

# TRUMP AT WAR

John Yoo\*

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## INTRODUCTION

Donald Trump campaigned on ending foreign wars. In his view, conflicts wasted American lives and treasure for nothing. While President Barack Obama had struggled over whether to intervene in the Syrian civil war, Trump tweeted: “We should stay the hell out of Syria . . . .” He asked: “WHAT WILL WE GET FOR OUR LIVES AND \$ BILLIONS?ZERO.”<sup>1</sup>

Much to the dismay of the Washington, D.C. policy community, Trump followed through. In December 2018, the White House announced that U.S. troops would withdraw from Syria.<sup>2</sup> After Jim Mattis resigned as Secretary of Defense in protest and Congress reacted in an uproar, Trump paused.<sup>3</sup> But with John Bolton installed as national security advisor and Mike Pompeo as Secretary of State, Trump returned to his original plan.<sup>4</sup> In October 2019, Trump agreed with Turkey President Recep Tayyip Erdogan to redeploy

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\* Emanuel S. Heller Professor of Law, University of California at Berkeley School of Law; Visiting Scholar, American Enterprise Institute; Visiting Fellow, Hoover Institution; J.D., 1992 Yale Law School; A.B. 1989 Harvard College. The author thanks Francis Adams, Min Soo Kim, and David Song for their excellent research assistance.

1. TRUMP TWITTER ARCHIVE, <https://www.thetrumparchive.com/?searchbox=%22We+should+stay+the+hell+out+of+Syria%2C+the+%5C%22rebels%5C%22+are+just+as+bad+as+the+current+regime.+WHAT+WILL+WE+GET+FOR+OUR+LIVES+AND+%24+BILLIONS%3FZERO%22> (quoting Donald Trump (@realDonaldTrump), TWITTER (June 15, 2013, 8:33 PM), <https://twitter.com/realdonaldtrump/status/346063000056254464>).

2. Dion Nissenbaum et al., *In Shift, Trump Orders U.S. Troops Out of Syria*, WALL ST. J. (Dec. 19, 2018), <https://www.wsj.com/articles/u-s-military-preparing-for-a-full-withdrawal-of-its-forces-from-northeastern-syria-11545225641>.

3. Helene Cooper, *Jim Mattis, Defense Secretary, Resigns in Rebuke of Trump’s Worldview*, N. Y. TIMES (Dec. 20, 2018), <https://www.nytimes.com/2018/12/20/us/politics/jim-mattis-defense-secretary-trump.html?searchResultPosition=1>.

4. Declan Walsh & David E. Sanger, *Pompeo Speech Lays Out Vision for Mideast, Taking Shots at Obama*, N. Y. TIMES (Jan. 10, 2019), <https://www.nytimes.com/2019/01/10/world/middleeast/mike-pompeo-speech-middle-east-obama.html>.

1,000 U.S. special forces away from the Turkey-Syria border.<sup>5</sup> The Turkish military quickly invaded Syria and set up a buffer zone at the expense of the U.S.'s Kurdish allies.<sup>6</sup> Trump triumphantly tweeted: "COMING HOME! We were supposed to be there for 30 days - That was 10 years ago."<sup>7</sup> He continued: "When these pundit fools who have called the Middle East wrong for 20 years ask what we are getting out of the deal, I simply say, THE OIL, AND WE ARE BRINGING OUR SOLDIERS BACK HOME, ISIS SECURED!"<sup>8</sup>

Syria symbolized Trump's broader campaign promise to re-balance American military strategy. He believed that the U.S. spent too much protecting the free world while our allies enjoyed the free ride. Afghanistan and Iraq symbolized for Trump the extreme costs of foreign entanglements. "We're rebuilding other countries while weakening our own," Trump said in his first major foreign-policy speech.<sup>9</sup> "I am the only person running for the presidency who understands this and this is a serious problem."<sup>10</sup> Once in office, Trump set an end to U.S. involvement in Syria and began to wind down deployments in Afghanistan and Iraq.<sup>11</sup> He raised doubts about whether the U.S. would honor Article 5 of the North Atlantic Treaty, which requires NATO members to treat any attack on one as an attack on all.<sup>12</sup> He demanded that Japan and Korea pay more for the large U.S. military presences in their territory.<sup>13</sup>

On the other hand, Trump followed a more activist course than at first appears. He continued the interventions of his predecessors in the Middle East. He launched strikes on Syrian military facilities to retaliate for the

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5. Eric Schmitt, *President Endorses Turkish Military Operation in Syria, Shifting U.S. Policy*, N. Y. TIMES (Oct. 7, 2019), <https://www.nytimes.com/2019/10/07/us/politics/trump-turkey-syria.html>.

6. Ben Hubbard et al., *Abandoned by U.S. in Syria, Kurds Find New Ally in American Foe*, N. Y. TIMES, (Oct. 23, 2019), <https://www.nytimes.com/2019/10/13/world/middleeast/syria-turkey-invasion-isis.html>.

7. TRUMP TWITTER ARCHIVE, <https://www.thetrumparchive.com/?results=1&searchbox=%22coming+home%22> (quoting Donald Trump (@realDonaldTrump), TWITTER (Oct. 25, 2019, 8:32 AM), <https://twitter.com/realDonaldTrump/status/1187708412685107200>).

8. *Id.*

9. *Transcript: Donald Trump's Foreign Policy Speech*, N. Y. TIMES, (Apr. 27, 2016), <https://www.nytimes.com/2016/04/28/us/politics/transcript-trump-foreign-policy.html>.

10. *Id.*

11. Jim Garamone, *U.S. Completes Troop-Level Drawdown in Afghanistan, Iraq*, DOD NEWS (Jan. 15, 2021), <https://www.defense.gov/Explore/News/Article/Article/2473884/us-completes-troop-level-drawdown-in-afghanistan-iraq/>.

12. Rosie Gray, *Trump Declines to Affirm NATO's Article 5*, ATLANTIC (May 25, 2017), <https://www.theatlantic.com/international/archive/2017/05/trump-declines-to-affirm-natos-article-5/528129/>.

13. Choe Sang-Hun, *U.S. and South Korea Sign Deal on Shared Defense Costs*, N. Y. TIMES (Feb. 10, 2019), <https://www.nytimes.com/2019/02/10/world/asia/us-south-korea-military-costs.html>.

Assad regime's use of chemical weapons.<sup>14</sup> U.S. troops remained in Syria to fight ISIS and protect the Kurds.<sup>15</sup> He kept the military in Afghanistan and authorized the spectacular use of heavy munitions.<sup>16</sup>

President Trump also kept war as a regular tool of foreign policy. In his 2017 speech to the United Nations, he promised to “totally destroy” North Korea if it continued to develop nuclear weapons.<sup>17</sup> “Rocket Man is on a suicide mission for himself and for his regime,” Trump said of Kim Jong-un.<sup>18</sup> “[I]f [the U.S.] is forced to defend itself or its allies, we will have no choice but to totally destroy North Korea.”<sup>19</sup> Earlier that year, he had reacted to North Korean threats by declaring: “They will be met with fire and fury like the world has never seen.”<sup>20</sup> Trump allowed the U.S. Navy to continue its challenges to China's fortified artificial islands in the South China Sea.<sup>21</sup> Despite the Ukraine impeachment controversy, the U.S. sold lethal weapons to Kyiv to fight a Russian-backed separatist movement.<sup>22</sup> For an alleged isolationist, Trump has kept the U.S. on the beat as the world's only policeman.

Critics accused Trump of risking war. Trump used the United Nations “as a stage to threaten war,” Senator Dianne Feinstein said, which “further isolates the United States.”<sup>23</sup> Trump, however, followed in a long line of

14. Helene Cooper et al., *U.S., Britain and France Strike Syria Over Suspected Chemical Weapons Attack*, N.Y. TIMES (Apr. 13, 2018), <https://www.nytimes.com/2018/04/13/world/middleeast/trump-strikes-syria-attack.html>.

15. Lara Jakes & Eric Schmitt, *U.S. Struggles to Keep Allies in Fight Against ISIS in Syria*, N.Y. TIMES (Nov. 13, 2019), <https://www.nytimes.com/2019/11/13/world/middleeast/turkey-syria-kurds-trump.html>.

16. Robin Wright, *Trump Drops the Mother of All Bombs on Afghanistan*, NEW YORKER (Apr. 14, 2017), <https://www.newyorker.com/news/news-desk/trump-drops-the-mother-of-all-bombs-on-afghanistan>.

17. Julian Borger, *Donald Trump threatens to 'totally destroy' North Korea in UN speech*, GUARDIAN (Sept. 19, 2017), <https://www.theguardian.com/us-news/2017/sep/19/donald-trump-threatens-totally-destroy-north-korea-un-speech>.

18. *Id.*

19. Remarks by President Trump to the 72nd Session of the United Nations General Assembly, U.S. EMBASSY VENEZUELA (Sept. 19, 2017), <https://ve.usembassy.gov/remarks-president-trump-72nd-session-united-nations-general-assembly-september-19-2017/>.

20. Peter Baker & Choe Sang-Hun, *Trump Threatens 'Fire and Fury' Against North Korea if It Endangers U.S.*, N.Y. TIMES (Aug. 8, 2017), <https://www.nytimes.com/2017/08/08/world/asia/north-korea-un-sanctions-nuclear-missile-united-nations.html>.

21. Hannah Beech, *China's Sea Control Is a Done Deal, 'Short of War with the U.S.'*, N.Y. TIMES (Sept. 20, 2018), <https://www.nytimes.com/2018/09/20/world/asia/south-china-sea-navy.html>.

22. Tracy Wilkinson, *U.S. Decision to Provide Anti-Tank Missiles to Ukraine Angers Russian Leaders*, L.A. TIMES (Dec. 26, 2017), <https://www.latimes.com/nation/la-fg-us-ukraine-20171226-story.html>.

23. Press Release, Dianne Feinstein, Feinstein Statement on Trump UN Speech (Sep. 19, 2017), <https://www.feinstein.senate.gov/public/index.cfm/press-releases?id=F02C3D61-E841-478C-90C9-E3A155A9E18B>.

Presidents who have used such threats to deter enemies, communicate resolve, and negotiate disputes.<sup>24</sup> Critics did not just attack the wisdom of these engagements; they accused the White House of waging unconstitutional wars without congressional approval. American airstrikes on Syria or support for Saudi fighting in Yemen broke the law, apparently, because Congress had not declared war. “Make no mistake: President Trump’s airstrikes against Syria were unconstitutional,” claimed Professor Michael Paulsen.<sup>25</sup> *National Review* columnist David French chimed in about U.S. support for Saudi Arabia: “It’s now official: The president who ran for office pledging to reduce military entanglements abroad is involving American forces in a foreign war in direct defiance of the plain language of the Constitution.”<sup>26</sup> Some conservatives, such as Mike Lee of Utah and Rand Paul of Kentucky, took to the floor of the Senate to propose bills to declare Trump’s decisions as Commander-in-Chief unconstitutional.<sup>27</sup> But these efforts failed in the face of a presidential veto.<sup>28</sup>

Liberals and conservatives both have taken inconsistent attitudes toward war powers. Many sharply criticized President George W. Bush (and Presidents George H.W. Bush, Reagan, and Nixon) for conducting wars without congressional approval but then remained silent when President Obama attacked Libya to overthrow Muammar al-Ghaddafi.<sup>29</sup> Former Yale Law School Dean, and noted critic of presidential war powers, Harold Koh defended the Libya attacks while serving as Legal Advisor to the State Department and later refused to criticize the constitutionality of the Syria attacks.<sup>30</sup> Koh argued that Obama had not violated the Declare War Clause because these wars were not really wars at all. “[T]he situation in Libya does

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24. See Matthew C. Waxman, *The Power to Threaten War*, 123 YALE L.J. 1626, 1626 (2014) (“The swelling scope of the President’s practice in wielding threatened force largely tracks the standard historical narrative of war powers shifting from Congress to the President.”).

25. Michael Stokes Paulsen, *Trump’s First Unconstitutional War*, NAT’L REV. (Apr. 11, 2017); <https://www.nationalreview.com/2017/04/donald-trump-syria-strike-unconstitutional-declaration-war/>.

26. David French, *America’s War in Yemen Is Plainly Unconstitutional*, NAT’L REV. (Apr. 27, 2019), <https://www.nationalreview.com/2019/04/americas-war-in-yemen-is-plainly-unconstitutional/>.

27. Catie Edmondson, *In Bipartisan Bid to Restrain Trump, Senate Passes Iran War Powers Resolution*, N.Y. TIMES, (Feb. 13, 2020), <https://www.nytimes.com/2020/02/13/us/politics/iran-war-powers-trump.html>.

28. Lindsay Wise, *Senate Fails to Override Trump Veto of Resolution on Force Against Iran*, WALL ST. J. (May 7, 2020), <https://www.wsj.com/articles/senate-fails-to-override-trump-veto-of-resolution-on-force-against-iran-11588876119>.

29. Stuart Taylor, Jr., *An Invasion of Iraq Requires the Approval of Congress*, ATLANTIC (Aug. 31, 2002), <https://www.theatlantic.com/politics/archive/2002/09/an-invasion-of-iraq-requires-the-approval-of-congress/378094/>.

30. Harold Koh, *Not Illegal: But Now the Hard Part Begins*, JUST SECURITY (Apr. 7, 2017), [hereinafter, Koh, *Not Illegal*], <https://www.justsecurity.org/39695/illegal-hard-part-begins/>.

not constitute a war requiring specific congressional approval under the Declaration of War Clause of the Constitution.”<sup>31</sup>

But these critics gave full vent to their frustrations once Trump occupied the Oval Office. Senator Bernie Sanders asserted that Trump had “no legal authority” to attack Syria, even though he had not criticized Obama’s 2011 Libya intervention.<sup>32</sup> Hina Shamsi, director of the National Security Project at the ACLU, declared that the strike “violates the constitution and US treaty obligations under the UN charter.”<sup>33</sup> Trump’s Syria attack “probably violate[s] the U.N. Charter and (therefore) the U.S. Constitution,” in the words of Georgetown law professor Martin Lederman.<sup>34</sup> Yale Law Professor Harold Koh, who served as the legal advisor in the Obama administration and approved the Libyan intervention, at best could only declare Trump’s strikes “Not Illegal.”<sup>35</sup>

This Article will explain why these conservative and liberal critics were mistaken in their views of Trump and war. The Constitution vests the President with executive power and the role of Commander-in-Chief,<sup>36</sup> which, in the words of *Federalist 70*, gives him the primary constitutional duty of, “protection of the community against foreign attacks.”<sup>37</sup> The Founders vested these powers in the president precisely because only an individual could act with sufficient “energy in the executive” to respond to the challenges of foreign policy and national security.<sup>38</sup> Congress has an arsenal of authorities to block presidential war-making, such as control over the size and shape of the military.<sup>39</sup> Despite these war powers, the Constitution does not grant Congress the sole right to decide whether to go

31. *Libya and War Powers: Hearing Before the S. Comm. on Foreign Rel.*, 112th Cong. 8 (2011) (statement of Hon. Harold Koh, Legal Advisor, U.S. Department of State), [https://www.foreign.senate.gov/imo/media/doc/062811\\_Transcript\\_Libya%20and%20War%20Powers.pdf](https://www.foreign.senate.gov/imo/media/doc/062811_Transcript_Libya%20and%20War%20Powers.pdf).

32. Press Release, Bernie Sanders, Sanders Statement on Trump’s Authority to Go to War in Syria (Apr. 11, 2018), <https://www.sanders.senate.gov/press-releases/sanders-statement-on-trumps-authority-to-go-to-war-in-syria/>; Michael Crowley, *Bernie’s Foreign Policy Deficit*, POLITICO (Jan. 30, 2016), <https://www.politico.com/story/2016/01/bernie-sanders-foreign-policy-deficit-218431>.

33. Sabrina Siddiqui & Lauren Gambino, *Are Donald Trump’s Missile Strikes in Syria Legal?*, GUARDIAN (Apr. 7, 2017), <https://www.theguardian.com/us-news/2017/apr/07/donald-trump-us-missile-strikes-syria-legal>.

