

KOSOVO, WAR POWERS, AND THE MULTILATERAL FUTURE

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INTRODUCTION

Aside from getting himself impeached but not removed, President William J. Clinton's most noteworthy impact on the Constitution has been in the area of war powers. In March 1999, President Clinton ordered 31,000 American servicemen and women to engage in air operations against Serbia, the largest and most powerful province of the former Yugoslavia, to prevent the "ethnic cleansing" of Albanians living in Kosovo. As part of an operation sponsored by the North Atlantic Treaty Organization ("NATO"), 7000 American ground troops then entered Kosovo on June 10, 1999, after NATO bombing had forced Serbia to withdraw its forces. It is unclear how long American troops will remain, as NATO's goals include not just ending war but building a new nation in Kosovo.

While broader in scale and destructiveness, President Clinton's Kosovo operation followed a pattern set by similar military interventions over the last eight years. In 1993, President Clinton expanded the goals of the 28,000 American troops in Somalia, originally deployed by President Bush for humanitarian reasons, but then withdrew them after the deaths of soldiers in combat. Then, in 1994, President Clinton sent 16,000 American troops to Haiti, under the auspices of the U.N., to oversee its transition to democratic government. Since December 1995, as many as 20,000 American troops have implemented a U.N.-brokered peace plan in Bosnia, another province of the former Yugoslavia. American war planes continue to enforce a no-fly zone in Iraq, and on occasion American cruise missiles and bombs have attacked Iraqi military assets. In the summer of 1998,

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President Clinton again used cruise missiles, this time to hit suspected terrorist targets in Sudan and Afghanistan. On President Clinton's watch, American troops also have participated in U.N. peacekeeping missions in dangerous places such as Macedonia and Rwanda.

The Clinton administration did not receive congressional authorization for its decisions to use force abroad in any of these cases. To the contrary, the President has justified his military interventions more often on the need to uphold our obligations to the United Nations or NATO, than upon congressional approval. Although on several occasions Congress refused to authorize the use of force, President Clinton argued that he had the sole constitutional power as commander-in-chief to send American servicemen and women into harm's way. While he often signaled that he would welcome congressional support, he also made clear that he would implement his military plans without it. President Clinton further refused to acknowledge that the War Powers Resolution bound his discretion to act. The Clinton administration has rendered the War Powers Resolution a dead letter.

This Article discusses the constitutional implications of the Clinton administration's war power activities. Part I explains that President Clinton's claim of unilateral executive war power, while at times rhetorically overbroad, is supported by the Constitution's text and original understanding. In creating a flexible system of war powers, the Constitution allows the President to exercise significant initiative in war matters, while providing Congress with ample authority to check presidential adventurism by refusing to fund military operations. Congress had a full opportunity to prevent President Clinton from deploying the armed forces in Kosovo. It simply chose, as a political matter, not to.

Part II considers whether the administration's unilateral decisions to use force can find support in the Constitution, and responds to scholarly criticism of recent executive warmaking. Events have shown again that international law scholars, the vast majority of whom believe that Congress must authorize all offensive uses of force,¹ have

¹ See, e.g., LOUIS FISHER, *PRESIDENTIAL WAR POWER* 185-206 (1995); JOHN HART ELY, *WAR AND RESPONSIBILITY: CONSTITUTIONAL LESSONS OF VIETNAM AND ITS AFTERMATH* 3-5 (1993); MICHAEL J. GLENNON, *CONSTITUTIONAL DIPLOMACY* 80-84 (1990); LOUIS HENKIN, *CONSTITUTIONALISM, DEMOCRACY, AND FOREIGN AFFAIRS* 109 (1990); HAROLD HONGJU KOH, *THE NATIONAL SECURITY CONSTITUTION: SHARING POWER AFTER THE IRAN-CONTRA AFFAIR* 158-61 (1990); Louis Fisher, *Unchecked Presidential Wars*, 148 U. PA. L. REV. 1637 (2000) [hereinafter Fisher, *Unchecked Presidential Wars*]; William Michael Treanor, *Fame, the Founding, and the Power to Declare War*, 82

failed to describe reality or to remain consistent in their criticism of executive warmaking.²

This Article also examines the constitutional implications of the increasingly multilateral nature of the American use of force. Kosovo and other Clinton-era operations, in which the American military participates as part of multinational forces under international mandate, may prove to be the model for the future. Part III addresses whether the Constitution imposes any limitations on the President's ability to send American troops to serve under international command. It then turns to two other questions raised by Kosovo involving the relationship between international law and presidential power: whether the President gains any constitutional authority *vis-à-vis* Congress when using force pursuant to treaty, and whether the President may violate international law in the course of ordering the military to intervene abroad. Kosovo is a demonstration of the President's freedom to pursue the goals of multilateral organizations, even to the point of waging war either without congressional authorization or in violation of international law. Nonetheless, the Constitution places limits on the federal government's ability to cooperate with international organizations, particularly in its restrictions on delegating authority under federal law to non-U.S. officers, and in Congress's discretion to use the legislative power to block presidential foreign policy. Thus, Kosovo provides only an uncertain precedent for the future. On the one hand, it reaffirms the President's unilateral authority to use force, but on the other hand, it does not justify the further internationalization of American military intervention.

I. AMERICAN INTERVENTION IN KOSOVO

This Part discusses the constitutional issues that have surrounded the Clinton administration's use of force abroad. It begins by briefly sketching out the constitutional allocation of powers and recent practice by the three branches of government. As events in Kosovo may set the paradigm for future multilateral military interventions, I focus my comments on its details.

CORNELL L. REV. 695, 699-700 (1997); Jane E. Stromseth, *Understanding Constitutional War Powers Today: Why Methodology Matters*, 106 YALE L.J. 845, 848-49 (1996) (book review).

² I explore elsewhere the reasons why international legal scholars have been inconsistent concerning Kosovo. See John C. Yoo, *The Dogs That Didn't Bark: Why Were International Legal Scholars MIA on Kosovo?*, 1 CHI. J. INT'L L. (forthcoming 2000) (copy on file with the *University of Pennsylvania Law Review*) [hereinafter Yoo, *Legal Scholars MIA*].

