions of the other. Neither Federalists nor Antifederalists contended that the courts should step in to referee separation of powers disputes. If the Framers had understood that the courts would oversee the constitutional processes of going to war, it would have been in the Federalists' political interests to emphasize a

place during a larger discussion about the virtues of a national government, whose strength and unity would deter the European powers from partitioning America. Wilson hoped the United States' strength and the vastness of the Atlantic Ocean would prevent the new nation from "mix[ing] with the commotions of Europe." 2 ELLIOT, *supra* note 119, at 528. Then Wilson remarked, "No, sir, we are happily removed from them, and are not *obliged to throw ourselves into the scale with any.*" 2 *id.* (emphasis added). Wilson's subsequent statement that "[t]his system will not hurry us into war" appears to have been intended to contrast the treaty power with the war power. 2 *id.* He was not expounding on the President's and Congress' joint powers over war, but instead was reassuring his audience that the President and the Senate alone could not obligate the nation to enter a full-scale war because of treaty obligations—a fairly common practice in a period of European great power rivalries and alliances. Thus, Wilson emphasized that neither "a single man" nor "a single body of men" could involve the nation in total war, but that the legislature as a whole must decide. 2 *id.* He quite correctly understood that the treaty power could not trump the Declare War Clause.

Although this reading might explain Wilson's thoughts in a more cogent fashion, it is perhaps safer just to count Wilson as a dissenter from the prevailing Federalist view on war powers. But Wilson's statement on war powers does not square perfectly with his broad thoughts in favor of a strong executive expressed during the ratification debates. For example, in defending the executive's qualified veto over legislation, Wilson stressed that the President's constitutional powers would enable him to act as an independent representative of the People:

The President, sir, will not be a stranger to our country, to our laws, or to our wishes. He will, under this Constitution, be placed in office as the President of the whole Union, and will be chosen in such a manner that he may be justly styled the man of the people. Being elected by the different parts of the United States, he will consider himself as not particularly interested for any one of them, but will watch over the whole with paternal care and affection. . . . He will have before him the fullest information of our situation; he will avail himself not only of records and official communications, foreign and domestic, but he will have also the advice of the executive officers in the different departments of the general government.

2 *id.* at 448.

Separately, Wilson also underscored that the President's military authority, among others, would render him free from legislative oppression. "[T]here is no well-grounded reason to suspect the President will be the *tool* of the Senate," Wilson remarked, because the President's powers were "of such a nature as to place [the President] above expression of contempt." 2 *id.* at 512-13. By linking the representational and protective aspects of the presidency with its independent commander-in-chief powers, Wilson himself may have helped sketch the theoretical justification for presidential initiative in war. It should also be noted that Wilson's primary Federalist ally in the state ratifying convention, Thomas M'Kean, echoed his Virginia colleague by explaining that Congress' role in war lay in funding as well as declaring war. 2 *id.* at 536-37.

Nonetheless, even later in life, Wilson adhered to his belief that Congress should play the paramount role in war. In his lectures given as a professor of law in "the college of Philadelphia," Wilson contended that "[t]he power of declaring war, and the other powers naturally connected with it, are vested in congress." 2 WILSON, *supra* note 451, at 57. He also suggested in his lectures that the Constitution had mimicked the Anglo-Saxon distribution of authority by giving all power over making war and peace in the legislature, just as the ancient "wittenagemote" had held the same power before the Norman conquest. 2 *id.* at 57-58.

judicial role in war, just as they had highlighted Congress' funding check on the President.

One might read Article III, which commands that "[t]he judicial Power shall extend to all Cases . . . arising under this Constitution,"⁵⁴⁸ as requiring the federal courts to adjudicate war powers disputes between the branches. The framing debates, however, suggest that disputes over war powers fall outside Article III, because the Framers did not view conflicts between the President and Congress as "Cases."⁵⁴⁹ In contrast with the Constitution's design for passing a statute, which has to meet the textual requirements of bicameralism and presentment, the Constitution does not require one single, constitutionally correct method for going to war.⁵⁵⁰ Rather, the Constitution establishes a system that creates a fluid, mutable process for going to war—one defined not by the Constitution, but by the branches in the use of their constitutional powers. Having placed war powers in the arena of politics, the Framers would have viewed inter-branch disputes in the area as unsuitable for judicial resolution. Such disputes would not constitute an Article III "Case," because no party could make a claim of right enforceable in court.

The failure to establish a judicial role in war powers also might have stemmed from the Framers' understanding of the Declare War Clause as declaratory in nature. As I have argued earlier, the Framers would have understood the Declare War Clause as a judicial power vested in Congress, just as the Constitution gave the Senate judicial authority in the trial of impeachments.⁵⁵¹ In these areas, the Constitution places Congress in the position of the court of last resort. The federal judiciary therefore could not exercise appellate jurisdiction over war powers decisions because the Constitution allocated to Congress the sole power to declare if war exists. Allowing courts to review war powers decisions would prove an unconstitutional extension of appellate jurisdiction beyond the bounds of Article III.

This analysis may explain the prevalence of the political question doctrine in foreign affairs cases today. The courts are correctly holding such cases non-justiciable because the Constitution has vested Congress with the sole judicial power to decide whether the United States is at war.

548. U.S. CONST. art. III, § 2.

549. Professor Jesse Choper has suggested that the courts also should hold war powers cases nonjusticiable for functional reasons. JESSE H. CHOPER, *JUDICIAL REVIEW AND THE NATIONAL POLITICAL PROCESS: A FUNCTIONAL RECONSIDERATION OF THE ROLE OF THE SUPREME COURT* 379 (1980).

550. Because the Constitution establishes a clear, defined, exclusive process for passing a statute, it seems appropriate for the courts to intervene in a case such as *INS v. Chadha*, 462 U.S. 919 (1983) (invalidating legislative veto). But in the war powers context, the Constitution fails to provide any such manageable standards for the courts to apply.