34. Marty Lederman, *Why the Strikes Against Syria Probably Violate the U.N. Charter and (therefore) the U.S. Constitution*, JUST SECURITY (April 6, 2017), <https://www.justsecurity.org/39674/syrian-strikes-violate-u-n-charter-constitution/>.

35. Harold Koh, *Not Illegal: But Now the Hard Part Begins*, JUST SECURITY (April 7, 2017), <https://www.justsecurity.org/39695/illegal-hard-part-begins/>.

36. U.S. CONST. art. II, § 2, cl. 1.

37. THE FEDERALIST NO. 70, at 423 (Alexander Hamilton) (Clinton Rossiter ed., 1961).

38. *Id.*

39. U.S. CONST. art. I, § 8, cls. 11, 15.

to war. Instead, the Constitution divides the war power between the executive and legislative branches and encourages them to struggle for control over foreign policy and war. By refusing to concede an unprecedented veto to Congress over military operations, Trump preserved the constitutional right of future Presidents to take the measures necessary to protect the Nation's security.

### I. THE TRUMP STRATEGY FOR WAR

President Trump took office in the midst of several wars. Almost two decades after the 9/11 attacks, the U.S. continues to fight the Taliban in Afghanistan.<sup>40</sup> Although the U.S. had withdrawn from Iraq in 2011, the Obama administration had intervened in Syria to fight ISIS.<sup>41</sup> President Trump won his greatest military victory by finishing off ISIS as a caliphate in control of territory, culminating in an October 27, 2019 operation that killed ISIS founder Abu Bakr al-Baghdadi.<sup>42</sup>

Neither war raised a significant constitutional issue. In both cases, Congress had enacted an Authorization to Use Military Force (AUMF) in the wake of the September 11 attacks.<sup>43</sup> In the broadest grant of war power by Congress since World War II, the AUMF recognized that “the President has authority under the Constitution to take action to deter and prevent acts of international terrorism against the United States.”<sup>44</sup> It authorized him “to use all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorist attacks . . . .”<sup>45</sup> It did not limit its approval for war by time or geography. The AUMF clearly authorized the wars that Trump inherited. The Taliban had provided al-Qaeda with a safe haven before the attacks and harbored it afterwards.<sup>46</sup> After the U.S.'s lightning-quick victory over the Taliban in the

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40. Julian E. Barnes & Thomas Gibbons-Neff, *U.S. Should Slow Withdrawal from Afghanistan, Bipartisan Panel Urges*, N. Y. TIMES, (Feb. 3, 2021), <https://www.nytimes.com/2021/02/03/us/politics/afghanistan-biden-trump-troops-withdrawal.html>.

41. Peter Baker & Michael D. Shear, *U.S. Weighs Direct Military Action Against ISIS in Syria*, N. Y. TIMES, (Aug. 22, 2014), <https://www.nytimes.com/2014/08/23/world/middleeast/obama-adviser-says-military-action-possible-against-isis.html>; Reuters Staff, *Timeline: Invasion, Surge, Withdrawal; U.S. Forces in Iraq*, REUTERS (Dec. 18 2011), <https://www.reuters.com/article/us-iraq-usa-pullout-idUSTRE7BH08E20111218>.

42. Missy Ryan & Dan Lamothe, *Trump Says Islamic State leader Abu Bakr al-Baghdadi Blew Himself up as U.S. Troops Closed in*, WASH. POST, (Oct 27, 2019).

43. Authorization for Use of Military Force, Pub. L. No. 107-40, § 2, 115 Stat. 224, 224 (2001).

44. *Id.*

45. *Id.*

46. Mujib Mashal, *How the Taliban Outlasted a Superpower: Tenacity and Carnage*, N. Y. TIMES (Jan. 15, 2021), <https://www.nytimes.com/2020/05/26/world/asia/taliban-afghanistan-war.html>.

weeks after 9/11, the Taliban fled to western Pakistan, regrouped, and returned.<sup>47</sup> During the Bush years, troop deployments rose to 25,000.<sup>48</sup> Obama ordered a temporary deployment surge of 30,000 additional troops in 2009, but then drew down forces to about 8,000 by 2016.<sup>49</sup>

Although President Trump had campaigned on withdrawing from Afghanistan, he changed his mind. In 2017, at the request of Defense Secretary Mattis, President Trump agreed to boost the force level to about 14,000.<sup>50</sup> But after firing Mattis in late 2018, the President announced that he would halve the deployment.<sup>51</sup> Despite the investment in men and treasure, the war in Afghanistan had reached a stalemate. By the end of the fighting season in 2019, the Taliban controlled about 12% of the country's districts, the U.S.-backed government controlled approximately 53%, and 34% of the country remained contested.<sup>52</sup> Trump's frustration with the ongoing conflict revealed itself in the fall of 2019, with the leaked news that the President had planned to invite Taliban leaders to Camp David, *on September 11*, to sign an agreement for an end to the fighting.<sup>53</sup> Trump cancelled the visit after public outcry, the resignation of John Bolton,<sup>54</sup> and a Taliban car bomb attack in Kabul.<sup>55</sup> Nevertheless, the Constitution gives the President as Commander-in-Chief the ability to order the U.S. armed forces to cease fighting.<sup>56</sup>

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47. *America's Longest War: A Visual History of 18 Years in Afghanistan*, WALL ST. J. (Feb. 29, 2020), <https://www.wsj.com/articles/americas-longest-war-a-visual-history-of-18-years-in-afghanistan-11583010024>.

48. Craig Whitlock et al, *The War in Afghanistan: A Visual Timeline of the 18-Year Conflict*, WASH. POST (Dec. 9, 2019), <https://www.washingtonpost.com/graphics/2019/investigations/amp-stories/visual-timeline-of-the-war-in-afghanistan/>.

49. *Id.*

50. Michael R. Gordon, *Trump Gives Mattis Authority to Send More Troops to Afghanistan*, N.Y. TIMES (June 13, 2017), <https://www.nytimes.com/2017/06/13/world/asia/mattis-afghanistan-military.html>.

51. Helene Cooper & Katie Rogers, *Trump, Angry Over Mattis's Rebuke, Removes Him 2 Months Early*, N.Y. TIMES (Dec. 23, 2018), <https://www.nytimes.com/2018/12/23/us/politics/trump-mattis.html>.

52. CLAYTON THOMAS, CONG. RESEARCH SERV., R45122, AFGHANISTAN: BACKGROUND AND U.S. POLICY IN BRIEF 1, 5 (2019), <https://www.hsdl.org/?view&did=824841>.

53. Peter Baker et al., *How Trump's Plan to Secretly Meet with the Taliban Came Together, and Fell Apart*, N.Y. TIMES (Sept. 8, 2019), <https://www.nytimes.com/2019/09/08/world/asia/afghanistan-trump-camp-david-taliban.html>.

54. Peter Baker, *Trump Ousts John Bolton as National Security Adviser*, N.Y. TIMES (Sept. 10, 2019), <https://www.nytimes.com/2019/09/10/us/politics/john-bolton-national-security-adviser-trump.html>.

55. *US Service Member Among Dead in Taliban Suicide Attack in Kabul*, GUARDIAN (Sept. 5, 2019), <https://www.theguardian.com/world/2019/sep/05/taliban-claims-bombing-us-embassy-peace-talks-kabul>.

56. See U.S. CONST. art. II, § 2, cls. 1–2 (giving the President the power to command the military and make treaties).

Trump could also rely on the AUMF for what became the other war of his first term: Syria. Even before Trump entered office, the U.S. had already intervened in the civil war. In 2011, President Obama called for regime change as a civil war erupted against the rule of Bashar al-Assad in Syria.<sup>57</sup> As reports circulated that the Assad regime may have used mustard and/or sarin gas against civilians, Obama declared that Syria had crossed “a red line,” though he left the consequences unstated.<sup>58</sup> Obama went to Congress for authorization to intervene in Syria, but Congress refused.<sup>59</sup> Russian President Putin came to a humiliating rescue, in which the U.S. refrained from war in exchange for Russian supervision of the Syrian removal of chemical weapons.<sup>60</sup>

By 2014, Washington had shifted its attentions from chemical weapons to ISIS. An offshoot of al-Qaeda, ISIS seized vast swaths of territory in both Syria and Iraq during the chaos of civil war.<sup>61</sup> Its forces controlled major cities and significant population and resources in both nations; ISIS had even threatened Baghdad before Iraqi forces had turned the tide.<sup>62</sup> That fall, the Obama administration launched airstrikes against ISIS and soon deployed troops in Syria.<sup>63</sup> Not only did President Trump continue the war, but he also loosened the rules of engagement so that U.S. forces could fight more

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57. Scott Wilson & Joby Warrick, *Assad Must Go, Obama Says*, WASH. POST (Aug. 18, 2011), [https://www.washingtonpost.com/politics/assad-must-go-obama-says/2011/08/18/gIQAelheOJ\\_story.html](https://www.washingtonpost.com/politics/assad-must-go-obama-says/2011/08/18/gIQAelheOJ_story.html).

58. David E. Sanger & Eric Schmitt, *U.S. Shifting Its Warning on Syria's Chemical Arms*, N.Y. TIMES (Dec. 6, 2012), <https://www.nytimes.com/2012/12/07/world/middleeast/syrias-chemical-weapons-moves-lead-us-to-be-flexible.html>.

59. Russel Berman, *The War Against ISIS Will Go Undeclared*, ATLANTIC (Apr. 15, 2015), <https://www.theatlantic.com/politics/archive/2015/04/the-war-against-isis-will-go-undeclared/390618/>.

60. Hisham Melhem, *How Obama's Syrian Chemical Weapons Deal Fell Apart*, ATLANTIC (Apr. 10, 2017), <https://www.theatlantic.com/international/archive/2017/04/how-obamas-chemical-weapons-deal-fell-apart/522549/>.

61. Megan Specia, *The Evolution of ISIS: From Rogue State to Stateless Ideology*, N.Y. TIMES (Mar. 20, 2019), <https://www.nytimes.com/2019/03/20/world/middleeast/isis-history-facts-islamic-state.html>.

62. Loveday Morris, *Iraqi Forces Face Resistance in Trying to Push Last of Al-Qaeda Affiliates out of Ramadi*, WASH. POST (Jan. 19, 2014), [https://www.washingtonpost.com/world/iraqi-government-forces-launch-major-effort-to-push-last-of-al-qaeda-affiliates-out-of-ramadi/2014/01/19/a196ac8c-8137-11e3-a273-6ffd9cf9f4ba\\_story.html](https://www.washingtonpost.com/world/iraqi-government-forces-launch-major-effort-to-push-last-of-al-qaeda-affiliates-out-of-ramadi/2014/01/19/a196ac8c-8137-11e3-a273-6ffd9cf9f4ba_story.html).

63. Helene Cooper & Eric Schmitt, *Airstrikes by U.S. and Allies Hit ISIS Targets in Syria*, N.Y. TIMES (Sep. 22, 2014), <https://www.nytimes.com/2014/09/23/world/middleeast/us-and-allies-hit-isis-targets-in-syria.html>.



aggressively.<sup>64</sup> ISIS's last city, its capital of Raqqa, fell in 2017, and strikes killed al-Baghdadi and his number two aide in October 2019.<sup>65</sup>

Like Obama before him, Trump could invoke Bush's AUMF. The September 11 law authorized the President to use forces against all "organizations" that "committed[] or aided" the 2001 attacks.<sup>66</sup> Although ISIS and al-Qaeda later became rivals, ISIS originally began as a franchise of the original terrorist group.<sup>67</sup> Trump could also have relied upon the 2002 AUMF that approved the Iraq invasion, which authorized the President to use the Armed Forces "as he determines to be necessary and appropriate" to "defend the national security of the United States against the continuing threat posed by Iraq" and "enforce all relevant United Nations Security Council resolutions regarding Iraq."<sup>68</sup> One of those Security Council resolutions authorized the U.S. to restore international peace and stability in the region.<sup>69</sup> Ejecting ISIS from Iraqi territory and preventing ISIS from using Iraqi territory to attack Americans would qualify.

But Trump's use of force against the Syrian government had to rely solely on the President's sole constitutional authority. Ending the Syrian civil war, stopping Assad's use of Weapons of Mass Destruction (WMDs), or protecting Syrian civilians cannot fall within either the 2001 or 2002 AUMFs. Nevertheless, Trump used force where Obama would not. In April 2017, Trump ordered a retaliatory strike against Syria for using chemical weapons against a rebel village.<sup>70</sup> The Navy launched 59 Tomahawk cruise missiles against the Syrian Air Force base that had carried out the attack, damaged Syrian military facilities, and put 20% of the Syrian Air Force out of action.<sup>71</sup> In a letter to Congress Trump stated that, because of "the vital

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64. Helene Cooper, *Trump Gives Military New Freedom. But with That Comes Danger*, N.Y. TIMES (Apr. 5, 2017), <https://www.nytimes.com/2017/04/05/us/politics/rules-of-engagement-military-force-mattis.html>.

65. Peter Baker et al., *ISIS Leader al-Baghdadi Is Dead, Trump Says*, N.Y. TIMES (Oct. 27, 2019), <https://www.nytimes.com/2019/10/27/us/politics/isis-leader-al-baghdadi-dead.html>.

66. Authorization for Use of Military Force, Pub. L. No. 107-40, § 2, 115 Stat. 224, 224 (2001).

67. ROBIN WRIGHT ET AL., *THE JIHADI THREAT ISIS, AL-QAEDA, AND BEYOND* 10–11 (2017).

68. Authorization for Use of Military Force against Iraq Resolution of 2002, Pub. L. No. 107-243, § 3(a), 116 Stat. 1498, 1501.

69. *Id.* at 1499.

70. Michael R. Gordon et al., *Dozens of U.S. Missiles Hit Air Base in Syria*, N.Y. TIMES (Apr. 6, 2017), <https://www.nytimes.com/2017/04/06/world/middleeast/us-said-to-weigh-military-responses-to-syrian-chemical-attack.html>.

71. *Id.*; Press Release, Statement by Secretary of Defense Jim Mattis on the U.S. Military Response to the Syrian Government's Use of Chemical Weapons (Apr. 10, 2017), <https://www.defense.gov/Newsroom/Releases/Release/Article/1146758/statement-by-secretary-of-defense-jim-mattis-on-the-us-military-response-to-the/source/GovDelivery/> (announcing that the U.S. Airstrike on Shayrat airfield on April 6th damaged 20% of Syria's operational aircrafts); *see also Syria*

national security and foreign policy interests of the United States,” he had acted “pursuant to [his] constitutional authority to conduct foreign relations and as Commander in Chief and Chief Executive,” which is “consistent with the War Powers Resolution.”<sup>72</sup> Congressional Democrats criticized Trump for violating the Constitution, and public interest groups sued to stop the attacks.<sup>73</sup>

Trump returned to military strikes when Damascus continued its WMD use. According to U.S. intelligence, Assad ordered the use of sarin gas in November 2017 on the outskirts of Damascus and, between June 2017 and April 2018, used chemical weapons at least 15 times.<sup>74</sup> In April 2018, President Trump joined British and French leaders in ordering airstrikes on three Syrian chemical weapons facilities.<sup>75</sup> However, thanks to Obama’s deal with Putin, Russia had returned to the Middle East, and its air force and anti-aircraft defenses provided air cover for Assad’s forces.<sup>76</sup> Destruction was minimal.<sup>77</sup>

Trump issued a constitutional defense of his attacks. While the Trump Justice Department claimed that the President had the authority to use force without congressional permission, it adopted a cramped theory of executive power developed by the Obama administration. A May 2018 opinion by DOJ’s Office of Legal Counsel (OLC) began well enough. It argued that the Commander-in-Chief and Executive Power Clauses gave him “the authority to direct U.S. military forces in engagements necessary to advance American national interests abroad.”<sup>78</sup> OLC repeated William Rehnquist’s justification of Nixon’s expansion of the Vietnam War to Cambodia: history plainly showed that “the Executive, under his power as Commander in Chief, is

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War: *US Missiles ‘Took Out 20% of Aircraft’*, BBC NEWS (Apr. 10, 2017), <https://www.bbc.com/news/world-middle-east-39561102>.