A. *War Powers in Practice*

While the constitutional text divides the warmaking power between the President and Congress, it does not explicitly declare which branch must act first to initiate hostilities. Article II vests in the President the commander-in-chief power, the power to send and receive ambassadors, and all of the other executive powers of the United States.³ Article I grants Congress the authority "to declare War, grant Letters of Marque and Reprisal, and make Rules concerning Captures on Land and Water," to raise and fund the military, and to organize the military.⁴ Congress also enjoys other foreign affairs powers, such as the authority to regulate international commerce, to enact immigration laws, and to pass laws to punish piracy.⁵ The federal courts have no special role in warmaking, aside from their jurisdiction over cases arising under the Constitution, treaties, and federal laws, and controversies involving ambassadors, admiralty, and maritime law, and diversity suits with foreign states or citizens.⁶ Finally, Article I, Section 10 of the Constitution wholly excludes the states from matters involving war, unless they receive congressional permission or are threatened with invasion.⁷

A modern system of warmaking has evolved around this formal distribution of constitutional powers that allows presidents to take the initiative in military hostilities.⁸ Pro-Congress scholars claim that unilateral presidential warmaking violates Congress's sole possession of the power to declare war. Congress, however, has used that authority only five times in the nation's history. Meanwhile, presidents have committed forces to combat at least 125 times in the Republic's 210 year history, although most of these interventions were either small in scale or had received legislative support.⁹ Since World War II, presi-

³ See U.S. CONST. art. II, §§ 1-2.

⁴ *Id.* art. I, § 8.

⁵ See *id.* art. I, §§ 3, 4, 10.

⁶ See *id.* art. III, § 2.

⁷ See *id.* art. I, § 10.

⁸ I am not here arguing that modern practice itself can provide a constitutional justification for presidential warmaking in Kosovo. Rather, I am merely showing, descriptively, that Kosovo is consistent with the way the branches have conducted warmaking. Later, I will argue that the constitutional system of war powers is sufficiently flexible to permit this modern working system of war powers. See *infra* Part II.D.

⁹ See OFFICE OF THE LEGAL ADVISER, U.S. DEP'T OF STATE, THE LEGALITY OF UNITED STATES PARTICIPATION IN THE DEFENSE OF VIET-NAM (1966), reprinted in 1 THE VIETNAM WAR AND INTERNATIONAL LAW 583, 597 (Richard A. Falk ed., 1968) (citing "at least 125 instances" of force without Congress's approval); see also CONGRESSIONAL

dents have expanded upon this practice by sending the armed forces into several major conflicts without congressional authorization. In the Korean War, President Truman consciously chose to rely upon his commander-in-chief and executive powers to send troops, rather than seek legislative permission.¹⁰ Likewise, in Vietnam, President Johnson only received the at best ambiguous Tonkin Gulf Resolution¹¹ as a sign of congressional support, which was declaration of war.¹²

Post-Vietnam efforts by Congress to control presidential warmaking by statute have met with little success. In 1973, Congress enacted the War Powers Resolution ("WPR"), which prohibits the president from introducing the American military into hostilities, whether actual or imminent, without either a declaration of war, specific statutory authorization, or an attack on the United States or its forces.¹³ The WPR requires a president to "consult with Congress" before sending the armed forces into hostilities and to report to Congress within forty-eight hours of sending the military into hostilities.¹⁴ Sixty days after the report, the President must terminate the intervention.¹⁵

Presidents have never acknowledged the WPR's constitutionality, and their recent actions have ignored its terms. Presidents Ford and Carter never expressly recognized the Resolution's binding force, and President Reagan refused to comply with the Resolution when he ordered the use of force in Lebanon, Grenada, Libya, and the Persian Gulf.¹⁶ Like the presidents before him, President Bush sent messages

RESEARCH SERVICE, INSTANCES OF USE OF UNITED STATES ARMED FORCES ABROAD, 1789-1989 (Ellen C. Collier ed., 1989), reprinted in THOMAS M. FRANCK & MICHAEL J. GLENNON, FOREIGN RELATIONS AND NATIONAL SECURITY LAW 650 (2d ed. 1993) (listing "215 times that the United States has utilized military forces abroad," some of which were "conducted solely under the President's powers as Chief Executive or Commander in Chief").

¹⁰ See John C. Yoo, *The Continuation of Politics by Other Means: The Original Understanding of War Powers*, 84 CAL. L. REV. 167, 178-79 (1996) [hereinafter Yoo, *Original Understanding*] ("Secretary of State Dean Acheson and Senate Majority Leader Scott Lucas both convinced Truman to rely on his Commander-in-Chief powers to support his actions . . .").

¹¹ Pub. L. No. 88-408, 78 Stat. 384 (1964).

¹² There is substantial dispute among pro-Congress scholars concerning whether the Tonkin Gulf Resolution constituted sufficient legislative support for the Vietnam War. See John C. Yoo, *Clio at War: The Misuse of History in the War Powers Debate*, 70 U. COLO. L. REV. 1169, 1178 n.32 (1999) [hereinafter Yoo, *Clio*].

¹³ See War Powers Resolution, Pub. L. No. 93-148, 87 Stat. 555 (1973) (codified at 50 U.S.C. §§ 1541-1548 (1994)).

¹⁴ See *id.* §§ 3, 4(a).

¹⁵ See *id.* § 5(b). The Resolution provides the President with 30 additional days if necessary to permit a safe withdrawal. See *id.*

¹⁶ See Yoo, *Original Understanding*, *supra* note 10, at 181 (noting that Presidents

notifying Congress of military interventions in Panama and the Persian Gulf that were "consistent with" the Resolution, but that did not obey it. During the Gulf War, President Bush dispatched troops to the Middle East for well longer than permitted by the WPR's sixty day clock.¹⁷ Even as he asked for a congressional sign of support, President Bush argued that he already had the constitutional authority to implement U.N. Security Council Resolution 678, which asked member states to use "all necessary means" to force Iraqi troops out of Kuwait.¹⁸

Use of force under the Clinton administration has only further undermined the WPR. In 1994, pursuant to U.N. mandate, President Clinton planned a military intervention in Haiti, despite a unanimous Senate resolution declaring that he had no authorization to do so. Stating that he had sufficient independent constitutional authority, Clinton sent 20,000 American troops to supervise the transition to a democratic government in violent conditions. Five years later, those troops are only now winding down their deployment.¹⁹ In 1993, the administration began its long involvement in the Balkans by sending American warplanes to enforce a no-fly zone over Bosnia-Herzegovina. That same year, the President dispatched American troops to Macedonia as part of a U.N. peacekeeping operation. In February 1994, sixty American warplanes conducted airstrikes against Serbian targets in order to bring about an end to the conflict in Bosnia, again pursuant to U.N. authorization. In December 1995, President Clinton ordered the deployment of 20,000 American troops to Bosnia to implement a peace agreement; at least 6000 American servicemen and

Ford, Carter, and Reagan only "took note of," or acted in ways "consistent with," and simply rejected compliance with the WPR, respectively).