551. See *supra* text accompanying notes 402-405.

As noted earlier, courts may adjudicate cases that involve the ramifications of the nation's wartime status. But in these cases, the courts must simply accept the actions of the political branches in war matters as valid determinations of whether a state of war exists.

At a time closer to the framing, the early Supreme Court adopted just such an analysis. In *Martin v. Mott*,⁵⁵² an 1827 case not unlike the Vietnam and Persian Gulf war cases brought by reservists, the Court faced the question of whether a militiaman called to service by the President could challenge the call-up because a sufficient emergency did not exist. Pursuant to its Article I, Section 8 powers,⁵⁵³ Congress had "provide[d] for calling forth the militia" in a 1795 act, which permitted the President to summon the militia "whenever the United States shall be invaded, or be in imminent danger of invasion."⁵⁵⁴ The plaintiff argued that the Court should decide for itself whether a sufficient danger of invasion existed to permit the President to exercise his statutory powers. Rejecting this claim, the Court held that the President's official call-up of the militia was itself sufficient proof of the emergency, because, as Justice Story explained, the President "is necessarily constituted the judge of the existence of the exigency, in the first instance," and thus he is "the sole and exclusive judge of the existence of those facts" upon which his judgment is based.⁵⁵⁵

The Declare War Clause would seem to demand at least a similar degree of deference from the courts. Like the executive order in *Martin*, an official declaration of war (or absence thereof) is proof enough concerning the existence of a state of war. Beyond judging whether such a declaration has issued, courts would remain incompetent to determine if the nation is at war. Even if the executive has engaged in hostilities without popular support, neither Congress nor individuals have an avenue for redress in the courts.⁵⁵⁶

552. 25 U.S. (12 Wheat.) 19 (1827).

553. "The Congress shall have Power . . . [t]o provide for calling forth the Militia to execute the Laws of the Union, suppress Insurrections and repel Invasions . . ." U.S. CONST. art. I, § 8, cl. 15. Note that there is no similar grant of power to Congress over the standing army and navy.

554. *Martin*, 25 U.S. (12 Wheat.) at 28-29.

555. *Id.* at 31-32.

556. If anything, the several leaders of the ratification effort anticipated the use of judicial review by the courts to prevent Congress from overstepping its authorities, not the President. As Hamilton wrote in the famous *The Federalist No. 78*, "the courts of justice are to be considered as the bulwarks of a limited constitution against legislative encroachments . . ." THE FEDERALIST NO. 78, *supra* note 304, at 526 (emphasis added). The Framers generally did not think of judicial review as a check on the executive branch. In *No. 78*, for example, Hamilton consistently refers to the "legislative act," or the "legislative power" when discussing the object of judicial review. *Id.* at 524-26. Given the Framers' fears that the legislative branch would have the greatest power and incentive to encroach on the prerogatives of the other branches, their reliance on judicial review to control only Congress makes perfect sense. With the legislature's powers "at once more extensive and less susceptible of precise limits," according to Madison, the Framers quite reasonably expected Congress

As this Section has shown, the Framers provided for executive control and initiative in war, balanced by Congress' power to raise and supply the military. Decisions on war would arise from the political interaction of the branches, which had their plenary constitutional powers at hand to enforce their wishes. In marked contrast to the Constitution's careful definition of the process to make treaties or statutes, the Framers left to future leaders the development of a war-making process. They simply marked out the boundaries within which the branches could struggle over that process, war by war. The Framers did not require judicial review of war, then, because they assumed the process itself to be mutable, as it was in Britain, the colonies, and in the states. To paraphrase Edward Corwin, the Constitution was not an invitation to the President and Congress to struggle for primacy in war, it was an expectation of struggle.⁵⁵⁷

5. *The New Constitution in Practice*

This view of the Constitution is also supported by early post-ratification history. Because scholars have viewed the Declare War Clause as granting Congress the sole authority to begin war, the United States' failure to wage a declared war until 1812 might be seen as something of a puzzle. Certainly the answer does not lay in the existence of an era of good international feelings from 1789-1812. These years saw the French Revolution, a general European war, and a resulting series of challenges for American national security policy.⁵⁵⁸ For the Republic's first five years, the Washington administration waged a difficult conflict with Indians in the Ohio River Valley, and the Adams administration fought a naval war, known as the Quasi-War, toward the turn of the century. Neither of these wars were small conflicts. The former witnessed the crushing defeat of the nation's first standing army by the Indians in 1791, in response to which the Washington administration created the nation's first permanent military establishment.⁵⁵⁹ Even though no declaration of war had issued against the Indians,

to control—if not abuse—the President's use of the tools at hand. *Id.* No. 48, at 334. Witness Madison's discussion in *The Federalist No. 48*: "As the legislative department alone has access to the pockets of the people . . . and . . . a prevailing influence over the pecuniary rewards of those who fill the other departments, a dependence is thus created in the latter, which gives still greater facility to encroachments of the former." *Id.*

557. See generally EDWARD S. CORWIN, *THE PRESIDENT: OFFICE AND POWERS 1787-1984* (Randall W. Baird et al. eds., 5th rev. ed. 1984).

558. For discussion of the interests at stake for America, see generally ALEXANDER DECONDE, *ENTANGLING ALLIANCE: POLITICS AND DIPLOMACY UNDER GEORGE WASHINGTON* (1958); DREW R. MCCOY, *THE ELUSIVE REPUBLIC: POLITICAL ECONOMY IN JEFFERSONIAN AMERICA* (1980); BRADFORD PERKINS, *THE CREATION OF A REPUBLICAN EMPIRE, 1778-1865* (1993); BRADFORD PERKINS, *THE FIRST RAPPROCHEMENT* (1955).