72. Letter from President Donald J. Trump to Congressional Leaders on United States Military Operations (Apr. 15, 2018), <https://www.govinfo.gov/content/pkg/DCPD-201800243/html/DCPD-201800243.htm>.

73. Charlie Savage, *Watchdog Group Sues Trump Administration, Seeking Legal Rationale Behind Syria Strike*, N.Y. TIMES (May 8, 2017), <https://www.nytimes.com/2017/05/08/world/middleeast/syria-united-protect-democracy-trump-lawsuit.html>; Charlie Savage, *Was Trump’s Syria Strike Illegal? Explaining Presidential War Powers*, N.Y. TIMES (Apr. 7, 2017), <https://www.nytimes.com/2017/04/07/us/politics/military-force-presidential-power.html>.

74. April 2018 Airstrikes Against Syrian Chemical-Weapons Facilities, 42 Op. O. L. C. 1, 2 (2018), [hereinafter Memorandum on April 2018 Airstrikes], <https://www.justice.gov/olc/opinion/file/1067551/download>.

75. Helene Cooper et al., *U.S., Britain and France Strike Syria Over Suspected Chemical Weapons Attack*, N.Y. TIMES (Apr. 13, 2018), <https://www.nytimes.com/2018/04/13/world/middleeast/trump-strikes-syria-attack.html>.

76. *Id.*

77. *Id.*

78. Memorandum on April 2018 Airstrikes, *supra* note 74, at 5.

authorized to commit American forces in such a way as to seriously risk hostilities, and also to actually commit them to such hostilities, without prior congressional approval.”<sup>79</sup>

But then OLC imposed constraints on Trump. First, it maintained that the Syrian strikes had to advance the “national interests.”<sup>80</sup> According to OLC, the national interests usually focused on the protection of American citizens and property abroad.<sup>81</sup> It asserted that U.S. interests in the world meant that the President should have “wide latitude” to use force not just “to protect American interests” but to respond to “regional conflagrations and humanitarian catastrophes . . . .”<sup>82</sup> In Syria, the national interest included regional stability, preventing humanitarian catastrophes, and deterring WMD use.

Despite its broad definition of “national interest,” OLC proceeded to incorrectly cabin presidential power. It adopted the Clinton-Obama view that Congress’s power to declare war gave it the sole authority to begin hostilities abroad.<sup>83</sup> But to justify Trump’s attack on Syria, like Obama’s 2010 Libya attacks, OLC claimed that neither war was really a “war.”<sup>84</sup> Attacking Syria, OLC argued, did not rise to the level of a war because of the “anticipated nature, scope, and duration” of the conflict.<sup>85</sup> Military operations would cross the line into a constitutional war “when characterized by ‘prolonged and substantial military engagements, typically involving exposure of U.S. military personnel to significant risk over a substantial period.’”<sup>86</sup> Trump’s Syria strikes did not amount to war because the U.S. only used aircraft and missiles for a limited time and mission.

OLC’s conclusion cannot be taken seriously. Its distinction between small, short wars that the President may begin unilaterally and large, long wars that require prior congressional approval has no foundation in the Constitution’s text. The Declare War Clause grants Congress the power “To declare War, grant Letters of Marque and Reprisal, and make Rules concerning Captures on Land and Water.”<sup>87</sup> There is no mention of “small” versus “large” wars. OLC mistakenly defines a war based on the potential

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79. *Id.* at 7 (citing *The President and the War Power: South Vietnam and the Cambodian Sanctuaries*, 1 Op. O.L.C. Supp. 321, 331 (May 22, 1970)).

80. *Id.* at 5.

81. *Id.*

82. *Id.* at 10.

83. *Id.* at 15.

84. *Id.*

85. *Id.* at 22.

86. *Id.* at 18 (quoting Memorandum Opinion for the Attorney General: Authority to Use Military Force in Libya, 35, Op. O. L. C. 1, 8 (April 1, 2011)).

87. U.S. CONST. art. I, § 8, cl. 11.

harm to U.S. troops regardless of the magnitude of the conflict. Suppose the U.S. launches a nuclear weapon against an enemy capital. No U.S. troops are at risk in a one-time attack that destroys the enemy political and military leadership. Under OLC's test, a nuclear attack would not qualify as war. The magnitude of the destruction and the U.S.'s object to change a foreign regime should meet the test for a war in the constitutional sense. Or suppose the U.S. used its overwhelming naval and air power to attack a weaker country that could not retaliate, as in Libya or Serbia. According to OLC, the President can easily escape the constitutional limits on war by selecting some branches of the armed force, but not others, to do the fighting.

The Trump administration's adoption of this approach to war powers may have made sense as a matter of political expediency, but it does not as a matter of constitutional law. It also creates undesirable incentives. OLC's test would encourage the executive branch to choose air or naval forces, even when ground troops would more effectively protect American interests. The Balkan Wars, for example, ended not because of the air campaign against Serbia but because NATO threatened to send troops.<sup>88</sup> OLC's rule could encourage Presidents to launch superficial attacks that may only defer challenges to our national security, rather than solve them.

The next Part describes a more principled approach that makes sense of the decades of executive initiative in war-making. It shows that the Constitution does not prescribe a step-by-step method for beginning wars, in contrast to its careful process for passing a law. It argues that the President can initiate hostilities abroad under his executive power and his role as Commander-in-Chief. The President's power is not unilateral, but the check on it does not arise from the Declare War Clause, which in this Article, I argue does not refer to a power to begin wars. Instead, the legislature's main restraint on presidential power comes from the power of the purse. The Framers understood that Congress could prevent presidential adventurism by refusing to build, or continuing to supply, the armies and navies necessary. Rather than unconstitutional warfare, President Trump's use of force falls within the range of acceptable constitutional conduct because Congress has refrained from its readily available powers to stop him.

## II. WAR POWERS IN PRACTICE

Attacking President Trump for violating the Constitution's war powers flies in the face of practice and ignores the best reading of the constitutional

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88. Craig R. Whitney, *NATO Threatens Military Action to Stem the Violence in Kosovo*, N. Y. TIMES (Jan. 29, 1999), <https://www.nytimes.com/1999/01/29/world/nato-threatens-military-action-to-stem-the-violence-in-kosovo.html>.

text. Presidents have long initiated military conflict without specific congressional authorization. This practice extends at least as far as the Korean War, if not further, for large, lengthy ground wars. And in a time of small U.S. armed forces, the very first administrations engaged in several low-intensity conflicts. But during the Vietnam War, academic critics claimed that this form of war violated the original intent of the Constitution's Framers.<sup>89</sup> As this view reached the status of academic consensus in the 1970s and 1980s, leading Democratic politicians picked it up in their attacks on the Reagan and Bush presidencies.<sup>90</sup> Then, of course, Democrats furiously attacked George W. Bush for the wars in Afghanistan and Iraq, even though they had voted to authorize them, on the ground that he had somehow violated the Constitution.<sup>91</sup>

Despite their wars in Libya and Syria, members of the Obama administration once agreed with their Democratic congressional brethren. In a 2007 interview, candidate Barack Obama declared: "The President does not have power under the Constitution to unilaterally authorize a military attack in a situation that does not involve stopping an actual or imminent threat to the nation."<sup>92</sup> Candidate Hillary Clinton answered the same question: "the Constitution requires Congress to authorize war. I do not believe that the President can take military action – including any kind of strategic bombing – against Iran without congressional authorization."<sup>93</sup> President Joe Biden sang from the same hymn book. In 2007, Biden declared in a TV interview:

I was chairman of the Judiciary Committee for 17 years . . . I teach separation of powers in constitutional law. This is something I know. So I got together and brought a group of constitutional scholars together to write a piece that I'm going deliver to the

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89. JOHN C. YOO, *THE POWERS OF WAR AND PEACE: THE CONSTITUTION AND FOREIGN AFFAIRS AFTER 9/11*, at 154 (2005).

90. *Crockett v. Reagan*, 720 F.2d 1355, 1356 (D.C. Cir. 1983), cert. denied 467 U.S. 1251 (1984) (dismissing a suit brought by 29 Members of Congress against the Reagan administration for supporting the war in El Salvador); *Lowry v. Reagan*, 676 F. Supp. 333, 334 (D.D.C. 1987) (dismissing lawsuit against Reagan administration for ordering Navy escort of tankers in Persian Gulf); *Dellums v. Bush*, 752 F. Supp. 1141, 1143–44 (D.D.C. 1990) (dismissing lawsuit against U.S. intervention in Kuwait).

91. See, e.g., Mario M. Cuomo, *What the Constitution Says About Iraq*, L.A. TIMES (Sept. 3, 2007), <https://www.latimes.com/opinion/la-oe-cuomo3sep03-story.html>. Then-Senator Barack Obama made a point in his campaign for President in 2007–2008 that he did not vote for the Iraq War, unlike his primary opponent, Hillary Clinton, and maintained that the President could not wage war without congressional consent. Jeff Zeleny, *As Candidate, Obama Carves Antiwar Stance*, N.Y. TIMES (Feb. 26, 2007), <https://www.nytimes.com/2007/02/26/us/politics/26obama.html>.

92. Charlie Savage, *Barack Obama's Q&A*, BOSTON GLOBE (Dec. 20, 2007), <https://archive.boston.com/news/politics/2008/specials/CandidateQA/ObamaQA/>.

93. Charlie Savage, *Hilary Clinton Q&A*, BOSTON GLOBE (Dec. 20, 2007), <http://archive.boston.com/news/politics/2008/specials/CandidateQA/ClintonQA/>.

whole United States Senate, pointing out the president has no constitutional authority to take this nation to war against a country of 70 million people unless we're attacked or unless there is proof that we are about to be attacked. And if he does, I would move to impeach him. . . . I would lead an effort to impeach him.<sup>94</sup>

Obama and his cabinet found it easier to claim constitutional principle when they were out of office than when they assumed responsibility for American national security in office.

But such inconsistency did not disturb many scholars. They turned to the original understanding to claim that Congress's power to "declare war" gives it the exclusive right to decide whether to initiate military hostilities abroad. They usually permit only a small exception for self-defense.<sup>95</sup> But their positions often did not remain consistent when a Democrat was in office. Throughout the Reagan/Bush wars in places like Grenada, Libya, Lebanon, and Panama, for example, the leading lights of international legal scholarship accused Republican Presidents of acting unconstitutionally because they had received no congressional authorization.<sup>96</sup> Law professors even went to court to support challenges to the military aid program for El Salvador, covert assistance for the Nicaraguan Contras, American naval escort operations in

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94. *Biden: 'I Would Move to Impeach Him'*, NBC NEWS (Dec. 5, 2007), <https://www.nbcnews.com/id/wbna22104596> (providing a transcript of Biden's interview on the December 4, 2007 broadcast of "Hardball with Chris Matthews").

95. *See, e.g.*, HAROLD HONGJU KOH, *THE NATIONAL SECURITY CONSTITUTION: SHARING POWER AFTER THE IRAN-CONTRA AFFAIR* 158–61 (1990) [hereinafter KOH, *NATIONAL SECURITY*] (referencing two major British engagements in which the King "did not declare war until more than a year after offensive operations had begun"); Bruce Ackerman, *Opinion, Trump Can't Make War Whenever He Likes*, N.Y. TIMES (Apr. 16, 2018), <https://www.nytimes.com/2018/04/16/opinion/trump-syria-congress-war-resolution.html> (discussing the War Powers Resolution's timing limitations and required justifications by the president to Congress).

96. *See, e.g.*, LOUIS FISHER, *PRESIDENTIAL WAR POWER* 200–03 (1995) [hereinafter FISHER, *PRESIDENTIAL WAR POWER*] (criticizing Republican presidents' use of armed forces absent congressional authorization); JOHN HART ELY, *WAR AND RESPONSIBILITY: CONSTITUTIONAL LESSONS OF VIETNAM AND ITS AFTERMATH* 49 (1993) [hereinafter ELY, *WAR & RESPONSIBILITY*] (noting that in eight military actions throughout the 1980s, the president failed to file the applicable statements or reports with Congress); MICHAEL J. GLENNON, *CONSTITUTIONAL DIPLOMACY* 86, 102–03 (1990) [hereinafter GLENNON, *CONSTITUTIONAL DIPLOMACY*] (stating that the expectation in the War Powers Resolution that Congress and the President "would actually lead to collective . . . judgement . . . was mistaken."); LOUIS HENKIN, *CONSTITUTIONALISM, DEMOCRACY, AND FOREIGN AFFAIRS* 84 (1990) [hereinafter HENKIN, *CONSTITUTIONALISM*] (discussing Representative Conyers' challenge to President Regan's use of armed forces in Grenada as "usurp[ing] congressional war power"); KOH, *NATIONAL SECURITY*, *supra* note 95, at 156, 158–161 (arguing that the executive power to remake constitutional law in this field creates a constitutional grant of "legitimacy for arbitrary, unsupervised, and even unauthorized exercises of executive discretion").

the Persian Gulf, and ultimately the 1991 Persian Gulf War.<sup>97</sup> In an effort to stop unilateral presidential war-making, professors took to the popular press and the airwaves, testified before Congress, and even considered representing soldiers who might resist a call-up unless Congress declared war.<sup>98</sup>

But Democratic presidents showed an equal tendency for using military force no different than their Republican predecessors. Bill Clinton threatened or used force in Haiti, Iraq, Bosnia, Afghanistan, Sudan, and Kosovo.<sup>99</sup> But when Clinton launched the two most significant military interventions in his presidency, the dispatch of 20,000 troops to Bosnia in 1995 and the air war against Serbia in 1999, scholarly critics of the administration's constitutional authority were few and far between.<sup>100</sup> Although he portrayed himself as deferential to Congress on war powers during the elections, once in the Oval Office, Obama just as readily laid claim to inherent executive power. In Libya, he ordered an air war to help depose Ghaddafi and install a pro-western regime, all without the approval of Congress or the United Nations (which some scholars used to think legally necessary, too).<sup>101</sup> No great

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97. See *Crockett v. Reagan*, 558 F. Supp. 893, 895 (D.D.C. 1982), aff'd, 720 F.2d 1355, 1357 (D.C. Cir. 1983), cert denied, 467 U.S. 1251 (1984) (alleging that President Reagan's support and aid of El Salvador violated the War Powers Resolution); *Ramirez de Arellano v. Weinberger*, 745 F.2d 1500, 1508–09 (D.C. Cir. 1984) (alleging that creating a military base on the plaintiff's property in Honduras was not authorized by any statute or constitutional provision); *Sanchez-Espinoza v. Reagan*, 568 F. Supp. 596, 598 (D.D.C. 1983) (claiming that Nicaraguan paramilitary forces, backed by the U.S. government, violated international law and the U.S. Constitution); *Lowry v. Reagan*, 676 F. Supp. 333, 336 (D.D.C. 1987) (discussing the use of the War Powers Resolution related to the U.S. military's activities in the Persian Gulf).

98. See, e.g., John Hart Ely, 'War by Default' Isn't the Law, L.A. TIMES (Dec. 23, 1990) (arguing that wars cannot be started without congressional approval); Harold Hongju Koh, *Bush Honors the Law the Constitution's Framers Did Not Intend the Power to Conduct American Foreign Policy to be Exclusively Presidential*, NEWSDAY, Jan. 19, 1991, at 2, Proquest, Doc. No. 278307002 (noting Reagan's and Bush's assertions of presidential authority regarding foreign affairs, even when acting without congressional oversight); *The Constitutional Roles of Congress and the President in Declaring and Waging War. Before the S. Comm. on the Judiciary*, 102d Cong., 1 (1991) (recording the statements of Louis Henkin, Harold Koh, and William Van Alstyne); Harold Hongju Koh, *Presidential War and Congressional Consent: The Law Professors' Memorandum in Dellums v. Bush*, 27 STAN. J. INT'L L. 247, 252 (1991) (describing activities of eleven law professors who signed amicus curiae memorandum).