¹⁷ President Bush sent troops to Saudi Arabia within days of the August 2, 1990 Iraqi invasion of Kuwait, and engaged in a build-up that reached more than 430,000 troops by November 8, but did not receive a congressional resolution of support until January 12, 1991, more than five months after the first American deployment. American troops invaded Kuwait and Iraq shortly thereafter. *See id.* at 186-88.

¹⁸ When he signed Congress's joint resolution supporting the use of force to implement U.N. Resolution 678, H.R.J. Res. 77, 102d Cong. (1991) (enacted), Bush declared that "my signing this resolution does not[] constitute any change in the long-standing positions of the executive branch on either the President's constitutional authority to use the Armed Forces to defend vital U.S. interests or the constitutionality of the War Powers Resolution." Statement on Signing the Resolution Authorizing the Use of Military Force Against Iraq, 27 WEEKLY COMP. PRES. DOC. 48 (Jan. 14, 1991).

¹⁹ *See* Steven L. Myers, *Full-Time U.S. Force in Haiti To Leave an Unstable Nation*, N.Y. TIMES, Aug. 26, 1999, at A1 (describing the withdrawal of American troops from Haiti).

women remain there today.²⁰ In addition to the Balkans, President Clinton has twice engaged several limited uses of force against Iraq and against terrorist targets in Afghanistan and the Sudan, mostly through the use of airstrikes by warplanes and cruise missiles. In all of these crises, the administration acted without statutory authorization and instead claimed support from the U.N. or NATO. Troops have participated in several of these operations well beyond the time limits demanded by the WPR, with little congressional sanction or efforts at enforcement.

B. Kosovo

This pattern of executive initiative and legislative acquiescence culminated in the American intervention in Kosovo. A province of the former Yugoslavia, Kosovo was inhabited both by ethnic Albanians and Serbs.²¹ While under communist control, Kosovo gained substantial autonomy within the Yugoslavian federal structure, and Albanians assumed the overwhelming majority of the population. Under Slobodan Milosevic, however, Yugoslavia in the late 1980s eliminated Kosovo's independent status and imposed a harsh authoritarian rule. In 1998, Serbia launched a crackdown in Kosovo that killed dozens of Albanians and led thousands of others to flee. By Spring 1999, NATO-led efforts to broker a diplomatic peace between Albanian Kosovars and the Serbian government had failed.²²

In March 1999, Serbian military forces began a broad offensive aimed at driving the Albanian population out of the province. Most Albanians went into hiding, fled to neighboring countries, or were killed or detained.²³ On March 23, after the Clinton administration's special envoy left Belgrade with no hope for a negotiated settlement, the Senate passed (but the House did not), by a vote of fifty-eight to forty-one, a concurrent resolution authorizing the President to "conduct military air operations and missile strikes in cooperation with our NATO allies against the Federal Republic of Yugoslavia (Serbia and Montenegro)."²⁴ On March 24, American warplanes, in conjunction

²⁰ See *id.* (noting that the Pentagon was drawing up plans to reduce the number of American troops in Bosnia from 6200 to 4000).

²¹ These facts are taken from *Campbell v. Clinton*, 52 F. Supp. 2d 34, 37 (D.D.C. 1999).

²² See *id.*

²³ See *id.*

²⁴ S. Con. Res. 21, 106th Cong. (1999).

with other NATO forces, began attacking Serbian forces in Kosovo.²⁵ In a nationally televised address, President Clinton argued that airstrikes were necessary to protect innocent Albanians, to prevent the conflict from spreading to the rest of Europe, and to act with our European allies in maintaining peace.²⁶ President Clinton declared that the military's mission would be "to demonstrate NATO's seriousness of purpose," to "deter an even bloodier offensive against innocent civilians in Kosovo," and "to seriously damage the Serbian military's capacity to harm the people of Kosovo."²⁷ American air and missile operations expanded beyond Serbian units in Kosovo to include military, strategic, and civilian targets within Serbia itself, such as air defense, electrical, communications, and government facilities.

Hewing to the pattern set during previous administrations, presidential initiative in warmaking produced congressional funding support, but nothing more. On the same day that airstrikes began, the House of Representatives passed a resolution by 424 to one that declared its support for American troops, but refused to authorize the use of force.²⁸ On March 26, President Clinton sent a message to the President *pro tempore* of the Senate and the Speaker of the House informing them of the American airstrikes against Serb forces.²⁹ Reciting Serbian atrocities against the Albanian Kosovars, he claimed that the Milosevic regime had violated both the U.N. charter, U.N. Security Council resolutions, and NATO resolutions. The President justified his unilateral decision to use American forces to attack another sovereign nation on his "constitutional authority to conduct U.S. foreign relations and as commander-in-chief and Chief Executive."³⁰ While he

²⁵ See *Campbell*, 52 F. Supp. 2d at 37.

²⁶ See Address to the Nation on Airstrikes Against Serbian Targets in the Federal Republic of Yugoslavia (Serbia and Montenegro), 35 WEEKLY COMP. PRES. DOC. 516, 517 (Mar. 24, 1999).

²⁷ *Id.*

²⁸ See H.R. Res. 130, 106th Cong. (1999) (supporting the American troops in the Balkans despite the "deep reservations" of some members of the House). After recognizing that President Clinton had sent American armed forces to operate against Serbia, the resolution merely declared that "the House of Representatives supports the members of the United States Armed Forces who are engaged in military operations against the Federal Republic of Yugoslavia and recognizes their professionalism, dedication, patriotism, and courage." *Id.*

²⁹ See Letter to Congressional Leaders Reporting on Airstrikes Against Serbian Targets in the Federal Republic of Yugoslavia (Serbia and Montenegro), 35 WEEKLY COMP. PRES. DOC. 527, 527-28 (Mar. 26, 1999) [hereinafter Letter to Congressional Leaders (Mar. 26, 1999)] (explaining the justifications for the military strikes while fulfilling his duties "consistent with the War Powers Resolution").