559. See KOHN, *supra* note 382, at 91-127.

George Washington exclaimed, "But, we are involved in actual war!"⁵⁶⁰ The Quasi-War produced not only raids on merchant commerce, but also full-scale battles between American and French ships, and the creation of a huge 10,000-man regular army, with George Washington as its Commander in Chief and Alexander Hamilton as his deputy.⁵⁶¹

In neither 1789 nor 1798 did the President or Congress believe a declaration of war was necessary. In both conflicts, the President managed international relations, and after diplomacy had failed, ultimately decided to use military force. Once he had decided upon combat, the President turned to the Congress for the raising and supply of the necessary troops and sailors. In the context of voting on the President's requests, Congress had ample opportunity—of which it invariably took advantage—to discuss war aims and strategies. Thus, in 1789 President Washington and his Secretary of War decided that the Indians in the Northwest were preventing the peaceful settlement of territory ceded by Great Britain and that a combination of military force and diplomacy was needed. Once the Indian war bogged down, President Washington had to ask Congress for more and more funds: first for a call-out of the militia in 1789 to begin operations; then, for 2,000 regular troops, after the first, inconclusive battle with the Indians in 1790; then, after the stunning defeat of General St. Clair the next year, for a tripling of military expenditures to one million dollars a year and 5,000 more troops.⁵⁶² Although Congress agreed to the President's requests, each appropriation was accompanied by a vigorous discussion over the war's merits.⁵⁶³ For example, Washington's final request for a 5,000-man army, which finally defeated the Indians under General "Mad" Anthony Wayne at the Battle of Fallen Timbers in 1794, provoked a bitter debate in Congress over whether peace efforts would be more effective than force, whether white settlers had provoked the war, whether the state militias should be used rather than army regulars, and whether it would make for better strategy to seek one winning blow rather than "dribbling away" money every year.⁵⁶⁴ Congress' approval of the appropriation by a vote of 29-19 in the House and 15-12 in the Senate constituted an explicit authorization of the President's war plans. Congress never considered a declaration of war necessary.⁵⁶⁵

560. *Id.* at 107.

561. See generally DeCONDE, *supra* note 120; MICHAEL A. PALMER, *STODDERT'S WAR: NAVAL OPERATIONS DURING THE QUASI-WAR WITH FRANCE, 1798-1801* (1987).

562. See KOHN, *supra* note 382, at 97-98, 110-11, 120-24.

563. See *id.*

564. *Id.* at 121-22.

565. *Id.* at 122-23. One could argue that the Framers believed a declaration of war was unnecessary in 1789 because the Americans did not consider the Indians a nation-state in the international system. There is, however, no direct evidence to support such a view; to the contrary, tribes were enough of a nation-state to sign treaties. See generally Philip P. Frickey, *Marshalling Past*

The Quasi-War further supports the conclusion that a declaration of war was not understood as necessary for authorizing combat. The Quasi-War arose out of revolutionary France's efforts to shatter Britain's peace with the United States established by the Jay Treaty of 1794.⁵⁶⁶ After a series of French raids on American commerce and the declaration of France's Directory that American ships would be seized if they carried British goods, President Adams sent three diplomatic emissaries to Paris to negotiate a settlement. When this encounter exploded into the "XYZ Affair," Adams sent the country on a course for war by publicly releasing the dispatches of the envoys, by requesting new ships for the navy, and by seeking the buildup of coastal defenses and a new army of up to 50,000 men. In response, Congress approved Adams' designs to wage a naval war against France by supplying the funds for the bulked up military.⁵⁶⁷ "We are," Federalists declared, "now in a state of war."⁵⁶⁸ Yet Congress never brought to a vote a motion to declare war, even though Federalists controlled both houses and the presidency. Even those High Federalists who wanted a declaration viewed its benefits in a purely domestic light. A declaration, they thought, would "rouse the spirit of the people, facilitate the collection of taxes, quicken the military preparations, and cut off the correspondence of Republicans with France by making such correspondence a crime punishable by law."⁵⁶⁹ But in terms of an authorization of combat, there was no need for a declaration because Congress had already played a significant role in raising and funding the military and in setting rules for the capture of French ships.

Congress' failure to declare war against France also demonstrates the *limited* nature of the conflict. Not seeking a declaration was a deliberate decision of President John Adams, who believed that a full-scale war against France would not be in the national interest. His decision fulfilled the hopes of those Framers who wanted the President to play a more significant role than that of a mere super-magistrate. As we have seen, the Framers left the crucial decisions in war to the President because they viewed him as the nation's protector and representative. Today, we may see less need for a national presidency that could counter Congress' regionalist interests. But the late eighteenth and early nineteenth centuries were a time when the Framers rightfully could fear that a majority in Congress might support a war for sectional, rather than national, advantage. Thus, the Framers looked to the President to lead

and Present: Colonialism, Constitutionalism, and Interpretation of Federal Indian Law, 107 HARV L. REV. 381 (1993).

566. DECONDE, *supra* note 120, at 8.

567. *See id.* at 90-96.

568. *Id.* at 105.

569. *Id.* at 104.

America into war when the national interest required, or to discourage war when self-interested factions gained control of Congress.

The Framers' design was realized during both the Quasi-War and the 1789 Indian War. In the Indian War, President Washington pursued a limited war that rejected the hopes of both New England Federalists, who opposed the war because of its costs, and Southern Republicans, who sought an aggressive war to secure territorial gain.⁵⁷⁰ During the Quasi-War, Adams resisted the demands of his own pro-English party leaders, who wanted a total war against France.⁵⁷¹ Believing that peace was possible without risking the costs of a full-scale war, Adams opted for a limited naval conflict that permitted diplomatic contacts and, eventually, a negotiated reconciliation.⁵⁷² In both cases, the President pursued the national interest, while different factions in Congress quarreled over aims and strategies in order to achieve their regional or party objectives.