99. John M. Broder, *Conflict in the Balkans: The American Leader; The Evolution of a President: From a Protesting Dove to a Hesitant Hawk*, N.Y. TIMES (Mar. 28, 1999), <https://www.nytimes.com/1999/03/28/world/conflict-balkans-american-leader-evolution-president-protesting-dove-hesitant.html>.

100. John C. Yoo, *The Dogs that Didn't Bark: Why Were International Legal Scholars MIA on Kosovo?*, 1 CHI. J. INT'L L. 149, 152–57 (2000).

101. Conor Friedersdorf, *How Obama Ignored Congress, and Mised America, on War in Libya*, ATLANTIC (Sept. 13, 2012), <https://www.theatlantic.com/politics/archive/2012/09/how-obama-ignored-congress-and-mised-america-on-war-in-libya/262299/>.

debates followed in Congress; Democrats who had readily attacked Reagan and the Bushes for their allegedly illegal wars did nothing to stop Obama.

Both Presidents Trump and Obama, like their predecessors, properly rejected the pro-Congress view of war powers. Critics of President Trump accept that modern history runs contrary to their elaborate step-by-step method for making war.<sup>102</sup> Presidents from at least Harry Truman, if not before, have used force abroad without congressional authorization.<sup>103</sup> So, liberal and conservative critics instead make a plea to the original understanding of the Constitution—an ideologically uncomfortable position for many who would never consult the Framers’ views on abortion, gay marriage, or the right to bear arms. John Hart Ely, however, spoke in absolutist words in claiming support from the Founders. Ely declared that there is a “clarity of the Constitution on this question . . . .”<sup>104</sup> While often it is true that “the ‘original understanding’ of the document’s framers and ratifiers can be obscure to the point of inscrutability . . . . [i]n this case,” Ely says bluntly, “it isn’t.”<sup>105</sup> According to Ely and those who have followed in his footsteps, the inescapable conclusion is that “all wars, big or small, ‘declared’ in so many words or not . . . , had to be legislatively authorized.”<sup>106</sup> Only when Congress has authorized a war do the President’s commander-in-chief powers over the armed forces kick in.<sup>107</sup>

Critics following Ely find that any use of presidential power to start war without Congress’s approval beforehand violates the original understanding of the Constitution. Michael Ramsey makes the argument concisely. He argues that the Framers understood the power to “declare war” as giving Congress the sole power to decide on whether to commence military hostilities against other nations.<sup>108</sup> Under international and domestic law at the time of the ratification, therefore, “declare war” must have been shorthand for “begin war” or “commence war” or “authorize war.”<sup>109</sup> His co-author, and one of the great conservative scholars of the presidency, Saikrishna Prakash, further supports this argument by claiming that the diplomatic, political, and legal elites of the eighteenth century used “declare

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102. Robert J. Delahunty & John Yoo, *Making War*, 93 CORNELL L. REV. 123, 123 (2007).

103. BEVIN ALEXANDER, *KOREA: THE FIRST WAR WE LOST* 33–34 (1986).

104. ELY, *WAR & RESPONSIBILITY*, *supra* note 96, at 5.

105. *Id.* at 3.

106. *Id.*

107. *Id.* at 5.

108. John Yoo, *War and the Constitutional Text*, 69 U. CHI. L. REV. 1639, 1660 (2002) [hereinafter Yoo, *War & Constitutional Text*].

109. See Michael D. Ramsey, *Textualism and War Powers*, 69 U. CHI. L. REV. 1543, 1590–609 (2002) (discussing the usage of “wage war” as interchangeable with “declare war”).



war” colloquially to mean start war.<sup>110</sup> Therefore, the President cannot activate his commander-in-chief authority and fight a war until Congress gives its blessing first—though they, and virtually all scholars, concede that the President has an inherent authority to use force when the U.S. has suffered an attack.<sup>111</sup> Thus, the Declare War Clause both expands Congress’s war powers and restricts those of the President. As Michael Glennon of the Fletcher School writes, the clause not only “empowers Congress to declare war,” but “also serves as a limitation on executive war-making power, placing certain acts off limits for the President.”<sup>112</sup>

These critics of presidential war-making make an initial argument based on the text, but they fail to carefully read the constitutional text and structure before rushing off to consult eighteenth-century records of the Framing. First, the Constitution does not treat “declare war” as synonymous with the power to begin military hostilities. Instead of turning immediately to eighteenth-century legal commentary, an interpreter of the Constitution must first explain other provisions of the text, such as Article III’s vesting of all executive power in the President and Commander-in-Chief Clause, Article I, § 10’s prohibition on state war-making, Article III’s definition of treason, and Congress’s powers over the raising and supporting of armies. Placing the Declare War Clause in its textual context shows that the Constitution does not define a legalistic procedure for war-making but instead creates a flexible system for conducting hostilities through the interaction of the political branches.

While Congress has the power to declare war, the President also possesses significant war powers. Article II, § 2 of the Constitution states that the “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 . . .”<sup>113</sup> He is further vested with all of “the executive Power” and the duty to execute the laws.<sup>114</sup> These provisions have long been recognized to give the President absolute command over the armed forces of the U.S., to the point of ordering their use in hostilities

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110. Saikrishna Prakash, *Unleashing the Dogs of War: What the Constitution Means by “Declare War”*, 93 CORNELL L. REV. 45, 93–94 (2007).

111. Ramsey, *Textualism and War Powers*, *supra* note 109, at 1622–31; Michael D. Ramsey, *The President’s Power to Respond to Attacks*, 93 CORNELL L. REV. 169, 170 (2007) [hereinafter Ramsey, *The President’s Power to Respond*] (“Professor Prakash and I part company, though, on the President’s power to respond to other nations’ attacks on the United States. *Unleashing* argues that the Constitution only empowered the President to respond defensively, not offensively.”).

112. GLENNON, CONSTITUTIONAL DIPLOMACY, *supra* note 96, at 17.

113. U.S. CONST. art. II, § 2, cl. 1.

114. U.S. CONST. art. II, § 1, cl. 1; U.S. CONST. art II, § 3.

abroad.<sup>115</sup> Nowhere does the constitutional text provide that the commander-in-chief power cannot be used by the President to wage military hostilities unless Congress first issues a declaration of war. Most scholars never examine the original meaning of the Commander-in-Chief Clause. Rather, they assume that the Declare War Clause must somehow trump the Commander-in-Chief Clause, which they generally treat as limiting, rather than empowering, the President, by not vesting him with the full power of making war.

It makes little sense to read the Commander-in-Chief Clause as limiting the President when it appears in Article II rather than Article I. Rather, the Constitution places the Commander-in-Chief Clause in Article II because it divides the war power, which was once unitary under the British Constitution, between the legislature and executive.<sup>116</sup> That alone, however, does not produce a narrow reading of the commander-in-chief power. Even where Article I assigns Congress power with respect to a particular military matter, it does not necessarily vest it with exclusive authority. Rather, the President as Commander-in-Chief may be able to exercise authority over the same matter concurrently with Congress. For example, although Article I, § 8, Clause 14 vests Congress with the power to “make Rules for the Government and Regulation of the land and naval Forces,” the President as Commander-in-Chief may unilaterally prescribe military punishments, at least in default of congressional action.<sup>117</sup>

Reading the commander-in-chief power narrowly reverses the traditional rule of interpretation of Article II. Although they became bitter political enemies, Hamilton and Madison agreed that Article II vests the federal executive power in the President alone—Hamilton with foreign affairs and Madison with the removal of inferior officers.<sup>118</sup> Exceptions in favor of the legislature are to be read narrowly. If the power to make war was

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115. See *Johnson v. Eisentrager*, 339 U.S. 763, 789 (1950) (asserting that the President has authority to deploy United States armed forces “abroad or to any particular region”); *Fleming v. Page*, 50 U.S. (9 How.) 603, 615 (1850) (“As commander-in-chief, [the President] is authorized to direct the movements of the naval and military forces placed by law at his command, and to employ them in the manner he may deem most effectual . . .”); *Loving v. United States*, 517 U.S. 748, 776 (1996) (Scalia, J., concurring in part and concurring in judgment) (asserting that the “inherent powers” of the Commander in Chief “are clearly extensive”); *Maul v. United States*, 274 U.S. 501, 515–16 (1927) (Brandeis & Holmes, JJ., concurring) (explaining that the President “may direct any revenue cutter to cruise in any waters in order to perform any duty of the service”); *Massachusetts v. Laird*, 451 F.2d 26, 32 (1st Cir. 1971) (stating that the President has “power as Commander-in-Chief to station forces abroad”); Memorandum Opinion for the Attorney General: Authority to Use United States Military Forces in Somalia, 16 Op. O.L.C. 6, 6–7, 13 (Dec. 4, 1992).

116. Delahunty & Yoo, *Making War*, *supra* note 102, at 128.

117. U.S. CONST. art. I, § 8, cl. 14; U.S. CONST. art. II, § 2, cl. 1.

118. Delahunty & Yoo, *Making War*, *supra* note 102, at 128; THE FEDERALIST NO. 70, at 424–25 (Alexander Hamilton) (Clinton Rossiter ed., 1961).

traditionally part of the executive power, which no one seriously disputes, then it is the Declare War Clause, rather than the commander-in-chief power, that is to be read as a narrow exception.

Neglect of the President's textual powers under Article II ignores the historical record of practice as well. Congress has declared war only five times,<sup>119</sup> the most recent instance more than fifty years ago in World War II.<sup>120</sup> Meanwhile, presidents have committed military forces to combat without a declaration of war more than 130 times since the Constitution's ratification.<sup>121</sup> Since World War II, moreover, presidents have engaged in several significant military engagements without a declaration of war or other congressional authorization. When President Truman introduced American troops into Korea in 1950, he did not seek congressional authorization, relying instead on his inherent executive and commander-in-chief powers. In the Vietnam conflict, President Johnson never obtained a declaration of war nor an unambiguous congressional authorization, although the Gulf of Tonkin Resolution expressed some level of congressional support for military intervention.<sup>122</sup> Congress, however, never authorized the expansion of the Vietnam War into Laos and Cambodia by President Nixon.

To be sure, in the wake of Vietnam, Congress enacted the War Powers Resolution, which limits foreign military interventions to 60 days without

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119. JENNIFER K. ELSEA & MATTHEW C. WEED, DECLARATIONS OF WAR AND AUTHORIZATIONS FOR THE USE OF MILITARY FORCE: HISTORICAL BACKGROUND AND LEGAL IMPLICATIONS, 1–2, 4 (Cong. Rsch. Serv., No. RL31133 Version 17, 2014), <https://crsreports.congress.gov/product/pdf/RL/RL31133/17>.

120. *Id.*

121. BARBARA S. TORREON & SOFIA PLAGAKIS, INSTANCES OF USE OF UNITED STATES ARMED FORCES ABROAD, 1798-2018, at 1–41 (Cong. Rsch. Serv. No. R42738 Version 23, 2018), <https://crsreports.congress.gov/product/pdf/R/R42738/23>.

122. While presidential critics such as Ely and Henkin generally attack unilateral executive war making in the postwar period, they find the Gulf of Tonkin Resolution to amount to acceptable congressional authorization for war, even though it was not a declaration of war. *See* ELY, WAR & RESPONSIBILITY, *supra* note 96, at 16 (claiming that the Resolution “certainly was broad enough to authorize the subsequent actions President Johnson took in Vietnam”); HENKIN, CONSTITUTIONALISM, *supra* note 96, at 84 (“In my view, Congress had in fact authorized [the Vietnam War] in the Tonkin Gulf Resolution and the war was therefore within the President’s authority delegated to him by Congress.”). Other critics, however, believe the Vietnam War was unconstitutional as well. *See, e.g.*, J. Gregory Sidak, *To Declare War*, 41 DUKE L. J. 27, 70–71 (1991) (arguing that Congress shirked its responsibilities by failing to obey constitutional formalities with regard to the Vietnam conflict); ARTHUR M. SCHLESINGER, JR., THE IMPERIAL PRESIDENCY 180 (Houghton Mifflin 1989) (stating that a resolution, such as the Tonkin Gulf Resolution, “giving the President authority to use force as he saw fit in vague future contingencies was precisely the sort of resolution rejected as unacceptable in the early republic”); Francis D. Wormuth, *The Nixon Theory of the War Power: A Critique*, 60 CAL. L. REV. 623, 690–94 (1972) (“[S]ince the Tonkin Gulf Resolution did not elect either general or limited war and did not authorize the President to define our legal status, we were in a position that had no legal characterization, except, of course, illegality.”).

congressional authorization.<sup>123</sup> Critics of presidential activism in national security often invoke the War Powers Resolution, and some have even brought lawsuits under it to no avail.<sup>124</sup> Presidents have refused to accept its legality, and neither Congress nor the courts have shown any interest in enforcing it. Presidents Ford, Carter, and Reagan, for example, engaged in several military actions without congressional assent, although they did submit reports that were consistent (while disclaiming compliance) with the requirements of the Resolution.<sup>125</sup> Publicly declaring that he had the constitutional authority to initiate war unilaterally, President Bush committed a half-million soldiers to warfare in Operation Desert Storm for a period of time that violated the War Powers Resolution. President Clinton followed these precedents with interventions in Somalia, Haiti, Bosnia, the Middle East, and most significantly Kosovo, none of which were authorized by Congress. While President George W. Bush sought and received approval of the wars in Afghanistan and Iraq, President Obama's wars in Libya and Syria went forward in violation of the War Powers Resolution's time limits.

Practice plays an important interpretive role for the question of the proper allocation of war powers. Both the Supreme Court and the political branches have often recognized that governmental practice represents a significant factor in establishing the contours of the separation of powers.<sup>126</sup> Even Justice Jackson's *Youngstown* opinion, much beloved by critics of presidential power, recognized that fact. "[C]ongressional inertia, indifference or quiescence may sometimes, at least as a practical matter, enable, if not invite, measures on independent presidential responsibility[.]" he wrote.<sup>127</sup> The role of practice in understanding the constitutional text is heightened in the foreign affairs and national security areas, where an absence of judicial precedent gives a long history of interbranch

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123. War Powers Resolution, Pub. L. No. 93-148, §5(b), 87 Stat. 555, 556 (1973) (codified at 50 USC §§ 1541-48 (1994)).

124. See *Crockett v. Reagan*, 558 F. Supp. 893, 898 (D.D.C. 1982), *aff'd per curiam*, 720 F.2d 1355 (D.C. Cir. 1983), *cert. denied*, 467 U.S. 1251 (1984); *Sanchez-Espinoza v. Regan*, 568 F. Supp. 596, 599 (D.D.C. 1983).

125. John Yoo, *The Continuation of Politics by Other Means: The Original Understanding of War Powers*, 84 CAL. L. REV. 167, 181-82 (1996) [hereinafter Yoo, *The Continuation of Politics by Other Means*].

126. See, e.g., *Mistretta v. United States*, 488 U.S. 361, 393 (1989) (recognizing the significance of understanding practical consequences when determining the placement of commissions within the federal government); *Youngstown Sheet & Tube v. Sawyer*, 343 U.S. 579, 637 (1952) (Jackson, J., concurring) ("congressional inertia, indifference or quiescence may sometimes, at least as a practical matter, enable, if not invite, measures on independent presidential responsibility"); *United States v. Midwest Oil Co.*, 236 U.S. 459, 474 (1915) (noting that a "long-continued practice, known to and acquiesced in by Congress" creates a presumption that the practice is legitimate).