³⁰ *Id.* at 528.

welcomed Congress's demonstrations of support, President Clinton made clear that he did not need its authorization.³¹ Following the examples of Presidents Reagan and Bush,³² President Clinton described the report as "consistent" with, rather than "pursuant to," the WPR, demonstrating a refusal either to recognize the WPR's constitutionality or to comply with its terms.³³ In a follow-up letter on April 7, President Clinton refused to set an end date for American intervention and instead predicted that military operations would intensify until Milosevic ended his offensive against the Albanian Kosovars, stopped the repression, and agreed to a peace accord.³⁴

As the war continued throughout April and May, Congress considered a series of proposals that bore on war powers. On April 28, the House of Representatives first rejected, by a vote of 427 to two, a joint resolution declaring war upon the Federal Republic of Yugoslavia.³⁵ It then rejected, by a tie 213 to 213 vote, the March 23 Senate resolution authorizing the use of force.³⁶ The House also defeated, by a 290 to 139 vote, a concurrent resolution that would have required the President to remove all American troops from Yugoslavia operations.³⁷ The House then passed a bill that barred the use of any funds for the deployment of American forces in Yugoslavia without specific congressional authorization,³⁸ which the Senate did not consider. On May 20, Congress doubled the Administration's request for emergency funding for Yugoslavia war operations, to the tune of \$11.8 billion, but did not authorize the war.³⁹ On May 25, President Clinton reported to Congress that he had deployed even more aircraft and combat ground troops to the region to support deep strike operations

³¹ *See id.*

³² *See Yoo, Original Understanding, supra* note 10, at 181-82.

³³ Letter to Congressional Leaders (Mar. 26, 1999), *supra* note 29, at 528.

³⁴ *See* Letter to Congressional Leaders Reporting on Airstrikes Against Serbian Targets in the Federal Republic of Yugoslavia (Serbia and Montenegro), 35 WEEKLY COMP. PRES. DOC. 602, 603 (Apr. 7, 1999). In addition to airstrikes, the President notified Congress that he had sent combat ground forces to Albania and Macedonia, ostensibly to engage in humanitarian relief operations. *See id.*

³⁵ *See* H.R.J. Res. 44, 106th Cong. (1999).

³⁶ *See* S. Con. Res. 21, 106th Cong. (1999).

³⁷ *See* H.R. Con. Res. 82, 106th Cong. (1999).

³⁸ *See* H.R. 1569, 106th Cong. (1999).

³⁹ *See* 1999 Emergency Supplemental Appropriations Act, Pub. L. No. 106-31, tit. 11, ch. 3, 113 Stat. 57 (1999) (appropriating funding for operations "conducted against the Federal Republic of Yugoslavia (Serbia and Montenegro) during the period beginning on March 24, 1999, and ending on such date as NATO may designate, to resolve the conflict with respect to Kosovo").

in the Yugoslavia theater of operations.⁴⁰

Conclusion of the Kosovo conflict highlighted the WPR's impotence in constraining presidential decision making. Bombing attacks against Serbian targets both in Kosovo and in Serbia proper did not end until June 10, 1999, seventy-nine days after the war first began and nineteen days after the Resolution's sixty day clock had ended.⁴¹ As part of the peace terms accepted by Serbia, NATO sent 50,000 troops, 7000 of them American, into Kosovo to maintain peace and security during the transition to Kosovar self-government.⁴² Although an American, General Wesley Clark, directed the bombing campaign, American troops in the peacekeeping force served under both American and non-American NATO commanders, who themselves were under the command of a British general.⁴³ Congress has refused to give statutory authorization for the insertion of American troops, who, by May 2000, had been deployed to the region for almost a full year. Congress, however, agreed to provide supplementary appropriations for a long-term military presence in Kosovo. In other words, Congress could have stopped the war, if it had possessed the political will to do so, merely by *refusing* to appropriate the funds to keep the military operations going.

As they consistently have throughout the postwar period, the federal courts refused to adjudicate the constitutionality of the President's unilateral use of force or his violation of the WPR's terms. During the Kosovo bombing campaign, twenty-six House members sued President Clinton on the ground that he had usurped Congress's power to declare war and infringed the WPR by conducting airstrikes without congressional authorization.⁴⁴ Dismissing the action, the District Court for the District of Columbia found that the legislators did not have Article III standing to challenge the President's action because Congress, as a whole, had not acted to terminate the interven-

⁴⁰ See Letter to Congressional Leaders Reporting on Airstrikes Against the Federal Republic of Yugoslavia (Serbia and Montenegro), 35 WEEKLY COMP. PRES. DOC. 989, 989 (May 25, 1999).

⁴¹ See Address to the Nation on the Military Technical Agreement on Kosovo, 35 WEEKLY COMP. PRES. DOC. 1074, 1074 (June 10, 1999).

⁴² See Letter to Congressional Leaders Reporting the Deployment of United States Military Personnel as Part of the Kosovo International Security Force, 35 WEEKLY COMP. PRES. DOC. 1107, 1108 (June 12, 1999).

⁴³ See *id.* at 1107 (identifying Lieutenant General Sir Michael Jackson as the NATO commander of the international security presence in Kosovo).

⁴⁴ See *Campbell v. Clinton*, 52 F. Supp. 2d 34, 39 (D.D.C. 1999).

tion.⁴⁵ *Campbell v. Clinton* followed in the wake of earlier decisions of the D.C. District Court, including two opinions rendered during the Persian Gulf War, that had found similar challenges nonjusticiable.⁴⁶ Judicial reluctance to enter the fray is in keeping with historical practice, as the Supreme Court has never agreed to reach the merits of any challenge to presidential warmaking authority abroad.⁴⁷

Kosovo may represent a significant theoretical shift—one that the Clinton administration has accelerated if not set in motion—in the nature of the American way of war. During the Reagan and Bush administrations, the United States often intervened unilaterally, quickly, and generally in pursuit of purely American interests. American invasions in Grenada and Panama, for example, occurred without any significant multilateral participation, were executed within the sixty-day War Powers Resolution period, and did not receive Security Council approval.⁴⁸

While still significantly American in force structure, military organization, and political leadership, intervention during the Clinton years has been anything but unilateral. In Bosnia and Kosovo, American forces participated as part of an international military structure, sometimes under foreign command. Military operations are no longer short. Deployments in Haiti and Bosnia have proceeded for years, rather than weeks. American troops will most likely be stationed in Kosovo for months, if not years.