The Quasi-War also supports this study's argument that the Framers did not intend the judiciary to play a role in the decisions on war. Unlike the Indian War, the Quasi-War generated disputes that reached the Supreme Court in a trilogy of cases: *Bas v. Tingy*,⁵⁷³ *Talbot v. Seeman*,⁵⁷⁴ and *Little v. Barreme*.⁵⁷⁵ Commentators have placed great store in these opinions, particularly *Little*, as contemporaneous evidence showing that courts can exercise jurisdiction over war power cases.⁵⁷⁶ However, none of these cases called upon the Supreme Court to decide that the President was waging war in violation of the Constitution, or that Congress had failed to declare that a state of war existed, or that courts could step in to adjudicate inter-branch disputes over war. In fact, the precedent set by the trilogy remains quite modest. All three revolved around the question of how much of the value of a ship and its cargo, seized by an American commander during the naval operations against France, flowed to the commander instead of to the ship's owner. Such issues did not involve the power of going to war, but rather the domestic and legal effects of war once it had begun. Further, these cases clearly fell within Congress' power to "make Rules concerning Captures on . . . Water"⁵⁷⁷ and Article III's grant of the jurisdiction over "all

570. See KOHN, *supra* note 382, at 121-22.

571. See STANLEY ELKINS & ERIC MCKITTRICK, *THE AGE OF FEDERALISM* 595-99 (1993).

572. DECONDE, *supra* note 120, at 103-08, 112-13.

573. 4 U.S. (4 Dall.) 37 (1800).

574. 5 U.S. (1 Cranch) 1 (1801).

575. 6 U.S. (2 Cranch) 170 (1804), *overruled in part by* *Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89 (1984).

576. See, e.g., ELY, *supra* note 1, at 55; GLENNON, *supra* note 1, at 3-8; KOH, *supra* note 1, at 81-82.

577. U.S. CONST. art. I, § 8.

Cases of admiralty and maritime Jurisdiction,"⁵⁷⁸ which from its earliest days, the Supreme Court has read to authorize federal common lawmaking power.⁵⁷⁹

Rather than making grand pronouncements on the separation of powers, cases such as *Bas*, *Talbot*, and *Little* underscored Congress' role in deciding on the legal state of relations with a hostile nation. In *Bas* and *Talbot*, for example, owners of ships that had been captured by the French, and then recaptured by American warships, challenged the prize rules that would give the American commanders a substantial portion of the ship's proceeds. They argued that the prize rules did not operate because Congress had failed to declare war formally, and that as a result the Court should hold inapplicable any statutes concerning recaptures until a declaration of war had been issued.⁵⁸⁰ In both cases the Court held that Congress had the sole power to decide on the *legal* nature of hostilities: whether they would be "general" or "partial," "public" or "private," "solemn" and "imperfect" or "limited" and "imperfect." According to Justice Chase, "Congress is empowered to declare a general war, or [C]ongress may wage a limited war; limited in its place, in objects, and in time."⁵⁸¹ Chase then emphasized a declaration of war as important primarily in international law: "If a general war is declared, its extent and operations are only restricted and regulated by the *jus belli*, forming a part of the law of nations; but if a partial war is waged, its extent and operation depend on our municipal laws."⁵⁸² In adjudicating cases stemming from a limited war, the courts must defer to Congress' judgment on which laws of war would apply to the conflict, and which would not. Chief Justice Marshall expressed this principle in *Talbot*: "[C]ongress may authorize general hostilities, in which case the general laws of war apply to our situation; or partial hostilities, in which case the laws of war, so far as they actually apply to our situation, must be noticed."⁵⁸³ In all three cases, the Court rebuffed arguments that it should determine whether a state of war existed, or whether Congress and the President had acted constitutionally in beginning the conflict with France.⁵⁸⁴ Neither *Bas*, *Talbot*, nor *Little* (nor all three added together) constituted the *Marbury* of foreign relations law.

578. *Id.* art. III, § 2.

579. See PAUL M. BATOR ET AL., HART AND WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 892-95 (3d ed. 1988); WHITE, *supra* note 414, at 884-926.

580. See *Talbot v. Seeman*, 5 U.S. (1 Cranch) 1, 19-24 (1801); *Bas v. Tingy*, 4 U.S. (4 Dall.) 37, 37-38 (1800).

581. *Bas*, 4 U.S. (4 Dall.) at 43.

582. *Id.*

583. *Talbot*, 5 U.S. (1 Cranch) at 28.

584. To be sure, these decisions contain dicta that could support arguments for exclusive congressional power over war. Scholars have made the most of *Little v. Barreme*, the case of an American naval commander, Captain Little, who had obeyed President Adams' order to seize ships

CONCLUSIONS

This study has shown that the Framers intended Congress to participate in war-making by controlling appropriations. Although the Constitution gives the President the initiative in war by virtue of his powers over foreign relations and the military, it also forces the President to seek money and support from Congress at every turn. In making decisions whether to raise and support the requested forces, Congress can judge the benefits of a particular war as well as influence its means and ends. Such was the practice under the British Constitution and under the early American governments, elements of which provided models for the drafters of the new federal Constitution. Such was the explanation given by the supporters of the Constitution to its opponents.

Contrary to the arguments by today's scholars, the Declare War Clause does not add to Congress' store of war powers at the expense of the President. Rather, the Clause gives Congress a judicial role in declaring that a state of war exists between the United States and another nation, which bears significant legal ramifications concerning the rights and duties of American citizens. Congress' power to declare war also has the additional effect of ousting the courts from war powers disputes, because it deprives the courts of the ability to second-guess Congress' determination of whether a formal state of war exists.

suspected of American ownership, which had sailed from French ports. Unfortunately for Captain Little, Congress had authorized captures only of American ships sailing to French ports. Non-Intercourse Act, ch. 2, § 1, 3 Stat. 613 (1799). The Court, Chief Justice Marshall writing, held Little liable for damages to the ship-owners because Congress had not authorized seizures of ships sailing from French ports. See *Little v. Barreme*, 6 U.S. (2 Cranch) 170, 179 (1804). Critics of modern presidential war powers have read *Little* as standing for two propositions: (i) that courts can hear war powers cases, and (ii) that Congress can regulate the conduct of war even if Congress' regulations conflict with presidential orders. See, e.g., ELY, *supra* note 1, at 55; GLENNON, *supra* note 1, at 3-8; KOH, *supra* note 1, at 81-82.