127. *Youngstown Sheet & Tube*, 343 U.S. at 637 (1952) (Jackson, J., concurring); see also *Mistretta*, 488 U.S. at 393; *United States v. Midwest Oil Co.*, 236 U.S. at 474 (1915).

interpretation and interaction more weight. Finally, practice shows that many government leaders throughout American history have read the constitutional text as providing presidents with the power to commence military hostilities without congressional authorization.<sup>128</sup>

Practice demonstrates that the political branches have read the constitutional text to establish a stable, working system of war powers. The Constitution constructs a loose framework within which the President, as Commander-in-Chief, enjoys substantial discretion and initiative in conducting military hostilities. At the same time, Congress plays a significant role by controlling both the resources for war (through funding) and the legal status of hostilities (through declaring war). Unlike the legislative process, the constitutional text does not establish a specific procedure for going to war. Rather, it allocates different, potentially conflicting, war powers to the two branches. Presidential critics wish that the constitutional text compelled the sort of smooth, legalistic process upon the exercise of the commander-in-chief and executive powers that it requires for the passage of laws or the appointment of judges.<sup>129</sup> But a practical reading of the text better follows the original understanding of the commander-in-chief and executive powers held during the period leading up to the Constitution's ratification. Throughout American history, courts have agreed that these powers give the President broad constitutional authority to use military force in response to threats to the national security and foreign policy of the U.S.<sup>130</sup>

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128. Waxman, *supra* note 24, at 1637. "Whatever constitutional constraints on presidential use of force existed prior to World War II, however, most scholars also note that the President asserted much more extensive unilateral powers to use force during and after the Cold War, and many trace the turning point to the Korean War. Congress did not declare war in that instance, nor did it expressly authorize U.S. participation. From that period forward, Presidents have asserted broad unilateral authority to use force to address threats to U.S. interests, including threats to U.S. allies, and neither Congress nor the courts have managed to roll back this expanding power." *Id.*

129. See, e.g., Michael D. Ramsey, *Textualism and War Powers*, 69 U. CHI L. REV. 1543, 1549–51 (2002) (outlining "congressionalist" arguments as: (1) during and after ratifying debates, Framers and others involved with drafting made statements implying that Congress had singular control of hostility initiation; (2) records from the Philadelphia convention, and the debate that evolved Congress' enumerated power from "make[ing] war" to "declar[ing] war," indicating delegates saw no substantive difference in war power allocation; and (3) the fact that, in the years immediately after ratification, the President did not operationalize unilateral control committing the nation to hostilities, instead deferring to Congress for an authorization to take offensive action).

130. See *Loving v. United States*, 517 U.S. 748, 776 (1996) (Scalia, J., concurring in part and concurring in judgment) (recognizing the President's commander-in-chief powers as extensive); *Johnson v. Eisentrager*, 339 US 763, 789 (1950) (calling judicial intervention improper when the armed forces' deployment rationale is challenged); *The Prize Cases*, 67 U.S. (2 Black) 635, 670 (1862) (declaring the President's unilateral authority when deciding the degree of military force to use); *Fleming v. Page*, 50 U.S. (9 How.) 603, 615 (1850) (affirming the President's military powers).

## III. CONSTITUTIONAL TEXT AND HISTORY

Critics of President Trump and his predecessors reject the current system of war powers because they so quickly assume that “declare war” must have the colloquial meaning it holds today. But nowhere does the Constitution define or use the phrase “declare” in this manner. If this pro-Congress view was correct, we should expect the Constitution to consistently repeat the phrase when addressing war-making. It does not. When discussing war in other provisions, the Constitution employs phrases that indicate that declaring war referred to something less than the sole power to send the nation into hostilities. Take Article I, § 10, the Constitution’s most extensive discussion of war-making:

No State shall, without the Consent of Congress, lay any Duty of Tonnage, keep Troops, or Ships of War in time of Peace, enter into any Agreement or Compact with another State, or with a foreign Power, or engage in War, unless actually invaded, or in such imminent Danger as will not admit of delay.<sup>131</sup>

If we take seriously the idea of a written Constitution, then the same words in the Constitution must have the same meaning, and different words different meanings. If the pro-Congress view were correct, the Framers should have written a provision stating that “the President may not, without the Consent of Congress, engage in War, unless the United States are actually invaded, or in such imminent Danger as will not admit of delay.” Or, Article I, § 10 should have said “No state shall, without the consent of Congress, declare war.” Instead, Article I, § 10 carefully divides the war powers between Congress and the states in exactly the way that critics of executive power believe should apply between the President and Congress. Pro-Congress scholars cannot explain why the Constitution uses vastly different language to convey the same meaning. The contrast demonstrates that the Constitution does not establish any specific procedure for going to war.

Two additional provisions support an understanding of “declare war” as a means of recognizing the legal status of hostile acts, rather than as an authorization for hostilities. Article III defines the crime of treason, in part, as consisting of “levying War” against the U.S.<sup>132</sup> Again, “levying” must be broader in meaning than merely declaring. If the Framers had used “levy War” in Article I, § 8, they certainly would have made far clearer their alleged intention to grant Congress the sole power to decide whether to send

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131. U.S. CONST. art I, § 10, cl. 3.

132. *Id.* art. III, § 3, cl. 1.

the U.S. to war against another country. Congress's power to declare war also does not stand alone, but instead is part of a clause that includes the power to "grant Letters of Marque and Reprisal, and make Rules concerning Captures on Land and Water."<sup>133</sup> Placement of the power to declare war alongside these other two is significant, because they clearly involved the power of Congress to recognize or declare the legal status and consequences of certain wartime actions, rather than the power to authorize those actions. Letters of marque and reprisal allowed a sovereign nation to extend the protections of the laws of war to private forces acting in coordination with its armed forces.<sup>134</sup> Rules concerning captures determine the law that applies to prizes seized by American forces.<sup>135</sup> In both cases, these powers did not act to authorize hostilities as much as they determined the legal status and consequences of those hostilities. Understood in this way, adding the power to declare war to these other two parts in Article I, § 8, makes perfect sense.

Other foundational documents of the period demonstrate that the Framers thought of the power to begin hostilities as different than the power to declare war. Under the Articles of Confederation—the Nation's framework of government until the ratification—Congress operated as the executive branch of the U.S. Article IX vested Congress with "the sole and exclusive right and power of determining on peace and war . . . ."<sup>136</sup> Here, the Framers (many of whom had served in the Continental Congress) had on hand a text that clearly and explicitly allocated to Congress the "sole and exclusive" authority to decide ("determining on") whether to fight a war. If the Framers had intended to grant Congress the power to commence military hostilities, they could easily have imported the phrase from the Articles of Confederation into the Constitution, as they did with many of the other foreign-affairs powers.<sup>137</sup>

It makes no sense to ignore a document as historically and legally significant as the Articles of Confederation—our Nation's Constitution version 1.0. But critics also fail to consider the next most important documents of the time: State constitutions. Most of the State constitutions did not explicitly transfer to their assemblies the power to initiate hostilities,

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133. *Id.* art. I, § 8, cl. 11.

134. See Yoo, *The Continuation of Politics by Other Means*, *supra* note 125, at 250–52 (discussing Congress's limitation of power regarding foreign entities).

135. See *The Siren*, 80 U.S. (13 Wall.) 389, 392–93 (1871) ("The United States have succeeded to the rights of the crown. No one can have any right or interest in any prize except by their grant or permission. All captures made without their express authority ensure *ipso facto* to their benefit.").

136. ARTICLES OF CONFEDERATION OF 1781, art. IX, para. 1.

137. See *id.* (providing that Congress shall have the power to establish rules for captures, to grant letters of marque and reprisal, to appoint courts for the trial of piracies and felonies committed on the high seas, etc.).

but rather sought to control executive power by disrupting the structural unity of the governors. One State, however, chose to create exactly the type of arrangement contemplated by presidential critics. In its first 1776 constitution, South Carolina vested in its chief executive the power of commander-in-chief, but then declared that “the president and commander-in-chief shall have no power to make war or peace . . . without the consent of the general assembly and legislative council.”<sup>138</sup> In its 1778 constitution, South Carolina reaffirmed its decision that the legislature first must authorize war by stating that “the governor and commander-in-chief shall have no power to commence war, or conclude peace” without legislative approval.<sup>139</sup> South Carolina’s 1776 and 1778 constitutions show that the Framers did not understand the phrase “declare war” to amount to the power to “make war” or “commence war.” Both constitutions provided an example of constitutional language that clearly and explicitly created the very legislature dominated war-making system for which presidential critics wish. But the Framers rejected the use of such clear language, just as they did not impose the process of Article I, § 10, on the President and Congress.

Even if we were to agree that “declare war” were the central phrase, it does not bear the meaning that critics believe. As an initial matter, it is useful to examine the way that the people of that time used those words. Samuel Johnson, the premier lexicographer of his age, defined “declare” as: “[t]o clear; to free from obscurity”; “[t]o make known; to tell evidently and openly”; “[t]o publish; to proclaim”; “[t]o shew in open view”; or “[t]o make a declaration; to proclaim some resolution or opinion, some favour or opposition.”<sup>140</sup> This definition supports the argument that declaring war recognized a legal state of affairs between the U.S. and another country, rather than authorizing the steps to create hostilities in the first place. Johnson defines the words used elsewhere in the Constitution for fighting a war much more broadly than “declare.” Johnson defined “engage” as “[t]o embark in an affair; to enter in an undertaking,” or “[t]o conflict; to fight.”<sup>141</sup> He defined “levy” as “to raise money” or “to make war.”<sup>142</sup> He defined “commence,” the

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138. S.C. CONST. art. XXVI (1776), *reprinted in* 6 THE FEDERAL AND STATE CONSTITUTIONS, COLONIAL CHARTERS, AND OTHER ORGANIC LAWS 3247 (Francis N. Thorpe ed., 1909).

139. S.C. CONST. of 1778, art. XXXIII.

140. 1 SAMUEL JOHNSON, A DICTIONARY OF THE ENGLISH LANGUAGE, IN WHICH THE WORDS ARE DEDUCED FROM THEIR ORIGINALS, AND ILLUSTRATED IN THEIR DIFFERENT SIGNIFICATIONS BY EXAMPLES FROM THE BEST WRITERS. TO WHICH ARE PREFIXED, A HISTORY OF THE LANGUAGE, AND AN ENGLISH GRAMMAR 555 (W. Strahan ed., 1755) [hereinafter A DICTIONARY OF THE ENGLISH LANGUAGE].

141. *Id.* at 708–09.

142. 2 A DICTIONARY OF THE ENGLISH LANGUAGE, *supra* note 140 at 44.



word used in South Carolina's constitution, as "[t]o begin."<sup>143</sup> The Constitution's use of the words "levy" or "engage in" war clearly refer to a more active role in war-making, one that Congress does not share simply through the power to "declare." Even today, we commonly think of the statutes that establish public programs and mandates as "authorization" statutes (to be followed by funding), not "declaring" statutes. A declaration does not authorize or make, it recognizes.

Properly understanding the meaning of "declare" also requires an examination of the founding generation's use of the word in other contexts. When the Framers employed "declare" in a constitutional context, they usually used it in a juridical manner, in the sense that courts "declare" the state of the law or the legal status of a certain event or situation. When considering the meaning of declaring war, the Framers' thoughts would have turned to their most significant national legal act. The Declaration of Independence did not "authorize" military resistance to Great Britain. At the time that the Continental Congress met at Philadelphia in 1776, hostilities had existed for more than a year.<sup>144</sup> Congress had exercised sovereign powers—negotiating with Great Britain, sending representatives abroad, seeking aid—for at least two years.<sup>145</sup> The Declaration's importance was not in authorizing combat, but in transforming the legal status of the hostilities between Great Britain and her colonies from an insurrection to a war between equals. As David Armitage observes, "[i]n order to turn a civil war into a war between states, and thus to create legitimate corporate combatants out of individual rebels and traitors, it was essential to declare war and to obtain recognition of the legitimacy of such a declaration."<sup>146</sup> As a nation-state, the U.S. could make alliances and conduct commerce with other nations, which were critical steps in winning independence. The Declaration of Independence was the U.S.'s first declaration of war.

Presidential critics try to carry out a textual ju-jitsu to avoid the narrow meaning of a declaration of war. They concede, as they must, that by the time of the Constitution's framing, nations did not declare war often, and if they

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143. A DICTIONARY OF THE ENGLISH LANGUAGE, *supra* note 140 at 422.

144. LIBRARY OF CONGRESS, DOCUMENTS FROM THE CONTINENTAL CONGRESS AND THE CONSTITUTIONAL CONVENTION, 1774-1789, Digital Collections, <https://www.loc.gov/collections/continental-congress-and-constitutional-convention-from-1774-to-1789/articles-and-essays/timeline/1775/>.

145. David Armitage, *The Declaration of Independence and International Law*, 59 WILLIAM & MARY Q. 39, 46 (2002).

146. *Id.* at 47.

did, they usually did so after hostilities had begun.<sup>147</sup> But since the Framers inserted the Declare War Clause into the Constitution, it must grant some broader, more significant power than just declaring war—therefore, it must convey the sole right to decide on all hostilities.<sup>148</sup> Ramsey and Prakash agree that the eighteenth-century definition of “‘declare war’ meant to initiate war through hostilities as well as by formal proclamation.”<sup>149</sup> This argument, however, errs in ignoring declarations of war. To use the eighteenth-century understanding, declarations make public, show openly, and make known the state of international legal relations between the U.S. and another nation. This is a different concept than whether the laws of war apply to the hostilities; two nations could technically not be at war, even though their forces might be engaged in limited combat. In the period immediately before the Constitution, nations used declarations of war as a legal complaint that explained the reasons for war, the rules of the conflict, and the remedy that would bring the war to an end.<sup>150</sup> Declarations are also important for domestic constitutional purposes. Textually, a declaration of war places the Nation in a state of war, which triggers enhanced powers on the part of the federal government. Congress has recognized the distinction between declared total wars and non-declared hostilities by providing the executive branch with expanded domestic powers such as seizing foreign property, conducting warrantless surveillance, arresting enemy aliens, and taking control of transportation systems, to name a few—only when war is declared.<sup>151</sup>

The Constitution’s structure reinforces this reading of the text. Presidential critics read the Declare War Clause to mean more than a power to issue a declaration of war because otherwise the Constitution would impose no substantive limit on the President. Implicit in their argument is that war must follow the same rules as domestic affairs, where Congress

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147. See Yoo, *War & Constitutional Text*, *supra* note 108, at 1643 (noting eighteenth-century Great Britain as an example of nation that initiated few declarations of war); Yoo, *The Continuation of Politics by Other Means*, *supra* note 125, at 214–15 (referencing two major British engagements in which the King “did not declare war until more than a year after offensive operations had begun”).

148. Yoo, *War & Constitutional Text*, *supra* note 108, at 1643.

149. See Ramsey, *The President’s Power to Respond*, *supra* note 109, at 169 (responding to Professor Saikrishna Prakash’s *Unleashing the Dogs of War: What the Constitution Means by “Declare War,”* 93 CORNELL L. REV. 45 (2007)).

150. Yoo, *War & Constitutional Text*, *supra* note 108, at 1672.

151. See, e.g., 50 U.S.C. app. § 5(b)(1) (1994 & Supp. 1999) (concerning seizure of foreign property); 50 U.S.C. § 1811 (1994) (concerning electronic surveillance); 50 U.S.C. § 1829 (1994) (describing presidential authority of physical searches for foreign intelligence information); 50 U.S.C. § 1844 (Supp. 1998) (concerning trap and trace devices); 50 U.S.C. § 21 (1994) (concerning seizure of aliens); 10 U.S.C. § 2644 (1996) (authorizing the President to seize transportation systems as necessary during a time of war).

authorizes, and then the President executes. Yet, the Constitution itself nowhere describes such a process, nor does it explain how the Declare War Clause and the commander-in-chief power must interact. What happens if a President disagrees with Congress's war goals or its methods? Suppose Congress had ordered President Franklin Roosevelt to ignore the Pacific theater entirely or to avoid a direct invasion of France. Under the pro-Congress approach, the President could not disobey Congress's decision, just as he cannot refuse to enforce the laws passed by Congress for policy reasons. But it seems obvious that the Constitution allows the President as Commander-in-Chief to block congressional wartime decisions (including its decision to declare war), just as Congress can block the President through the funding power.