The goals of war have changed as well. During the Cold War, the United States engaged primarily in military conflicts between nation-states, where the goal was both military and political victory. Under President Clinton, however, the nation has become involved more of-

⁴⁵ See *id.* at 43 (noting that the “plaintiffs lack standing . . . [because the injury] is not sufficiently concrete and particularized”).

⁴⁶ See, e.g., *Dellums v. Bush*, 752 F. Supp. 1141, 1149-52 (D.D.C. 1990) (holding a challenge by Congressmen to deployment in Persian Gulf War unripe); *Ange v. Bush*, 752 F. Supp. 509, 511-15 (D.D.C. 1990) (holding a challenge by National Guard sergeant to raise a nonjusticiable political question).

⁴⁷ Of course, the Court has addressed the question of how far the commander-in-chief power extends domestically. See *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 585-88 (1952) (holding that the President’s constitutional powers do not extend to issuing seizure orders for private business property). *Youngstown*, however, did not review President Truman’s authority to initiate and wage the Korean War without formal congressional authorization.

⁴⁸ See generally MAX HILAIRE, *INTERNATIONAL LAW AND THE U.S. MILITARY INTERVENTION IN THE WESTERN HEMISPHERE* (1997); Abraham D. Sofaer, *The Legality of the United States Action in Panama*, 29 COLUM. J. TRANSNAT’L L. 281 (1991); Abraham D. Sofaer, Book Review, 92 AM. J. INT’L L. 586 (1998).

ten in "low-intensity conflicts," in which civilian leaders employ military force for more diffuse objectives, such as rebuilding nations, enforcing international peace or the status quo, and imposing costs on hostile regimes.⁴⁹ These objectives fall short of total military and political victory.

Further, it seems that the modern practice of warmaking has freed itself from the partisanship that afflicted earlier struggles over foreign policy. Before the Clinton administration, war power disputes invariably assumed party lines, with Republicans defending executive power and Democrats asserting that all hostilities required legislative authorization. Republicans controlled the executive branch for all but four of the twenty-four years between the presidencies of Johnson and Clinton, while Democrats controlled the majority of the House for that entire period. After President Clinton's two victories in 1992 and 1996, however, Democrats in Congress have lost their fire on the war powers issue. It is astonishing how Democratic congressmen who vociferously attacked aid to El Salvador, escorting oil tankers in the Persian Gulf, or the Grenada, Panama, and Persian Gulf Wars have been so obviously inconsistent toward the Clinton administration. Other Democrats in the executive branch defend presidential war powers with all of the fervor of their Republican predecessors.⁵⁰ The only governmental critics of the modern system of war powers—and they seem to be a relatively small group—are Republican congressmen who began service after the 1994 elections, and thus are not bound by earlier statements on war powers under Republican presidents. Practice under the Clinton administration seems to have established, for the first time since Vietnam, true bipartisan precedents in both Congress and the Presidency in favor of a flexible system of war powers characterized by executive initiative and legislative funding approval.

The Clinton administration, however, has given this practice a new, and potentially significant, twist. Under the Clinton approach, the approval of the U.N. or other international organizations has formed the basis for justifying intervention. When sending troops to Haiti and Bosnia, for example, President Clinton expressly relied upon the need to carry out U.N. Security Council resolutions as sup-

⁴⁹ See generally Mark T. Uyeda, *Presidential Prerogative Under the Constitution To Deploy U.S. Military Forces in Low-Intensity Conflict*, 44 DUKE L.J. 777, 779-89 (1995) (defining low-intensity conflicts and commenting on their emergence in the modern era).

⁵⁰ See, e.g., Walter Dellinger, *After the Cold War: Presidential Power and the Use of Military Force*, 50 U. MIAMI L. REV. 107, 109-10 (1995).

port, rather than upon domestic legal mandates.⁵¹ Although he could not rely upon the Security Council for approval of the Kosovo bombings, President Clinton still justified the intervention by appealing to our NATO obligations.⁵² As he declared when announcing the bombing campaign, "America has a responsibility to stand with our allies when they are trying to save innocent lives and preserve peace, freedom, and stability in Europe."⁵³

The Clinton administration has yet to explain fully the legal significance of international authorization. While the Clinton administration's refusal to seek affirmative congressional authorization may have been consistent with historical practice, it is still open to constitutional question. For future American participation in multilateral intervention to rest on a firm footing, the American legal system first must determine whether President Clinton's decision to use force in Kosovo is consistent with the Constitution.

II. KOSOVO AND THE CONSTITUTIONAL ALLOCATION OF WAR POWERS

To date, the Clinton administration has failed to provide a justification, under either constitutional or international law, for the war in Kosovo. This Part seeks to correct this omission. First, it examines the reasons why most academics, if they were to be consistent, would conclude that Kosovo was an unconstitutional war. It then critiques these theories for incorrectly interpreting the constitutional text, structure, and history. It concludes by discussing the justifications for the constitutionality of the President's use of force in the Balkans.

Surprisingly, legal academics fell silent during the Kosovo intervention. As far as I can tell, no leading scholar in the fields of constitutional law, foreign relations law, or international law publicly questioned, in opinion pieces or law review articles, the constitutionality of the Kosovo conflict. This absence of criticism is puzzling, even embarrassingly inconsistent, because it is hard to see how the American

⁵¹ See, e.g., Letter to Congressional Leaders Reporting on the Deployment of United States Aircraft to Bosnia-Herzegovina, 1995 PUB. PAPERS 1279, 1280 (Sept. 1, 1995) (Bosnia); The President's News Conference, 1994 PUB. PAPERS 1417, 1419 (Aug. 3, 1994) (relying upon U.N. resolutions to justify operations in Haiti); Remarks and Exchange with Reporters on Bosnia, 1994 PUB. PAPERS 186, 186 (Feb. 6, 1994) (Bosnia).