Professors Ely, Koh, and Glennon surely over-read *Little*. The Court could hear the case because it involved maritime and prize jurisdiction, which the text of the Constitution grants to the federal courts. Thus, the case did not really call upon the Court to pass judgment on the exercise of war powers, and thus did not present a political question. Congress' statute controlled because it set a "Rules concerning Captures on . . . Water," again pursuant to a clear constitutional grant of power. See U.S. CONST. art I, sec. 8. The Court did not enjoin enforcement of the President's order, but instead merely found that Captain Little was personally liable for damages. *Little* never reached questions concerning the justiciability of inter-branch war powers disputes, or the President's inherent authority to order captures going beyond Congress' commands. In fact, Chief Justice Marshall quite carefully left the issue open:

It is by no means clear that the [P]resident of the United States whose high duty it is to "take care that the laws be faithfully executed," and who is commander in chief of the armies and navies of the United States, might not, without any special authority for that purpose, in the then existing state of things, have empowered the officers commanding the armed vessels of the United States, to seize and send into port for adjudication, American vessels which were forfeited by being engaged in this illicit commerce.

Little, 6 U.S. (2 Cranch) at 177.

The Framers also may have believed judicial participation unwarranted because of the structure established in the war powers area. The potentially conflicting powers of the President and Congress establishes a system that demanded no constitutionally correct method of waging war, but instead permits flexible decision-making based on each branch's exercise of its powers. Aside perhaps from policing against the most extreme violations of those grants by another branch—such as if Congress attempted to “fire” the President as Commander in Chief—the courts have no constitutional standards to apply to a process the Framers left intentionally undefined. Instead, the Framers understood that the legislature and the executive would use their powers to defend the prerogatives of their departments, as well as to pursue their policy preferences against a recalcitrant coordinate branch. The Framers expected the branches to cooperate to wage a successful war, but also anticipated conflict should the two disagree. They also provided the means for the government to continue to function in war, so long as the legislature acquiesced in the actions of the executive.

A. *Modern War Revisited*

This study suggests that our constitutional system has never needed a *Marbury* to govern war powers. Instead, the exercise of war powers has developed in the realm of politics within the broad constitutional bounds established by the Framers. In the conflicts of the last half-century, ranging from Korea to the Persian Gulf, the President has acted to protect what he believed to be American national security interests abroad. Due to the elevated levels of men and material needed, these wars invariably forced the President to go to Congress before he could take military action. In each instance, Congress' opportunity to refuse or suspend funding gave Congress a powerful weapon, which it could use to pronounce its own policies. Thus, in June 1950, Truman immediately could intervene when South Korea was invaded, but he needed further appropriations for a longer-term commitment (which he sought from Congress a month later).⁵⁸⁵ Even though Republican leaders criticized the President's unilateral intervention, Congress readily approved the funding that Truman sought. As Dean Acheson described it later, “[a]ppropriations and powers tumbled over one another” in the haste with which Congress acted.⁵⁸⁶ For Vietnam, Congress voted as early as May 1965 to appropriate \$700 million for the war, added \$1.7 billion in September, and as the war escalated, approved another \$4.8 billion in March 1966.⁵⁸⁷ During these appropriations votes, members of

585. See ACHESON, *supra* note 38, at 402-13, 420-22.

586. *Id.* at 421.

587. See ELY, *supra* note 1, at 27-28.

Congress argued about the wisdom of the war and one even attempted, without success, to prevent the use of American draftees in Southeast Asia.⁵⁸⁸ And during the early stages of Operation Desert Shield, Congress approved \$978 million to support the American troop deployment.⁵⁸⁹ Congressional resistance to war at these points would have ended any presidential war efforts, because the President cannot veto a refusal to pass an appropriations bill. All Congress had to do was nothing.

Recent events further confirm that Congress fully understands that its appropriations power may be used to check executive military operations. Beginning in 1993, President Clinton authorized steadily increasing uses of American military force in the former Yugoslavia pursuant to United Nations Security Council resolutions. In April 1993, U.S. planes began to enforce the United Nations ban on military flights over Bosnia and Hercegovina. In June 1993, President Clinton sent 300 troops to participate in a U.N. peacekeeping force in Macedonia. In February 1994, sixty U.S. aircraft were made available to help the U.N. end the Bosnian conflict; from March through November, these planes shot down Serbian aircraft and bombed Serbian military positions. In December 1995, President Clinton ordered the deployment of 20,000 American troops to Bosnia to implement a peace agreement signed by Serbia, Bosnia, and Croatia.⁵⁹⁰

Like President Bush during the Persian Gulf War, President Clinton did not ask Congress for authorizing legislation or for a declaration of war. Instead, President Clinton declared that he had "directed the participation of U.S. forces in these operations pursuant to my constitutional authority to conduct the foreign relations of the United States and as Commander in Chief and Chief Executive."⁵⁹¹ As he put it in his message to Congress concerning his decision to send American troops to Bosnia, President Clinton requested only "an expression of support from the Congress."⁵⁹² President Clinton maintained that he had the unilateral authority to send the military to Bosnia, whether Congress gave its approval or not.

Congress fully deliberated President Clinton's decision to expand American military intervention in Bosnia. Even before he requested a

588. *Id.* at 28.

589. Tom Kenworthy, *Despite Veto Threat, House Cuts Favored Defense Programs*, WASH. POST, Sept. 20, 1990, at A6. Congress refused, however, the Bush administration's request for control over the allied contributions for the operation, stipulating that such funds cannot be spent except as authorized by Congress. *Id.*

590. William Drozdiak & John F. Harris, *Leaders Sign Pact to End Bosnia War; Clinton Urges People of Battered Country to "Seize This Chance,"* WASH. POST, Dec. 15, 1995, at A1.

591. Letter to Congressional Leaders on Bosnia, 31 WEEKLY COMP. PRES. DOC. 2144, 2145 (Dec. 6, 1995).

592. *Id.*

congressional expression of support, President Clinton already had received funding for the Bosnia operation in the 1996 Defense Department appropriations bill. During budget negotiations between the White House and congressional leaders in November 1995, President Clinton agreed to sign the \$243 billion appropriations bill, in exchange for congressional agreement that \$1.5 billion would be used to fund the 20,000 troops being sent to Bosnia.⁵⁹³ If Congress had chosen to oppose the intervention, it easily could have refused to add the \$1.5 billion, or it could have refused to fund all Pentagon operations overseas. Instead, Congress passed the funds to allow the executive to conduct its war plans.