Constitutional structure resolves ambiguities in the allocation of an executive power in favor of the Presidency. Article II, § 1 provides that the "executive Power shall be vested in a President of the United States . . . ."<sup>152</sup> By contrast, Article I's Vesting Clause gives Congress only the powers "herein granted."<sup>153</sup> This difference in language indicates that the Constitution limits Congress's legislative powers to the enumeration in Article I, § 8, while the President's powers include inherent executive powers that the Constitution does not explicitly list. As Alexander Hamilton famously argued in defending Washington's April 22, 1793 Neutrality Proclamation: "The general doctrine then of our constitution is, that the EXECUTIVE POWER of the Nation is vested in the President; subject only to the *exceptions* and *qu[a]llifications* which are expressed in the instrument."<sup>154</sup>

To be sure, Article II specifically enumerates powers in addition to the Vesting Clause. Critics of presidential power argue that this subsequent enumeration limits the "executive power" granted in the Vesting Clause.<sup>155</sup> But Article II does not define and cabin the grant in the Vesting Clause. Rather, it redirects some elements of executive power to Congress in Article I or divides the executive function between the President and the Senate. For example, the Framers gave the King's traditional power to declare war to Congress in Article I but reserved the commander-in-chief authority to the President in Article II. They altered the process for exercising other plenary

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152. U.S. CONST. art. II, § 1, cl. 1.

153. *Id.* art. I, § 1.

154. Alexander Hamilton, *Pacificus No. 1*, in THE PACIFICUS-HELVIDIUS DEBATES OF 1793-94, at 13 (Morton J. Frisch ed., 2007) [hereinafter Hamilton, *Pacificus No. 1*].

155. See, e.g., A. Michael Froomkin, *The Imperial Presidency's New Vestments*, 88 NW. U. L. REV. 1346, 1362-66 (1994) (rejecting the argument that Congress lacks constitutional authority to restrict the President's power over executive branch officials).

Crown powers, such as treaties and appointments, by including the Senate.<sup>156</sup> The enumeration in Article II marks the places where several traditional executive powers were diluted or reallocated. The Vesting Clause, however, conveyed all other executive powers to the President.

There can be little doubt that the decision to deploy military force is executive in nature. It calls for action and energy in execution, rather than the enactment of legal rules to govern private conduct. “The direction of war implies the direction of the common strength,” wrote Hamilton, “and the power of directing and employing the common strength, forms a usual and essential part in the definition of the executive authority.”<sup>157</sup> To the extent that the constitutional text does not explicitly allocate the power to initiate military hostilities, Article II’s Vesting Clause provides that it remains among the President’s unenumerated powers. Indeed, two of the most prominent conservative critics of the President’s war powers, Professors Prakash and Ramsey, make exactly this argument to claim that the President exercises virtually all the Nation’s diplomatic powers.<sup>158</sup> But then they suddenly reverse their reading of the executive power when it comes to war.<sup>159</sup> A consistent approach should root presidential authority both to initiate military hostilities and to conduct foreign policy in the Vesting Clause.

Depriving the President of the power to decide when to use military force would disrupt the basic constitutional framework for foreign relations. From the beginning of the Republic, the vesting of the executive, commander-in-chief, and treaty powers in the executive branch granted the President control over international affairs. As Secretary of State Thomas Jefferson observed during the first Washington administration: “The constitution has divided the powers of government into three branches . . . [and] has declared that ‘the [e]xecutive powers shall be vested in the [p]resident,’ submitting only special articles of it to a negative by the

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156. Thus, Article II’s enumeration of the Treaty and Appointment Clauses only dilutes the unitary nature of the executive branch in regard to the exercise of those powers, rather than transforming them into quasi-legislative functions. See John C. Yoo, *Treaties and Public Lawmaking: A Textual and Structural Defense of Non-Self-Execution*, 99 COLUM. L. REV. 2218, 2233–34 (1999) (arguing that the inclusion of Senate participation in making treaties dilutes the executive power to do so, as the Framers intended).

157. THE FEDERALIST NO. 74 at 497 (Alexander Hamilton) (Easton Press 1979).

158. See Saikrishna B. Prakash & Michael D. Ramsey, *The Executive Power Over Foreign Affairs*, 111 YALE L.J. 231, 252–53 (2001) (explaining that Article II of the Constitution clearly articulates a vested power in the President regarding foreign affairs).

159. Yoo, *War & Constitutional Text*, *supra* note 108, at 1678.

[s]enate.”<sup>160</sup> Due to this structure, Jefferson continued, the “transaction of business with foreign nations is [e]xecutive altogether. It belongs, then, to the head of that department, except as to such portions of it as are specially submitted to the [s]enate. Exceptions are to be construed strictly.”<sup>161</sup>

In defending President Washington’s Neutrality Proclamation, Hamilton came to the same view. According to Hamilton, Article II “ought . . . to be considered as intended merely to specify the principal articles implied in the definition of executive power; leaving the rest to flow from the general grant of that power . . . .”<sup>162</sup> Future Chief Justice John Marshall famously declared a few years later, “The President is the sole organ of the nation in its external relations, and its sole representative with foreign nations. . . . The [executive] department . . . is entrusted with the whole foreign intercourse of the nation . . . .”<sup>163</sup> Given this agreement, the President has exercised the primary authority over foreign affairs ever since.

Presidential critics will often claim that granting Congress the leading role in war will lead to greater “responsibility” in Ely’s words.<sup>164</sup> But it is not clear that placing the decision for war in Congress’s hands, rather than the President’s, would advance those goals, nor is it at all clear that those values should trump other important goals, such as effectiveness and efficiency. The Framers believed that giving authority to the President increased government accountability and responsibility due to his nationwide election and the need to balance legislative excess. As Alexander Hamilton wrote in *Federalist 76*, “[t]he sole and undivided responsibility of one man will naturally beget a livelier sense of duty and a more exact regard to reputation.”<sup>165</sup>

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160. Thomas Jefferson, *Jefferson’s Opinion on the Powers of the Senate Respecting Diplomatic Appointments*, 24 April 1790, NATIONAL ARCHIVES, <https://founders.archives.gov/documents/Jefferson/01-16-02-0215> (last visited May 20, 2021).

161. *Id.* (emphasis omitted).

162. PACIFICUS NO 1, 4 THE WORKS OF ALEXANDER HAMILTON, 432, 439 (Henry Cabot Lodge, ed., 1904).

163. 10 ANNALS OF CONG. 613–14 (1800).

164. See, e.g., William M. Treanor, *Fame, the Founding, and the Power to Declare War*, 82 CORNELL L. REV. 695, 700 (1997) (“The Founders intended that the [Declare War] Clause would vest in Congress principal responsibility for initiating conflict.”); FISHER, PRESIDENTIAL WAR POWER, *supra* note 96, at 203 (1995) (stating that “Congress needs to rediscover its institutional and constitutional duties” and that “[l]egislators must be prepared, and willing, to use the ample powers at their disposal.”); ELY, WAR & RESPONSIBILITY, *supra* note 96, at 3 (“The power to declare war was constitutionally vested in Congress” in order to “reduce the number of occasions on which [the United States] would become . . . involved.”); GLENNON, CONSTITUTIONAL DIPLOMACY, *supra* note 96, at 81 (“There is no evidence that the Framers intended to confer upon the President any independent authority to commit the armed forces to combat, except in order to repel ‘sudden attacks.’”); HENKIN, CONSTITUTIONALISM, *supra* note 96, at 109 (arguing that Congress is the “rudder” that steers the Constitution in foreign affairs matters); KOH, NATIONAL SECURITY, *supra* note 95, at 159–60 (noting that the trend has been toward increasing executive control but arguing for more balanced power sharing).

165. THE FEDERALIST NO. 76, at 510–11 (Alexander Hamilton) (Jacob E. Cooke ed., 1961).

Correcting one of the chief defects of the Articles of Confederation, the Framers included a sole executive in their designs to make the federal government more effective at war. “Good government” required “energy in the executive,” Hamilton wrote in *Federalist 70*.<sup>166</sup> A vigorous President, he said, was “essential to the protection of the community against foreign attacks.”<sup>167</sup> In *Federalist 74*, Hamilton was even more explicit about the functional superiority of the executive branch in war. “Of all the cares or concerns of government, the direction of war most peculiarly demands those qualities which distinguish the exercise of power by a single hand.”<sup>168</sup> Hamilton believed that “the power of directing and employing the common strength” of society in war “forms an usual and essential part in the definition of the executive authority.”<sup>169</sup> This has been the judgment of others since the Framing. With little variation, constitutional practice over two centuries has seen the President taking the lead in deciding whether to initiate armed conflict. We have a war powers system in which the initiative lies with the President, with Congress exercising an ex-post check.

Developments in technology and warfare favor the Constitution’s location of the initiative in the Executive now more than in the eighteenth century. The industrial revolution made possible the mass armies, navies, and air forces that eventually brought the continental U.S. within the reach of long-distance bombers and nuclear-tipped missiles. As Jeremy Rabkin and I have argued elsewhere, the information revolution has made speed and secrecy even more important with the introduction of cyber, robotic, and space weapons.<sup>170</sup> The branch of government most functionally suited to act in this security environment is the President, a fact that even the Framers foresaw. As Hamilton observed, “[d]ecision, 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 . . . .”<sup>171</sup> These functional considerations have led the Supreme Court to bless centralized presidential control over foreign policy and diplomacy.<sup>172</sup>

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166. THE FEDERALIST NO. 70, at 471 (Alexander Hamilton) (Jacob E. Cooke ed., 1961).

167. *Id.*

168. THE FEDERALIST NO. 74, at 500 (Alexander Hamilton) (Jacob E. Cooke ed., 1961).

169. *Id.*

170. Jeremy Rabkin & John Yoo, STRIKING POWER: HOW CYBER, ROBOTS, AND SPACE WEAPONS CHANGE THE RULES FOR WAR 1–32 (2017).

171. THE FEDERALIST NO. 70, *supra* note 166, at 472 (Alexander Hamilton).

172. *See also* United States v. Curtiss-Wright Exp. Corp., 299 U.S. 304, 319 (1936) (noting the limitation of Congress and authority towards a U.S. President’s foreign diplomacy).

Critics worry about vesting unchecked power in the hands of the President.<sup>173</sup> But that worry ignores the constitutional structure supporting the bare text. Even if the Declare War Clause were struck from the Constitution, Congress would already have ample ability to check the President through its power to raise and fund the military. Congress can refuse to create units necessary to carry out the President’s plans, terminate funding for units engaged in combat, and limit the overall size and shape of the military.<sup>174</sup> Congress can foreclose options and open up others. As one important eighteenth-century student of the British Constitution put it, the king’s power to declare and wage war “is like a ship completely equipped, but from which the parliament can at pleasure draw off the water, and leave it aground,—and also set it afloat again, by granting subsidies.”<sup>175</sup> In *Federalist 58*, Madison states that Parliament’s use of “the engine of a money bill” had secured for centuries its “continual triumph . . . over the other branches of the government . . . .”<sup>176</sup>

Lacking the Crown’s powers both to raise a military and to declare war, the President is even more at the mercy of Congress’s power of the purse. In enacting funding bills for the military, Congress has a full and fair opportunity to consider the merits of a military conflict. This was especially true at the time of the founding. In 1789, the U.S. had no Navy and an Army of less than 1,000 troops, which were barely suitable for border defense.<sup>177</sup> Although the militia might have provided an alternative fighting force, Article I reserves to Congress whether to place it at the President’s disposal.<sup>178</sup> To fight the Wars of 1812 and 1848, and the Civil War, Congress had to expand the armed forces to fight the specific conflict.<sup>179</sup> In approving these measures, Congress fully discussed the merits of the wars and could easily have foreclosed hostilities simply by refusing to appropriate anything.

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173. See Yoo, *War & Constitutional Text*, *supra* note 108, at 1680–81 (citing one argument that the Declare War Clause must give Congress the power to check the president).

174. *Id.*

175. J. L. DE LOLME, *THE CONSTITUTION OF ENGLAND; OR, AN ACCOUNT OF THE ENGLISH GOVERNMENT* 53 (N.Y., Hodge & Campbell 1821).

176. *THE FEDERALIST* NO. 58, at 395 (James Madison) (Jacob E. Cooke ed. 1961).

177. Morris J. MacGregor, *The Formative Years, 1783–1812*, in *AMERICAN MILITARY HISTORY* 107 (Maurice Matloff ed., 1969).

178. U.S. CONST. art. I, § 8, cl. 12–13.

179. See GORDON S. WOOD, *EMPIRE OF LIBERTY: A HISTORY OF THE EARLY REPUBLIC, 1789–1815*, at 659, 671–72 (2009) [hereinafter WOOD, *EMPIRE OF LIBERTY*] (noting an addition of tens of thousands of troops to an initially meager seven thousand in 1812); PAUL H. BERGERON, *THE PRESIDENCY OF JAMES K. POLK* 80 (1987) (noting the recruitment of some 20,000 volunteers for the war against Mexico); JAMES M. MCPHERSON, *BATTLE CRY OF FREEDOM: THE CIVIL WAR ERA* 312–14 (1988) (noting how military preparations for the Civil War, like other wars only occurred after the United States was in the middle of the conflict).

Kate Stith has observed that Congress's power of the purse "constitute[s] a low-cost vehicle for effective legislative control over executive activity."<sup>180</sup>

Critics of executive initiative in war could argue that the power of the purse no longer imposes a serious constraint due to the U.S.'s large standing military—the largest in the world.<sup>181</sup> There are two reasons to doubt this argument. First, the high cost of modern warfare still requires Presidents to seek congressional funding. Even during the Kosovo war, which involved no ground troops and only a limited portion of the Air Force, President Clinton had to seek special appropriations from Congress to allow the American military intervention to continue.<sup>182</sup> Second, Congress has built the large standing military that allows Presidents to act quickly. If it wanted to limit the President to defensive uses-of-force, Congress could leave aside the large carrier groups, strike bombers, and armored divisions that are primarily designed for offensive warfare. Congress acquiesces to quick wars because it would rather have the President take the risk with wars that are both unpredictable and dangerous. That Congress has not used its funding power more often to prevent or halt military hostilities reveals no flaw in the constitutional structure. It only reflects cooperation between the Executive and the Legislature.

Some critics will concede that recent practice, and even the Constitution's structure, support presidential initiative in war. Instead, they point to the eighteenth century's colloquial usage of "declare war" to mean commence war.<sup>183</sup> They rely heavily on the comment of James Wilson, one of the leading delegates to the Philadelphia Convention, who declared in the Pennsylvania ratifying convention that "[i]t will not be in the power of a single man" to involve the Nation in war, "for the important power of declaring war is vested in the legislature at large . . ."<sup>184</sup> Another critical piece of evidence for the pro-Congress side comes from Hamilton. In *Federalist 69*, he sought to downplay the Presidency by contrasting it with

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180. Kate Stith, *Congress' Power of the Purse*, 97 YALE L. J. 1343, 1360 (1988).

181. Delahunty & Yoo, *Making War*, *supra* note 102, at 132–33.

182. See JOHN YOO, *THE POWERS OF WAR AND PEACE: THE CONSTITUTION AND FOREIGN AFFAIRS AFTER 9/11* 157–59 (2005). The United States' intervention in Lebanon in the early 1980s provides another relatively recent instance to underscore the President's critical dependence on congressional funding when taking and sustaining military operations. See *Multinational Force in Lebanon Resolution*, Pub. L. No. 98-119, § 2(a)(5), 97 Stat. 805, 805 (1983); see also DAVID K. NICHOLS, *THE MYTH OF THE MODERN PRESIDENCY* 122 (1994) ("It has been . . . this fear of funding restrictions that forces the President to take the views of Congress into account.").

183. See, e.g., Michael D. Ramsey, *Textualism and War Powers*, 69 U. CHI. L. REV. 1543, 1590–609 (2002).

184. 2 JONATHAN ELLIOT, *DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION* 528 (2d ed. 1836) [hereinafter 2 ELLIOT], <https://memory.loc.gov/cgi-bin/ampage>.



the broader powers of the British king. Hamilton argued that the commander-in-chief power “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 . . . .”<sup>185</sup> Meanwhile, he observed, “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.”<sup>186</sup>

Other than these two key statements, presidential critics generally draw on passages from 17th and 18th century sources, including several leading founders, which use “declare war” as synonymous with commence hostilities. Writing as Pacificus, for example, Hamilton noted in 1793 that “the Legislature can alone declare war, can alone actually transfer the nation from a state of Peace to a state of War . . . .”<sup>187</sup> Responding as Helvidius, Madison agreed that “[t]hose who are to *conduct a war* cannot in the nature of things, be proper or safe judges, whether *a war ought* to be *commenced, continued, or concluded*.”<sup>188</sup>

These arguments fail on two grounds. First, they do not adequately account for the history of the Constitution’s ratification. In fact, their arguments run counter to what we know about the development of American constitutional thinking during this period. Second, their analysis ignores the language that Americans actually used in the constitutional texts of the time. They show that Americans and others in the eighteenth century (as now) could use the phrase “declare war” to refer to beginning military hostilities. But there are more important examples where the Framing generation used “declare war” in the narrower sense of setting international legal relations and employed other, more precise phrases to refer to the beginning of hostilities.