⁵² See Address to the Nation, *supra* note 26, at 517 ("Our mission is . . . to demonstrate the seriousness of NATO's purpose . . .").

⁵³ *Id.* at 518.

use of force in Kosovo was different, in any meaningful way, from previous military conflicts. During earlier interventions, law professors were anything but shy in voicing their opinions on the constitutionality of presidential warmaking. Shortly before the Persian Gulf War began, for example, a group of eleven prominent constitutional and international law professors filed an amicus brief in a federal district court that argued that the conflict would violate the Constitution if it did not receive affirmative congressional authorization.⁵⁴

Law professors initially did not limit themselves only to Republican presidents. Before the intervention in Haiti, the same professors who had filed the amicus brief in the Gulf War sent a public letter to Walter Dellinger, assistant attorney general for the Office of Legal Counsel, chastising him should he justify the intervention.⁵⁵ Even though the U.N. Security Council had issued a resolution authorizing a Haiti operation, these professors declared that "[i]n our judgment, that resolution does not absolve Congress of its constitutional obligation to approve military action or the President of his constitutional obligation to seek and obtain that approval."⁵⁶ Since Haiti, however, these professors have remained silent, even as President Clinton has unilaterally ordered military interventions with ever greater frequency, especially, and most notably, in the Balkans.⁵⁷

In their scholarly works, these foreign relations law scholars generally agree that unilateral presidential warmaking, without congressional authorization, violates the Constitution. Commentators such as Louis Fisher, John Hart Ely, Michael Glennon, Louis Henkin, and Harold Koh have argued that the three branches of government have failed in their constitutional obligations by allowing this pattern and practice to continue.⁵⁸ As they conceive it, the Constitution bars

⁵⁴ The brief is reprinted in Bruce A. Ackerman et al., *Ronald V. Dellums v. George Bush (D.D.C. 1990): Memorandum Amicus Curiae of Law Professors*, 27 STAN. J. INT'L L. 257 (1991).

⁵⁵ The professors included Abram Chayes and Laurence Tribe of Harvard, Bruce Ackerman and Harold Koh of Yale, Philip Kurland of Chicago, Gerald Gunther and John Hart Ely of Stanford, Lori Fisler Damrosch and Louis Henkin of Columbia, and William Van Alstyne of Duke. The letter is reprinted in Marian Nash (Leich), *Contemporary Practice of the United States Relating to International Law*, 89 AM. J. INT'L L. 96, app. at 127 (1995). The points made in the letter are further expanded upon in Lori Fisler Damrosch, *The Constitutional Responsibility of Congress for Military Engagements*, 89 AM. J. INT'L L. 58 (1995).

⁵⁶ Nash (Leich), *supra* note 55, app. at 127.

⁵⁷ I suggest explanations for this resounding silence on the part of these scholars elsewhere in Yoo, *Legal Scholars MIA*, *supra* note 2.

⁵⁸ See, e.g., Louis Fisher, *Congressional Abdication: War and Spending Powers*, 43 ST.

the President from initiating offensive wars (but not defensive ones), unless Congress affirmatively authorizes the use of force. Further, they argue that federal courts have the duty to enforce this shared allocation of the war power. These scholars rest their arguments almost wholly on two interrelated claims. First, they claim, the text of the Declare War Clause vests Congress with the authority to decide on the initiation of all forms of military hostilities. Under the Declare War Clause, Congress has control over formal, total war; the Marque and Reprisal Clause provides Congress with power over smaller-scale conflicts. Second, pro-Congress scholars assert, the Framers intended to transfer this power from the executive to the legislature because they believed that a multimember legislature would be less prone to excessive warmaking than a single executive.⁵⁹

These scholars leave little room for doubt in their conclusions. As Professor Ely declares, there is a "clarity of the Constitution on this question."⁶⁰ While he admits "the 'original understanding' of the document's Framers and ratifiers can be obscure to the point of inscrutability," he declares that "in this case, . . . it isn't."⁶¹ On behalf of the eleven law professors who opposed the Persian Gulf War, Professor Koh maintains that "the Constitution did not permit the President to order U.S. armed forces to make war without meaningfully consulting with Congress and receiving its affirmative authorization."⁶² Under this unbending approach, Kosovo clearly failed constitutional standards. President Clinton committed 31,000 troops to an air war that lasted seventy-nine days, well in excess of the limitations of the War Powers Resolution. He then sent 7000 more troops for a long-lasting ground deployment in Kosovo itself. Congress neither declared war, nor issued any kind of statutory authorization. Although Congress provided funding for the war and expressed its support for

LOUIS U. L.J. 931, 967-80 (1999) (discussing recent presidential foreign military initiatives and congressional disinclination to challenge them); ELY, *supra* note 1, at 47-67 (outlining the ways Congress can enforce the principles of the WPR or War Clause, but doubting that Congress will ever employ these methods); GLENNON, *supra* note 1, at 71-122 (supporting congressional reclamation of the "war power" based on constitutional allocation of authority between the executive and legislative branches); HENKIN, *supra* note 1, at 17-43 (advocating a reinvigoration of the principles of "dual democracy" to foreign affairs); KOH, *supra* note 1, at 117-49 (criticizing "congressional acquiescence" and "judicial tolerance" of presidential foreign affairs initiatives).

⁵⁹ See, e.g., ELY, *supra* note 1, at 140 n.10; Raoul Berger, *War-making by the President*, 121 U. PA. L. REV. 29, 36-37 (1972).

⁶⁰ ELY, *supra* note 1, at 5.

⁶¹ *Id.* at 3.

⁶² Harold Hongju Koh, *Presidential War and Congressional Consent: The Law Professors' Memorandum in Dellums v. Bush*, 27 STAN. J. INT'L L. 247, 249 (1991).

the troops, critics of presidential warmaking authority have never accepted such actions as sufficient legislative authorization for military hostilities.