Further debate over the wisdom of the Bosnia operation included efforts to eliminate funding for the troops. A bill to do just that passed the House of Representatives.⁵⁹⁴ House Resolution 2606, introduced by Representative Hefley, prohibited any use of Defense Department funds for deployment of American armed forces on the ground in Bosnia as part of the NATO implementation force. After debate concerning whether to support the Bosnia intervention, the Senate rejected H.R. 2606 by a vote of 22 to 77,⁵⁹⁵ and instead passed a resolution, by a vote of 69 to 30, supporting the mission. Disagreeing with the Senate, the House passed a resolution opposing President Clinton's policy, but supporting the troops.⁵⁹⁶

Thus, the appropriations power provided Congress with ample opportunity to weigh in on the decision to send troops to Bosnia. Congress had the clear opportunity to stop the mission by refusing to include funding for it in the Defense Department appropriations bill. It did not. The House then passed a funding ban, but the Senate demurred. In the course of considering the appropriations ban, Congress had the full opportunity to debate the merits of the President's military decision, and could have used its appropriations power to enforce its own judgment on the wisdom of sending the troops. By providing long-term funding for such military operations, Congress had given the executive the means to send the troops overseas. By refusing to cut those funds off, Congress chose to permit the executive to pursue war. The Senate's resolution only provided further endorsement of President Clinton's actions.

A critic could respond to these examples in two ways. First, one could claim that Congress cannot consider war issues responsibly when

593. John F. Harris & Eric Pianin, *Clinton Accepts Hill's Defense Spending Bill*, WASH. POST, Dec. 1, 1995, at A1, A6.

594. H.R. 2606, 103d Cong., 2d Sess. (1995).

595. 141 Cong. Rec. S18470 (Dec. 13, 1995).

596. Katharine Q. Seelye, *Anguished, Senators Vote to Support Bosnia Mission; Clinton Off to Paris Signing*, N.Y. TIMES, Dec. 14, 1995, at A1, A14.

voting on appropriations, because members of Congress will not risk creating the impression that they are leaving American troops at the front defenseless.⁵⁹⁷ Although one might feel some disappointment at Congress' failure to take advantage of its funding powers, a failure of political will should not be confused with a constitutional defect. A congressional decision not to exercise its constitutional prerogatives does not translate into an executive branch violation of the Constitution. Certainly congressional timidity cannot justify rearranging the Constitution—either to restrict the President's war-making powers, or to push the federal courts into political question cases—without a constitutional amendment.

Second, skeptics could claim that the appropriations check cannot prevent small-scale military interventions using existing funds. The original understanding cannot control because the Framers could not anticipate the existence of a large peacetime military that would allow the President to make war without immediate appropriations. Because the Framers thought that the President always had to seek congressional funding first, the argument continues, they intended to give Congress a de facto veto power over executive branch war decisions. Thus, we must require congressional approval before any hostilities to restore Congress' power to approve wars before they begin. If neither Congress nor the President will act to revive the legislature's proper role, then the courts must step in to restore the balance. As Ely puts it, we must seek "judicial 'remand' as a corrective for legislative evasion."⁵⁹⁸

This is a more compelling critique than the first, because it hinges on the idea that modern conditions have made the precise intent of the Constitution difficult to implement. However, we need not reach the question of whether changed conditions require today's constitutional interpreters to translate the Framers' principles into a modern context.⁵⁹⁹ The Framers' intent on war powers, as demonstrated in this Article, quite readily takes root in modern soil—without the need for a creative transplant. Anticipating the arguments of today, the Antifederalists claimed that the President would abuse his commander-in-chief powers once in control of a standing army. As we have seen, the typical Federalist response was: "Congress, who had the power of raising armies, could certainly prevent any abuse of that authority in the President—that they alone had the means of supporting armies, and that the President was

597. Scholars, such as Ely and Koh, have sought clever ways around "congressional acquiescence" to "[i]nduc[e] Congress to [d]o [i]ts [j]ob." ELY, *supra* note 1, at 47-67; KOH, *supra* note 1, at 123-33, 185-207.

598. ELY, *supra* note 1, at 54.

599. See Lessig & Sunstein, *supra* note 15, at 119 (citing changed circumstances as additional support for an argument against the concept of a strong unitary executive).

impeachable if he in any manner abused his trust."⁶⁰⁰ Such exchanges assumed that the President already possessed a standing military, and that Congress' sole remedy was a termination of funds, or impeachment if the President illegally used funds that Congress had allocated to other accounts.

The original constitutional design needs no modification to operate in the modern world. Nothing prevents Congress today from eliminating the funds for operations in Grenada, Lebanon, the Persian Gulf in 1987, or Panama. Nothing prevented Congress from prohibiting the expenditure of funds on any military operation. The Federalists realized that permitting the federal government to establish a standing army created the possibility of executive action without preceding congressional approval. Antifederalist arguments made them aware that the President could use the army not just for foreign adventures, but for domestic ones as well. But, the Framers decided that the risk brought by peacetime military forces was outweighed by the benefits of quick military action.

A final element of current war powers practice, judicial abstention, can seek hearty approval from the original understanding. An initial review of Supreme Court and lower federal court decisions demonstrated judicial reluctance to hear war powers cases.⁶⁰¹ During the Vietnam War, for example, the Supreme Court refused to grant certiorari in war powers cases, while the circuit courts regularly employed the much-maligned political question doctrine to abstain from war controversies. Scholars have criticized judicial reliance on the political question doctrine, but this study suggests that there is more meat to the matter. The courts cannot act in war powers cases because the Constitution allocates *all* power in the area to the political branches. The courts cannot issue a declaratory judgment concerning undeclared wars, as current scholars would have them do, because the Constitution vests this judicial-like power to declare war exclusively in Congress. There is no need for courts to police the balance of powers between President and Congress, because the Framers intended to establish a self-regulating system wherein the executive and legislative branches would monitor and control each other. Put into terms of current case law, war powers cases implicate the constitutional core of the political question doctrine, rather than its prudential emanations, because they "involve the exercise of a discretion demonstrably committed to the executive or legislature."⁶⁰² There are no "judicially discoverable and manageable stan-

600. 4 ELLIOT, *supra* note 119, at 114 (statement of Richard Spaight at North Carolina ratifying convention).