American constitutional development during the period between the Declaration of Independence and the Constitution’s ratification favored the expansion of executive power.<sup>189</sup> In the burst of constitution-making after Independence, the Framers adopted one national charter, the Articles of Confederation. This charter was crippled by a lack of executive organization

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185. THE FEDERALIST NO. 69, at 465 (Alexander Hamilton) (Jacob E. Cooke ed. 1961).

186. *Id.*

187. Hamilton, *Pacificus No. 1*, *supra* note 154, at 16.

188. James Madison, *Helvidius No. 1*, in THE PACIFICUS-HELVIDIUS DEBATES OF 1793–94, at 62 (Morton J. Frisch ed., 2007).

189. FORREST McDONALD, THE AMERICAN PRESIDENCY: AN INTELLECTUAL HISTORY 98–153 (1994); *see also* GORDON S. WOOD, THE CREATION OF THE AMERICAN REPUBLIC 1776–1787, at 138, 393–429, 434 (1967) (discussing how historically the three branches of law were being consumed by the legislative, a result warned of by Jefferson, leading to a crisis that led to the favoritism of expansion of executive powers).

and leadership, and state constitutions distinctive in their efforts to undermine executive unity and energy.<sup>190</sup> The result was legislative abuse, special interest laws, and weak governments.<sup>191</sup> Dissatisfaction with this state of affairs, even during a time of relative peace and prosperity, led American leaders to seek a new Constitution that would create a stronger, more independent executive branch wrapped within a more powerful national government.<sup>192</sup> Presidential critics do not explain why those who generally favored broader executive power would act in this one instance to limit it.

The Articles of Confederation provide a striking counterexample. Congress inherited the Crown's imperial powers in the colonies, while the states retained their legislative powers. It kept "the sole and exclusive right and power of determining on peace and war," to enter into treaties, and to conduct foreign relations.<sup>193</sup> Article IX required the approval of nine states before the nation could "engage in a war."<sup>194</sup> Article VI made clear that "[n]o state shall engage in any war without the consent of" Congress, unless under threat of invasion or imminent danger.<sup>195</sup> Critics do not explain why the Framing generation used these phrases, especially the word "engage," to clearly refer to the beginning of military hostilities, rather than their favored "declare." Indeed, the phrase "declare war" does not appear in the Articles of Confederation. The only interpretation that makes sense is that "engage" in war or "determine on war" were the broadest possible grants of power to Congress to begin hostilities, as they reflect the intention to vest all of the war power in the national government. "Declare" refers to a narrower subset of the war power that does not even make an appearance in our Nation's first constitution.

Under the Articles, Congress's problem was not a lack of formal executive power, but its organization and support. Governing by committee proved disastrous during the War of Independence. In 1781, Congress

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190. See ALEXANDER HAMILTON, 1 THE WORKS OF ALEXANDER HAMILTON 111 (Henry Cabot Lodge ed., 2d ed. 1904), <https://oll.libertyfund.org/title/lodge-the-works-of-alexander-hamilton-federal-edition-vol-1> ("Another defect in our system is want of method and energy in the administration. This has partly resulted from the other defect; but in a great degree from prejudice, and the want of a proper executive.").

191. See THE FEDERALIST NO. 22, at 134–39 (Alexander Hamilton) (Easton Press ed., 1979) (discussing various weakness of the federal government under the Articles of Confederation—the leeway given for foreign corruption to occur, the ability of minority states to negate the voting power of the majority, the federal government's inability to regulate commerce, to raise armies, etc.).

192. See generally THE FEDERALIST NOS. 15, 21–22 (Alexander Hamilton) (Easton Press ed., 1979) (discussing the various defects with the Articles of Confederation and their purported remedies in the U.S. Constitution).

193. Articles of Confederation art. IX (1777).

194. *Id.* at para. 6.

195. *Id.* at art. VI, para. 6.

replaced committees with executive departments that individual secretaries headed—an improvement, but a small one.<sup>196</sup> With Congress micromanaging policy, the Executive lacked “method and energy,” in the words of a young Alexander Hamilton.<sup>197</sup> The states refused to supply revenue to the national government or comply with its requests.<sup>198</sup> Once peace arrived, Congress proved utterly unable to handle its executive duties. It could not establish even a small military to protect the northern forts, which the British refused to hand over in violation of the 1783 peace treaty.<sup>199</sup> Britain and France imposed harmful trading rules against American ships, while Spain closed the critical port of New Orleans to American commerce.<sup>200</sup> American ambassadors could do nothing to reverse British and French policies because Congress had no authority over commerce with which to threaten retaliatory sanctions.<sup>201</sup>

Experimentation with the executive power, with poor results, went further in the states. In all but one state, the assembly elected the governor, making clear who served whom.<sup>202</sup> Some states tried multimember executives or required the governor to receive the blessing of a council of state, also appointed by the legislature.<sup>203</sup> As Gordon Wood has observed, the councils often made the governors “little more than chairmen of their executive boards.”<sup>204</sup> States limited the Governor’s term and eligibility. Most states provided for the annual election of the Governor, restricted the number of terms a Governor could serve, or both.<sup>205</sup> Pennsylvania reached the most radical extreme by creating a twelve-man executive council elected annually by the legislature.<sup>206</sup>

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196. See, e.g., RICHARD B. MORRIS, *THE FORGING OF THE UNION, 1781–89*, at 95–96 (1987).

197. ALEXANDER HAMILTON, 1 *THE WORKS OF ALEXANDER HAMILTON* 219 (Henry Cabot Lodge ed., 2d ed. 1904).

198. See, e.g., JACK N. RAKOVE, *THE BEGINNINGS OF NATIONAL POLITICS: AN INTERPRETIVE HISTORY OF THE CONTINENTAL CONGRESS* 275–96 (1979).

199. RICHARD H. KOHN, *EAGLE & SWORD: THE FEDERALISTS AND THE CREATION OF THE MILITARY ESTABLISHMENT IN AMERICA, 1783–1802*, at 54–72 (1975).

200. See John Yoo, *Globalism and the Constitution: Treaties, Non-Self-Execution, and the Original Understanding*, 99 *COLUM. L. REV.* 1955, 2011–12, 2081 (1999) (articulating Congress’s role in treaties, domestic, and legislative affairs and its check on the executive from the framers’ view).

201. See MARKS III, *supra* note 197, at 52–95 (explaining the political upheaval regarding Congress’s and the states’ authorities in trade); McDONALD, *supra* note 189, at 143–53.

202. See McDONALD, *supra* note 189, at 98, 133.

203. See WOOD, *supra* note 190, at 138–39 (discussing how these councils appointed by legislatures become more controllers than servants of the governors).

204. *Id.* at 138.

205. See McDONALD, *supra* note 189, at 131–33.

206. PA. CONST. § XIX (1776), *reprinted in* 5 FRANCIS NEWTON THORPE, *THE FEDERAL AND STATE CONSTITUTIONS, COLONIAL CHARTERS, AND OTHER ORGANIC LAWS OF THE STATES, TERRITORIES, AND COLONIES NOW OR HERETOFORE FORMING THE UNITED STATES OF AMERICA*, 3081, 3086–87 (William S. Hein & Co., Inc. 1993) (1909).

Federalists rejected the progressive weakening of the Executive. They modeled the federal Constitution on that of New York, which had freed the governor of legislative dependence, given him significant constitutional authority, and vested him with the sole power of leading the state's military.<sup>207</sup> During the Philadelphia Convention, initial proposals for the Presidency would have rendered the Executive into the servant of Congress, and little else.<sup>208</sup> But by the end, the Executive became institutionally independent and possessed "the Executive rights vested in Congress by the Confederation," which were presumably those in foreign affairs.<sup>209</sup> Even the well-known but confused debate in the Philadelphia Convention on August 17, 1787 supports the reading of declare war as narrower than conducting war. Delegates rejected the original grant to Congress of the power "to make war" because the legislature's "proceedings were too slow" and members of the House would know too little about foreign affairs.<sup>210</sup> They responded by proposing an expansion of the executive role in war-making. Pierce Butler argued for "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."<sup>211</sup>

The Constitutional Convention delegates clearly amended the draft to reduce Congress's role in war and to increase the President's. Immediately after Butler's comment, Madison and Elbridge Gerry moved "to insert 'declare,' striking out 'make' war; leaving to the Executive the power to repel sudden attacks."<sup>212</sup> Madison's amendment expanded the Executive's power to respond unilaterally to an attack, and it recognized that making war—the entire war power—was a broader power than the power to declare war. Madison's notes, however, do not elaborate on what type of attack would trigger the executive's war-making authority. While an invasion on American soil would qualify, it is unclear if assaults on American forces, citizens, or property overseas would as well. Subsequent confusion over the amendment suggests that the Convention did not share a consensus about the war power. Roger Sherman, for example, believed Madison's amendment was unnecessary. The original draft, he thought, "stood very well. The

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207. See CHARLES C. THATCH JR., *THE CREATION OF THE PRESIDENCY, 1775-1789: A STUDY IN CONSTITUTIONAL HISTORY* 34–37 (The Johns Hopkins Press 1922) (1969).

208. Initial proposals would have made Congress elect the President. See 1 *THE RECORDS OF THE FEDERAL CONVENTION OF 1787*, at 18–21 (Max Farrand ed., rev. ed. 1966) (outlining the Virginia Plan provisions for a National Executive).

209. *Id.* at 21.

210. 2 *THE RECORDS OF THE FEDERAL CONVENTION OF 1787*, at 318–19 (Max Farrand ed., rev. ed. 1966) [hereinafter Farrand ed., 2 *RECORDS OF 1787 FEDERAL CONVENTION*].

211. *Id.* at 318.

212. *Id.*

Executive [should] be able to repel and not to commence war.”<sup>213</sup> Sherman thought that reducing Congress’s power to that of declaring war would permit the Executive to commence wars unilaterally. He favored leaving “make” war as it was, because it was “better than ‘declare’ the latter narrowing the power too much.”<sup>214</sup>

Sherman’s comments, however, confused other delegates. Gerry seems to have interpreted Sherman’s argument as expanding executive power. He rose to proclaim that he “never expected to hear in a republic a motion to empower the Executive alone to declare war.”<sup>215</sup> Gerry may have feared any interpretation that gave the President an authority to declare war, because a declaration would represent a legal widening of a conflict at home and abroad. Oliver Ellsworth argued that declarations of war and the making of peace treaties should lie in different hands: “[T]here is a material difference between the cases of making war, and making peace. It [should] be more easy to get out of war, than into it. War also is a simple and overt declaration.”<sup>216</sup> In contrast to war’s simplicity, said Ellsworth, “peace [is] attended with intricate & secret negotiations.”<sup>217</sup> He shared the understanding that declaring war differed from commencing war, neither of which a Framer would have described as “simple and overt.” Declarations of war are “simple” because they alter legal relationships and recognize an existing state of hostilities in one shot. Rising to support Ellsworth, George Mason differentiated between war and peace: he “was for clogging rather than facilitating war; but for facilitating peace.”<sup>218</sup> He “was [against] 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.”<sup>219</sup> 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. The Convention then approved the change by eight states to one.<sup>220</sup>

Although the closing events of August 17 are somewhat unclear, we still can venture some tentative conclusions. Changing the phrase from “make”

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213. *Id.*

214. *Id.*

215. *Id.*

216. *Id.* at 319.

217. *Id.*

218. *Id.*

219. *Id.*

220. *Id.* at 314.

to “declare” reflected an intention to prohibit Congress from encroaching on the executive power to conduct war. Although the amendment only changed Article I, the substitutions recognized the President’s powers in one dimension and restricted it in another. The Framers understood that a reduction in congressional war authority would produce a corresponding expansion in executive authority. 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 also suggested that he might be able to engage the Nation in hostilities short of that. The August 17 debate also raises two other points. First, some of the delegates did not envision the Executive as a magistrate charged only with executing the laws. Some Framers believed that the president enjoyed a “protective power,” as Henry Monaghan has described it, which permitted him to guard the Nation from attack, even in the absence of congressional consent.<sup>221</sup> Another group thought that the president could lay a claim, equal to that of Congress, to representing the people, for he would “not make war but when the Nation will support it.”<sup>222</sup>

Throughout the Convention, delegates approved significant transfers of authority to the President. Critics do not explain why the Framers would have acted against these broader constitutional trends and weakened presidential authority in war. Critics also fail to show that the Framers believed the Constitution, once in practice, would require Congress to approve before the President could conduct hostilities. The Federalists, who had every incentive to downplay presidential power, never claimed that Congress’s Declare War power would serve as a check on executive decisions in favor of war. No Federalist or Anti-Federalist bestowed upon the Declare War Clause the broad sweep that pro-Congress scholars give it today. The closest they come is *Federalist 69*, in which Hamilton portrays the President’s powers in war as incomparable to the British King’s because Article II does not vest in the former the powers to declare war or raise armies.<sup>223</sup> Hamilton, however, never defines the power to declare war, nor does he ever discuss it as a legislative check on the Executive. Further, Hamilton does not contest the assumption that the President, like the King, could deploy troops and ships once the Legislature had provided them.

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221. Cf. Henry P. Monaghan, *The Protective Power of the Presidency*, 93 COLUM. L. REV. 1, 67 (1993).

222. Farrand ed., 2 RECORDS OF 1787 FEDERAL CONVENTION, *supra* note 211, at 318.

223. See THE FEDERALIST NO. 69, at 467–68 (Alexander Hamilton) (Easton Press ed., 1979) (discussing the delegation of federal and state powers according to the U.S. Constitution).

When the Federalists debated the Anti-Federalists over the Constitution, they never argued that the Declare War Clause would prevent the President from conducting hostilities. Instead, they predicted that Congress's power over funding would serve as the primary check. The most direct and revealing confrontation occurred in the Virginia ratifying convention, probably the most politically significant state in the ratification struggle. Patrick Henry, one of the Anti-Federalist leaders, argued that the President would use his command over the military to centralize his power.<sup>224</sup> Federalists responded by invoking the British Parliament's power of the purse to control war-making. "[N]o appropriation of money, to the use of raising or supporting an army, shall be for a longer term than two years," Federalist George Nicholas said.<sup>225</sup> "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."<sup>226</sup> Madison followed not with the Declare War Clause but with the maxim "that the sword and purse are not to be given to the same member."<sup>227</sup> Under the British constitution, which Henry had praised, Madison observed, "[t]he 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."<sup>228</sup> Although Madison would attack the constitutionality of the Neutrality Proclamation seven years later,<sup>229</sup> here he made no claims that Congress could constrain presidential war-making because of the Declare War Clause. Federalists explicitly relied on the Legislature's power to fund and raise the military instead.

Critics may argue that this dialogue has limited relevance because it centers on concerns of a domestic military tyranny rather than foreign military adventures. But the Federalists would have had every incentive to turn to the Declare War Clause in the crucial state of Virginia. That they did not is consistent with the evidence from the rest of the ratifying process. No Federalists discussed the Declare War Clause to respond to fears of an aggrandizing Executive in war. Instead, Federalists carefully explained that

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224. 9 RATIFICATION OF THE CONSTITUTION BY THE STATES: VIRGINIA, NO. 2, at 964 (John P. Kaminski & Gaspare J. Saladino eds., 1990).

225. JONATHAN ELLIOT, 3 DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION 391 (2d ed. 1891) [hereinafter 3 ELLIOT], <https://memory.loc.gov/l1/lled/003/0400/04030391.tif>.