A. War Powers and the Constitutional Text and Structure

These scholars are mistaken on the Constitution's allocation of war powers. In my opinion, the constitutional text, structure, and history indicate that the pro-Congress view errs in demanding a fixed process for warmaking that places the initiative in the legislature. A more rigorous attention to the sources indicates that the Framers did not intend the Constitution to establish a single, correct method for going to war. Rather, the Constitution vests the political branches with different powers related to war, which the President and Congress may use to cooperate or, at times, to struggle for control over foreign policy. Instead of a fixed method, the Constitution's allocation of warmaking authority yields a flexible system that can change to meet international challenges. During times of relative peace, Congress can use its authority over funding and the raising of the military to play a leading role in foreign policy. In times of emergency or national danger, however, the President can seize the initiative in war-making. The flexibility of the constitutional framework for warmaking becomes clear when compared to, for example, the Constitution's finely-wrought procedures for enacting a statute, or, in the area of foreign affairs, for approving a treaty. If the Framers had intended the Constitution to impose the strict process demanded by most foreign affairs scholars, they would have employed the more detailed mechanisms and language that they used elsewhere.

Taken in context, the constitutional text, structure, and history enable the stable system of war powers that the political branches have worked out over the last half century. Constitutional text, for example, does not mandate that Congress approve all uses of force by statute. Pro-Congress proponents too quickly read the power "To declare War" to mean the power to initiate all forms of hostilities, and they read the commander-in-chief and executive power clauses too narrowly to provide only for command over the troops in the field once war has been authorized. Such an anachronistic approach superimposes the modern meaning of declaring war, which we have come to associate with commencing military hostilities because of World Wars I and II, upon the eighteenth century text. Further, the constitutional text provides little support for international legal scholars' odd demand for statutory authorization of warmaking. While their reading

of the text suggests that Congress must declare war before the nation can initiate conflict, these academics only require some form of ex ante legislative authorization, which itself is not a formal declaration of war. Once these scholars concede that a declaration of war itself is unnecessary, however, they cannot explain why Congress must provide its support through authorizing statutes, rather than appropriations, which provide a real check on the executive's military operations. International legal scholars like to claim support from the text, but are willing to deviate from it only so far as it suits them, and no farther.⁶³

"Declare war" may have the same ring as "commence hostilities" to the ears of today's international legal scholars, but to eighteenth century Americans the phrase would have conveyed a narrower meaning. Not all forms of hostilities or military deployments rise to the level of a declared war, which in the Framers' minds would have referred to the sort of total war more similar to the World Wars than to Kosovo. During the seventeenth and eighteenth centuries, Great Britain and colonial Americans waged all sorts of conflicts, which sometimes included direct fighting with the armies and navies of other great powers, without official declarations of war.⁶⁴ Prominent treatise writers, such as the influential Blackstone, thought of "war" as only a "completely effectual" form of hostilities in which the nation would undertake the military and legal measures to transform the international legal relationship with the enemy nation from one of peace to one of war.⁶⁵ It was clearly understood in the eighteenth century that a declared war was only the ultimate stage in a gradually ascending scale of hostilities between nations. Throughout Anglo-American constitutional history, the power to initiate such hostilities and to control the escalation of conflict toward war had rested in the hands of the executive.⁶⁶ Vesting Congress with the power to declare war does not indicate an intention to transfer wholesale to the legislature the power to initiate and control the level of military hostilities. Thus, the eighteenth century un-

⁶³ Fisher's companion essay suffers from this problem. He repeatedly refers to examples where Congress has authorized the President, by statute, to conduct military operations to support his notion that the Declare War Clause reserves to Congress the power to initiate hostilities. See, Fisher, *Unchecked Presidential Wars*, *supra* note 1, at note 76-96 and accompanying text. Fisher fails to explain, however, why statutory authorization can satisfy the demands of the Clause, which would seem to require a congressional declaration of war, while appropriations cannot.

⁶⁴ See Yoo, *Original Understanding*, *supra* note 10, at 214-17 (summarizing the practice of initiating hostilities prior to—or without—a formal declaration of war in the 17th and 18th centuries).

⁶⁵ See 1 WILLIAM BLACKSTONE, COMMENTARIES *249-50.

⁶⁶ See generally Yoo, *Original Understanding*, *supra* note 10, at 196-241.

derstanding of war as referring only to total war provides the grounds for twenty-first century interpreters to read the phrase narrowly to exclude lower-intensity conflict.⁶⁷

A holistic examination of the text yields further possibilities. Other constitutional provisions, for example, suggest that the Framers did not equate "declare" with "authorize" or "commence." Article I, Section 10 provides that states, without the consent of Congress, may not "keep Troops, or Ships of War in time of Peace, enter into any Agreement or Compact with . . . a foreign Power, or engage in War, unless actually invaded, or in such imminent Danger as will not admit of delay."⁶⁸ In prohibiting the states from becoming involved in war, the Constitution says that states may not "engage" in war, while Congress alone enjoys the power to "declare" war. If the Framers had intended to vest Congress with a broad warmaking power, aside from operational command over forces in the field, then we would expect them to have used the broader "engage" language, rather than the narrower "declare." And as I will show in Part II.C, the Framers originally understood a declaration of war to have a specific meaning in eighteenth century international law, as a means of changing the legal

⁶⁷ Perhaps recognizing the difficulties in reading "declare" war so broadly, pro-Congress scholars like Lou Fisher have been shifting their arguments to a rather tortured interpretation of the Marque and Reprisal Clause. U.S. CONST. art. I, § 8, cl. 11. The Clause gives Congress the power not only to declare war but also the authority to "grant Letters of Marque and Reprisal, and make Rules concerning Captures on Land and Water." These letters gave private individuals permission to recover, through military action, compensation for injuries suffered at the hands of the citizens of a foreign nation. Without a letter, such actions would constitute piracy; with one, military actions became a legitimate form of privateering under international law. See Yoo, *Original Understanding*, *supra* note 10, at 250-51.