601. See *supra* text accompanying notes 70-104.

602. *Baker v. Carr*, 369 U.S. 186, 211 (1962).

dards"⁶⁰³ for resolving these cases because the Framers quite consciously designed war powers to have no fixed rules of conduct or process. Thus, during the Persian Gulf war, it was *Dellums v. Bush*⁶⁰⁴ which pushed judicial competence beyond its proper bounds by declaring that the President was violating the Constitution. And it was the less-touted *Ange v. Bush* which correctly concluded that the federal courts should not exercise jurisdiction in such cases because "Congress possesses ample powers under the Constitution to prevent Presidential over-reaching, should Congress choose to exercise them."⁶⁰⁵

But, as the refrain of some scholars goes, *Youngstown Sheet & Tube Co. v. Sawyer*⁶⁰⁶ stands for judicial competence in war and foreign affairs. However, one can read *Youngstown* to support the vision of the Court's role as sketched by this study. As we have recognized, the Framers did not expect to exclude all cases touching on war, only those that challenged the constitutional authorities of the Congress and the President. *Youngstown* essentially called upon the Court to decide if war existed, and if that condition of war permitted the President to act domestically in a way he could not during peacetime. Quite properly, the Court concluded that a total state of war did not exist because Congress had not issued a declaration of war, much in the same way that the early Marshall Court had looked to Congress' actions to determine the legal nature of the Quasi-War. The Court in *Youngstown* recognized that Congress alone had the authority to decide if a legal state of war existed which justified the seizure of the steel mills by the federal government. And, as we have seen, such a declaration was important primarily for its domestic effects, whether it be for notifying the People of their new enemy, or the authorization for the exercise of emergency powers by the federal government. Thus, *Youngstown* correctly held that the President could not usurp Congress' domestic authority to decide whether the nation was in a legal state of war. However, to the extent that *Youngstown* might stand for the proposition that courts can

603. *Id.* at 217.

604. 752 F. Supp. 1141, 1146 (D.D.C. 1990).

605. 752 F. Supp. 509, 514 (D.D.C. 1990). As Judge Richey further noted in declining to exercise jurisdiction:

If Congress considers the President's current deployment of forces in the Persian Gulf to violate the Constitution, or if Congress considers the country on the verge of being unconstitutionally brought to war, or if Congress concludes at any time that the President's actions in the Gulf have usurped Congress' constitutional role, Congress has many options to check the President. Congress can itself declare war, exercise its appropriations power to prevent further offensive and/or defensive military action in the Persian Gulf, or even impeach the President.

Id.

606. 343 U.S. 579 (1952).

enjoin any presidential action that conflicts with Congress, as suggested in Justice Jackson's concurrence,⁶⁰⁷ the decision went too far.

B. War and Republicanism

Rather than setting war and foreign affairs above the Constitution, these war power principles fulfill the aims of republican government. As Gordon Wood's recent work, *The Radicalism of the American Revolution*, has shown, the Constitution represented a reaction by the young leaders of the Revolution against the rampant, unchecked democracy that had swamped the state governments and had permitted interest groups to pass legislation to further their private interests.⁶⁰⁸ Madison's *The Federalist No. 10* "was only the most famous and frank acknowledgment of the degree to which private interests of various sorts had come to dominate American politics."⁶⁰⁹ Still clinging to the promise of republicanism before the onset of pure democracy, the Framers designed the Constitution to check legislative excess and the instrumental use of government merely to implement private interests.⁶¹⁰ However, this presented the Framers with something of a paradox, because while they remained suspicious of interest group politics, they also realized that all power and legitimacy in government flowed from popular sovereignty.⁶¹¹

Perhaps more successfully than in its other areas, the Constitution's war and foreign affairs provisions struggled to solve this dilemma. The Framers attempted to recognize the ultimate authority of the People by creating checks on the powers of its agent—the federal government.⁶¹² In a break from British political thought, the Americans posited that the government did not equal the sovereign, that the People were the only true authority, and that the government was merely the agent for exercising the power delegated by the People. Once they had broken the identity between government and sovereignty, the Framers could prevent the legislature from concentrating all powers in its hands, primarily by creating an independent executive that represented the will of the People as well as, or better than, Congress. In their competition to best effectuate the People's wishes, the branches would check each other in the hopes of winning popular acclaim and re-election. "Ambition must be made to counteract ambition," wrote Madison in *The Federalist No.*

607. See *id.* at 635-38, 654-55 (Jackson, J., concurring).

608. See Wood, *supra* note 415, at 253-55.

609. *Id.* at 253.

610. *Id.* at 253-70. This historical insight has spurred the recent interest in republicanism for constitutional interpretation. See generally Frank Michelman, *Law's Republic*, 97 YALE L.J. 1493 (1988); Cass R. Sunstein, *Beyond the Republican Revival*, 97 YALE L.J. 1539 (1988).

611. See generally Akhil R. Amar, *Of Sovereignty and Federalism*, 96 YALE L.J. 1425 (1987).

612. *Id.* at 1441-44.

51.⁶¹³ In order to harness the interest of government officials for the public good, Madison concluded, each branch had to possess "the necessary constitutional means, and personal motives, to resist encroachments of the others."⁶¹⁴ Thus, in the war powers context, the Framers did not rest the sovereign power of making war in one department, but divided it between the executive and legislature and gave each branch the means to check the other's designs. The President could not wage war without funds; Congress could not initiate hostilities without a Commander in Chief.