226. 10 RATIFICATION OF THE CONSTITUTION BY THE STATES: VIRGINIA, NO. 3, at 1281 (John P. Kaminski & Gaspare J. Saladino eds., 1993) [hereinafter Kaminski & Saladino, VIRGINIA, NO. 3].

227. *Id.* at 1282.

228. 3 ELLIOT, *supra* note 226, at 393.

229. The Pacificus-Helvidius Debates of 1793-1794: Toward the Completion of the American Founding, Online Library of Liberty, at 7, [https://oll-resources.s3.us-east-2.amazonaws.com/oll3/store/titles/1910/Hamilton\\_3953\\_EBK\\_v6.0.pdf](https://oll-resources.s3.us-east-2.amazonaws.com/oll3/store/titles/1910/Hamilton_3953_EBK_v6.0.pdf).

the checks on war-making under the new American Constitution would resemble practice under the British.<sup>230</sup> While the Executive would have command of the army and navy, only the legislature could bring them into existence.<sup>231</sup> While the President could conduct military operations, they would continue only while Congress chose to fund them.<sup>232</sup> A few offhand comments in which the term “declare” war is used to refer to beginning war have much less relevance to the question at hand than Federalist explanations of how the separation of powers would work in practice.

And what to make of the Declare War Clause? The Declare War Clause, like the adjacent grants of powers to define and punish “Offences against the Law of Nations,” to issue “Letters of Marque and Reprisal,” and to regulate “Captures on Land and Water,” is exceptional in vesting Congress, ordinarily a body with jurisdiction only over domestic matters, with the authority to speak to and to intervene in international affairs. By granting Congress the power to declare war, the Framers enabled it to serve notice on American citizens, neutral nations, and intended or actual foreign enemies of the existence of a state of war between the U.S. and another power or powers. Further, Congress would have had the authority to set forth the grievances that impelled the U.S. to war and to define the U.S.’s peace terms and strategic objectives. All of these functions—giving notice, providing justification, stating war aims—are superbly exemplified in the U.S.’s first declaration of war—the Declaration of Independence.<sup>233</sup> The Declaration of Independence served notice of a change in the legal relations between the U.S. and Great Britain, but it did not authorize the beginning of the war—fighting had already broken out at Lexington and Concord more than a year before July 4, 1776. The Declaration of Independence transformed the ongoing American Revolution from a mere civil war or rebellion into a public war between two states and, by so doing, made the American soldiery legitimate combatants in a regular war rather than leaving them to be treated as mere traitors or rebels.

Critics of presidential power also place great store in the practice of the executive branch after the Framing. In arguing Trump’s actions in Syria were unconstitutional, Andrew Napolitano argued “Madison himself argued that if the president could both declare and wage wars, he’d not be a president but

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230. 3 ELLIOT, *supra* note 226, at 393.

231. *Id.*

232. *Id.*

233. See Armitage, *supra* note 145 (noting that the Declaration of Independence was a speech-act that communicated independence and performed independence simultaneously).



a prince.”<sup>234</sup> The weight that practice deserves is unclear, as subsequent practice could not inform the understanding of those who had earlier ratified the Constitution. Other scholars place great store in presidential statements after 1789 to claim that “declare war” meant the sole authority to authorize hostilities.<sup>235</sup> Examples from America’s early wars, however, do not support the claim that Congress had authorized every early conflict. In all the wars fought during the first 50 years of the Constitution,<sup>236</sup> Congress voted declarations of war only once. Washington’s war against the Indians of the Ohio Valley and Jefferson’s war against the Barbary states illustrate this point. In both cases, congressional action created and funded the military necessary for offensive action, but it did not provide the equivalent of permission to start fighting.<sup>237</sup>

During Washington’s presidency, the U.S. waged war against only one enemy, the Indian tribes on the western frontier in present-day Ohio. The Washington administration developed a political and military strategy toward the Indians without consulting Congress. The administration sought Congress’s cooperation when it needed increases in the size of the Army, military spending, or approval of diplomatic missions and agreements.<sup>238</sup> It would have been impossible for the executive branch to conduct military operations against the Indians without Congress, but not because of the latter’s “declare war” power. There simply was no military for the President to order against the Indians. In 1789, the Army numbered only 672 troops, scattered over the frontier, while the Indian tribes threatening Georgia could field 5,000 warriors.<sup>239</sup> In 1790, after Congress expanded the army to 2,000 regular troops, Washington ordered offensive, punitive expeditions into Indian territory.<sup>240</sup> After the Army suffered a disastrous defeat in winter 1791, Washington returned to Congress to seek a five-fold increase in the

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234. Andrew P. Napolitano, *The Presidency, War Powers, and the Constitution*, WASH. TIMES (Oct. 9, 2019), <https://www.washingtontimes.com/news/2019/oct/9/the-presidency-war-powers-and-the-constitution/>.

235. Delahunty & Yoo, *Making War*, *supra* note 102, at 158.

236. *Id.*; see HENRY ADAMS, HISTORY OF THE UNITED STATES OF AMERICA DURING THE ADMINISTRATIONS OF JAMES MADISON 300 (Ernest Samuels ed., Midway Reprint 1979) (1967) (describing the Cabinet’s decision to create a new military district in Potomac in May of 1813); PAUL H. BERGERON, THE PRESIDENCY OF JAMES K. POLK 80 (1987); STANLEY ELKINS & ERIK MCKITRICK, THE AGE OF FEDERALISM 438 (1993) (referencing the training of the army for the Battle at Fallen Timbers).

237. Delahunty & Yoo, *Making War*, *supra* note 102, at 158–65.

238. See RICHARD H. KOHN, EAGLE AND SWORD: THE FEDERALISTS AND THE CREATION OF THE MILITARY ESTABLISHMENT IN AMERICA, 1783-1802, at 93 (1975) (noting that militia laws often prevented offensives unless state executives authorized them).

239. Delahunty & Yoo, *Making War*, *supra* note 102, at 159.

240. See KOHN, *supra* note 239, at 103–04.

size of the army, at triple the cost.<sup>241</sup> Under the command of General Anthony Wayne, the 3,500-man Army would win the Battle of Fallen Timbers.<sup>242</sup> Historians have recognized that this victory ended the threat of Indian resistance to the opening up of the Northwest Territory and led to the successful resolution of the frontier issues with the British.<sup>243</sup> Yet, throughout, Washington never sought, nor did Congress provide, a declaration of war. If Congress had disagreed with the President's military policy, it could have easily refused to establish or expand the Army, but it instead signaled its agreement by granting every one of Washington's requests.<sup>244</sup>

Soon after assuming the Presidency, Thomas Jefferson decided to stop paying tribute to the Barbary pirates. Although history remembers them as brigands, the Barbary pirates were in fact from the autonomous regions of Algiers, Tripoli, and Tunis within the Ottoman empire and Morocco.<sup>245</sup> In a meeting on May 15, 1801, the cabinet unanimously agreed that Jefferson should send a naval squadron to the Mediterranean as a show of force.<sup>246</sup> No one in the cabinet, including Madison or Gallatin, believed that the President had to seek congressional permission to order the mission.<sup>247</sup> Instead, they thought that a law creating the squadron supported a "training mission" in the Mediterranean.<sup>248</sup> The cabinet also agreed that the President had constitutional authority to order offensive military operations should a state of war already be in existence because of the hostile acts of the Barbary powers.<sup>249</sup> As Abraham Sofaer has observed, Jefferson and his advisors assumed they had the authority for the expedition simply by virtue of Congress's creation of the naval forces that made it possible—a position no different from the one President Washington had taken in the Indian wars.<sup>250</sup>

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241. See Statement of Henry Knox (Dec. 26, 1791), in 4 AMERICAN STATE PAPERS: INDIAN AFFAIRS 197, 197–99 (Walter Lowrie & Matthew St. Clair Clarke eds., 1832) (reasoning that lack of troops hindered the expedition and requesting 5,000 troops to solve issue).

242. See KOHN, *supra* note 239, at 156–57 (recounting the army's movements and Wayne's response to their victory).

243. See WOOD, EMPIRE OF LIBERTY, *supra* note 179, at 130–31 (explaining the victory at Fallen Timbers and how it broke Britain's influence over the Indians and Indian resistance in the Northwest).

244. See *id.* at 111, 130 (noting that Washington believed in creating a powerful army and describing the defeat that prompted the government to increase the military budget and create a standing army of 5,000 regulars).

245. See ABRAHAM D. SOFAER, WAR, FOREIGN AFFAIRS AND CONSTITUTIONAL POWER: THE ORIGINS 208 (1976) (acknowledging Tripoli, Algiers, Tunis and Morocco gaining much of their revenue from piracy and extortion as the underlying commercial reason for the conflict).

246. *Id.* at 209.

247. *Id.*

248. *Id.* at 209–10.

249. *Id.*

250. *Id.*

The Secretary of the Navy ordered Commodore Richard Dale—five days later—to proceed to the Mediterranean and, if he found that any of the Barbary states had declared war on the U.S., to “chastise their insolence[] by sinking, burning or destroying their ships & Vessels wherever you shall find them.”<sup>251</sup> Upon arriving in Tripoli, the *U.S.S. Enterprise* imposed a blockade and destroyed an enemy vessel.<sup>252</sup> Jefferson later told Congress that the *Enterprise* had acted in self-defense, and Congress authorized whatever measures might be necessary.<sup>253</sup> Jefferson’s decisions to send the Navy to a hostile area for offensive operations went unchallenged.<sup>254</sup>

These examples reinforce both the lessons of the Framing and modern practice. Critics portray presidential uses-of-force, from Washington to Trump, as violations of the Constitution. Only a declaration of war from Congress, according to this account, can cure the problem. But the Declare War Clause cannot bear this heavy responsibility. Even if English speakers in 2020, or in 1789, used “declare war” colloquially to refer to starting hostilities, the Clause did not concentrate the authority to begin a conflict in Congress. Careful scrutiny of the Constitution’s text, including the provisions adjacent to the Declare War Clause and other provisions relating to war, and of its structure establishes that the Clause must have had a narrower and more precise meaning. The most plausible interpretation of the Clause reads it as conferring on Congress the power to create a variety of legal regimes under international and domestic law suitable to the various kinds of conflicts subsumed under the name “public wars.” Rather than regulating the relations between the President and Congress, the Declare War Clause enables Congress to regulate the relations between the U.S. and other states. The Framers countered the risk of executive aggrandizement in war-making in other ways—most notably by vesting in Congress the power to raise armies and navies and to control their funding. The long and successful history of Parliament’s struggle in England, against the claim of the Crown

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251. Letter from Samuel Smith to Captain Richard Dale (May 20, 1801), in I CLAUDE A. SWANSON, *NAVAL OPERATIONS INCLUDING DIPLOMATIC BACKGROUND FROM 1785 THROUGH 1801*, at 465, 467 (1939) [hereinafter *NAVAL DOCUMENTS*], <https://babel.hathitrust.org/cgi/pt?id=msu.31293010906265&view=1up&seq=13>.

252. See Letter from Captain Richard Dale to Captain Samuel Barron (July 4, 1801), in *NAVAL DOCUMENTS*, *supra* note 252, at 500 (detailing methods to prevent ship’s escape); Letter from Captain Richard Dale to Lieutenant Andrew Sterett (July 5, 1801), in *NAVAL DOCUMENTS*, *supra* note 252, at 503 (directing Lieutenant Sterett to go to Algiers and take other American vessels with him); Letter from Captain Richard Dale to Captain Samuel Barron (July 9, 1801), in *NAVAL DOCUMENTS*, *supra* note 252, at 505 (instructing Captain Barron to head to Tripoli and how to proceed if he captures the Tripoli Admiral).

253. Thomas Jefferson, President, First Annual Message to Congress (Dec. 8, 1801), <https://millercenter.org/the-presidency/presidential-speeches/december-8-1801-first-annual-message>.

254. Delahunty & Yoo, *Making War*, *supra* note 102, at 165.

to wage war as it pleased, demonstrated to the Framers that the funding power was the most certain and effective check against executive abuses.

#### CONCLUSION

An obvious attraction of the Congress-first, President-second approach is that it is familiar. It is identical to the process that governs the enactment of legislation. We expect Congress to carry the initiative in passing laws, and that its collective representation of the American electorate will achieve deliberation, consensus, and clarity of legislative purpose. Furthermore, the “Declare War” approach to war seeks to “clog” the rush toward war by requiring both the Congress and President to agree before risking American lives and treasure abroad. Reducing the amount of war draws upon deeply ingrained American notions that, as the exceptional Nation, the U.S. can either withdraw from the conflict-torn affairs of the Old World or change the world as to render war itself obsolete.

But these assumptions do not rest on any tested truths. A Congress-first approach does not always generate a deliberation that produces fewer wars. The Mexican-American War of 1848, for example, did not result from extensive deliberation and consensus in Congress or the Nation, but rather a rush to war after an alleged attack on Sam Houston’s forces along the Rio Grande River. Congress did not declare war against Spain in 1898 after long discussion and consultation, but rather after the destruction of the *U.S.S. Maine* in Havana harbor. Both wars resulted in quick victory and large territorial conquests for the U.S., but it is not clear whether the defenders of congressional prerogatives today would have considered them “good” wars.

Nor does congressional deliberation ensure consensus. Even though Congress approved the Vietnam War in the Tonkin Gulf Resolution, the conflict still provoked some of the most divisive politics in American history. Congress authorized the war in Afghanistan in 2001 and the invasion of Iraq in 2002, but both wars lost their consensus in the U.S. political system as well. Conversely, a process without congressional declarations of war does not necessarily result in less deliberation or consensus. Nor does it seem to inexorably lead to poor or unnecessary war goals. Perhaps the most important example, although many might not consider it a “war,” is the conflict between the U.S. and the Soviet Union from 1946 through 1992. War was fought throughout the world by the superpowers and their proxies during this period. Yet the only war arguably authorized by Congress—and even this is a debated point—was Vietnam. The U.S. waged war against Soviet proxies in Korea and Vietnam, the Soviet Union fought in Afghanistan, and the two almost came into direct conflict during the Cuban Missile Crisis. Despite the

division over Vietnam, there appeared to be a significant bipartisan consensus on the overall strategy (containment) and goal (defeat of the Soviet Union, protection of Europe and Japan), and Congress consistently devoted significant resources to the creation of a standing military to achieve them. While the branches cooperated, Congress chose to provide funding and left to the President the heavy responsibility and potential blame for deploying the military abroad.

Presidential initiative and responsibility, followed by lackluster congressional support, remains the basic operating procedure for war today. Congress does not want the accountability for decisions on war. Instead, it provides the executive branch with a military designed to conduct offensive wars abroad, without any conditions. If the war goes well, Congress can take credit for providing the troops; if the war goes badly, it blames the President. The duty to protect the Nation's security and advance its foreign interests falls upon the President, whether it be Bush, Obama, or Trump. Congress can criticize Trump for withdrawing from Syria too early, or staying in Afghanistan too long, but the last thing it wants to do is take political responsibility for war. Presidents will take up the sword paid for by Congress, whether they want to or not, because the electorate will hold them responsible.

President Trump's interventions in Syria and Afghanistan should underscore one last truth about the constitutional way of war. Critics of executive power hold in their minds an image of war as one sparked by presidential adventurism, accompanied by congressional fecklessness. But they cannot understand the quandary posed by Trump: a Congress is more warlike than the President. President Trump withdrew U.S. troops from the Syrian-Turkish border and abandoned America's Kurdish allies. While his decision triggered howls of complaint from the military, members of Congress, and the national-security establishment, the Legislature cannot force the President to fight a war he does not want to fight. Congress can pay for the military, and even declare war, but it cannot decide tactics, strategy, or the deployment of the armed forces. Only the President, under the Constitution, has the authority as Commander-in-Chief to make those fundamental decisions. While Trump's critics may want U.S. troops to remain in Syria or Afghanistan, they cannot prevent a President from withdrawing from a fight abroad. And, in keeping true to his campaign promise to end these wars—regardless of their strategic benefits or costs—Trump is defending the power of all future Presidents to command the military in war.