Preventing the government from straying too far from the People's will, however, exacerbated the problem of interest group politics. If the leaders of the federal government strove to reflect accurately a popular will consumed with private interests, then republicanism's efforts to secure the common good surely would fail. Several of the Framers expressed fears that the federal government might engage in war or peace for sectional purposes.⁶¹⁵ Others believed that classical history displayed a wild tendency by pure democracies toward war.⁶¹⁶ It was to prevent the use of war for private interests that led the Framers to vest substantial war-making authority in an independent President. The Framers expected private interests to come forth in the legislature, against whose ambitions, Madison warned, "the people ought to indulge all their jealousy and exhaust all their precautions."⁶¹⁷ In response to these fears, the Framers expected the President to act as "the general Guardian of the National interests" by representing the country as a whole, rather than a particular section or interest.⁶¹⁸ The proper incentives would arise in part from the President's electoral base. Wrote Wilson, "Being elected by the different parts of the United States, he will consider himself as not particularly interested for any one of them, but will watch over the whole with paternal care and affection."⁶¹⁹ Not only would the President have the moral force of national election behind him, but the People would gain the benefit of enhanced government accountability. As Hamilton noted in *The Federalist No. 70*, concentrating such power

613. THE FEDERALIST NO. 51, *supra* note 304, at 349 (James Madison).

614. *Id.*

615. Thus, Southerners might fear that a New Englander-dominated government might sacrifice navigation rights on the Mississippi for a favorable alliance with Great Britain. This fear explains some of the violent opposition to the Jay Treaty reached with Great Britain. See DECONDE, *supra* note 559, at 101-40. Similarly, New Englanders opposed the war against the Northwest Indians because it seemed to pursue Southern hopes for westward expansion at a high price.

616. In the words of Justice Story: "Indeed, the history of republics has but too fatally proved, that they are too ambitious of military fame and conquest, and too easily devoted to the views of demagogues, who flatter their pride, and betray their interests." 2 STORY, *supra* note 378, § 1171.

617. THE FEDERALIST NO. 48, *supra* note 304, at 334 (James Madison).

618. 2 FARRAND, *supra* note 357, at 540-41 (Gouverneur Morris).

619. 2 ELLIOT, *supra* note 119, at 448.

in a single man would give the People "the two greatest securities they can have for the faithful exercise of any delegated power": first, "the restraints of public opinion," and second, "the opportunity of discovering with facility and clearness the misconduct of the persons they trust."⁶²⁰

As head of the executive branch, the President's institutional superiority would allow him to act quickly in the national interest. Headed by a single official, the executive branch would have access to more information and advice, and could act swiftly and with decisiveness. As Publius told the voters of New York: "Decision, activity, secrecy, and dispatch will generally characterise the proceedings of one man, in a much more eminent degree, than the proceedings of any greater number"⁶²¹ As a representative of the People, the President could resist interest group pressures, and as one person he could override those interests to secure the common good. If a faction-riven Congress impeded a military effort, the President could act first and then seek approval directly from the People based on his greater responsibilities and abilities.⁶²²

Besides the values of accountability and responsibility that adhered to a unitary executive, the President's energy and independence in war carried the additional virtue of enhancing republican decision making. As protector of the national interests, the President not only could wage war when a myopic Congress opposes it, but he also could prevent Congress from pushing the country into war too hastily. "In the legislature, promptitude of decision is oftener an evil than a benefit," wrote Hamilton.⁶²³ By slowing down congressional action, either by not waging hostilities or by vetoing bills, the President could force greater deliberation and caution by Congress and the nation before it decided on war.⁶²⁴ According to Hamilton, "[t]he differences of opinion, and the jarrings of parties in [the legislature], though they may sometimes obstruct salutary plans, yet often promote deliberation and circumspection; and serve to check excesses in the majority."⁶²⁵ President Adams's conduct during the Quasi-War bears out this aspect of the presidency, for he was able to restrain his own party from plunging the nation into a full-scale war with France. Although vilified by both Federalists and Jeffersonians for his middle ground, Adams surely acted in the best

620. THE FEDERALIST NO. 70, *supra* note 304, at 477-78 (Alexander Hamilton).

621. *Id.* at 472.

622. Cf. Jerry L. Mashaw, *Prodelegation: Why Administrators Should Make Political Decisions*, 1 J.L. ECON. & ORG. 81 (1985).

623. THE FEDERALIST NO. 70, *supra* note 304, at 475 (Alexander Hamilton).

624. Encouraging deliberation in all levels of government also has become one of the primary goals of modern republicanism. See Sunstein, *supra* note 610, at 1548-51.

625. THE FEDERALIST NO. 70, *supra* note 304, at 475 (Alexander Hamilton).

interests of the nation by countering French attacks on American shipping without embroiling the nation more deeply in the European wars. Adams' tale serves as a powerful example of the duty of the President, and the political price he can pay for pursuing the national interest.

A President sometimes must chart a risky course toward war because the Constitution places him squarely at the tiller. He is not alone; the Congress is at his side, either funding his decisions or frustrating them. This cooperative, and yet competitive, relationship has produced many different wars, and many different ways of going to war, in American history. It is perhaps ironic that as the United States today turns to its military more often in international affairs, the historical roots of war powers are so little understood by academia, or so ambiguously defined by the courts. The recent examples of presidential war-making and congressional inaction do not violate the Constitution, nor should they cause the confusion they appear to. Instead, the elasticity of the war power process has resulted directly from the Framers' conscious design. They established an arena with wide markers to permit the executive and legislative branches to work in harmony, or to struggle for primacy, over issues of war.

As shown in Panama, Kuwait, Somalia, Haiti, and Bosnia, the end of the Cold War has not produced a relaxation in the need for American military force abroad. The approach of a new millennium does not seem to bring the prospects of a millennial peace any closer, either to the world or to the President and the Congress. Indeed the continuing struggle between the branches over the powers of war is only the fulfillment of the Framers' design and in the best interests of the People.