Fisher and others seize on the Clause as referring to "any use of force short of a declared war." Fisher, *Unchecked Presidential Wars*, *supra* note 1, at text preceding note 54; see also Jules Lobel, *Covert War and Congressional Authority: Hidden War and Forgotten Power*, 134 U. PA. L. REV. 1035, 1045 (1986) ("In eighteenth century America, the term . . . came to signify any intermediate or low-intensity hostility short of declared war."); Stromseth, *supra* note 1, at 854. These scholars, however, provide no evidence from the original understanding, nor do they provide any textual or structural reasons, for reading this technical provision in such a broad manner. While letters of marque and reprisal referred to one form of low-intensity conflict, these scholars fail to demonstrate that the framers generally understood marque and reprisal to refer to *all* forms of conflict short of a declared war. Fisher overlooks a recent work on the Clause which suggests that letters of marque and reprisal authorized a narrow form of for-profit commercial warfare, regulated by prize courts, distinct from government-directed military action aimed at strategic, tactical, or political goals. See C. Kevin Marshall, Comment, *Putting Privateers in Their Place: The Applicability of the Marque and Reprisal Clause to Undeclared Wars*, 64 U. CHI. L. REV. 953, 974-81 (1997).

⁶⁸ U.S. CONST. art. I, § 10, cl. 3.

status between nations from one of peace to one of war, rather than as a prerequisite for starting hostilities. It would have been odd for the Framers to have used "declare" so colloquially, as international legal scholars today would have it, when the phrase bore such a precise meaning under the international law of the time.

Provisions beyond the Declare War Clause further indicate that if the Framers had intended to impose a strict, Congress-first, warmaking process, they would have used different language. Again, Article I, Section 10 proves suggestive. If the Framers had such a goal in mind, Articles I or II could have included a clause that declared "the President shall not engage the United States in War, without the consent of Congress." Article II, Section 2 similarly implies that if the Framers had wanted to require congressional participation in the decision on war, they knew how to draft the requisite language. Article II, Section 2, Clause 2 declares that the President "shall have Power, by and with the Advice and Consent of the Senate, to make Treaties, provided two thirds of the Senators present concur"⁶⁹ The same Section also requires senatorial consent in the making of judicial and ambassadorial appointments.⁷⁰ Pro-Congress scholars cannot explain why, if the Framers had wanted to slow down the process of going to war, they did not adopt a parallel phrase: the President "shall have Power, by and with the Advice and Consent of Congress, to make War." Instead, critics of presidential power require us to believe that the Framers sought such a goal, but chose to use obtuse, even inept language to do so. Other textual provisions, however, reinforce the notion that when the Framers wanted to make legislative participation a constitutional *sine qua non* in the exercise of certain executive powers, they knew how.

Constitutional structure lends support to the idea that the Framers expected the war power to be shaped by the interaction of the political branches within flexible constitutional guidelines. Unsurprisingly, the central feature of many of the Constitution's structural provisions involves the passage of legislation, its subject matter, and its potential reach. Inability to enact legislation that directly regulated individuals and private conduct posed perhaps the greatest obstacle to the success of the Articles of Confederation. Yet, fearful of centralized government power, the Framers sought to make the passage of legislation difficult. As a result, the constitutional structure establishes a de-

⁶⁹ *Id.* art. II, § 2, cl.2.

⁷⁰ *See id.*

tailed, finely-wrought method for public lawmaking. It allows a number of players in the system—the House, Senate, President and even the courts—to block the creation and implementation of legislation. Compare this to the relevant provisions governing warmaking. We find no clear, detailed process governing the relevant roles of the political branches in decisions about war—certainly none that rises to the same level of specificity and clarity for making statutes or even treaties. Rather, the Constitution briefly distributes different war-related powers in both Articles I and II without describing how they are to interact. The Constitution gives Congress the power only to declare war, not the power to commence hostilities, nor the power to make war.

Further, warmaking is affected by other grants of power and constitutional structures that do not impact the process of public lawmaking. The institutional center of gravity in the legislative process clearly rests with Congress, which not only acts as the starting point for legislation, but also as the ending point, given Congress's power to override a presidential veto. The Constitution vests Congress with "All legislative Powers herein granted."⁷¹ Warmaking, by contrast, is the quintessential executive power. It calls for action, energy, and dispatch in execution, rather than for the formulation of rules that govern the conduct of private individuals. Unlike legislation, where even the President's veto is granted in Article I, warmaking provisions rest in both Articles I and II. Unlike Congress's grant of legislative power in Article I, which is limited to the powers enumerated in Article I, Section 8 of Article II vests the President with all of an undefined federal executive power. Aside from any powers not specifically excepted from the President, such as those in Article II, Section 2 involving treaties and appointments, Article II's vesting clause reserves all other executive power to the President.⁷² Not only does this structure sug-

⁷¹ *Id.* art. I, § 1.

⁷² This, of course, was the argument most famously made by Alexander Hamilton in defending President Washington's Neutrality Proclamation. See *Pacificus No. 1*, June 29, 1793, in 15 THE PAPERS OF ALEXANDER HAMILTON 33, 37-43 (Harold C. Syrett ed., 1969) ("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 qualifications which are expressed in the instrument."). For a modern version of the argument, see Steven G. Calabresi & Saikrishna B. Prakash, *The President's Power To Execute the Laws*, 104 YALE L.J. 541, 663-64 (1994) (arguing that the President alone is accountable for executing federal law). Calabresi and Prakash's thesis, like Hamilton's, has not received general acceptance. See, e.g., Martin S. Flaherty, *The Most Dangerous Branch*, 105 YALE L.J. 1725 (1996); Lawrence Lessig & Cass R. Sunstein, *The President and the Administration*, 94 COLUM. L. REV. 1, 2 (1994) (alleging that the Framers envisioned strong

gest that the Declare War Clause ought to be read narrowly, it also allows for substantial flexibility in the manner in which the branches decide to go to war. What the constitutional structure does not do, however, is provide support for the arguments of pro-Congress scholars who would read the vesting of executive power in the President so narrowly as to be invisible and the Declare War Clause so broadly as to encompass most of the war power.

B. *The Historical Claims of Pro-Congress Scholars*

With the textual foundations of their argument so weak, pro-Congress scholars place the weight of their claims upon the original understanding. In particular, they maintain that the Framers consciously intended to change the system that had prevailed in Great Britain, where the Crown enjoyed all of the war power. According to these scholars, such as Louis Fisher, the Framers vested Congress with the power to decide on the use of force because they thought that legislatures—because of their larger numbers—were inherently less prone to war.⁷³ Scholars like Fisher generally rely upon four pieces of evidence in reaching this conclusion: Joseph Story's observation that vesting Congress with the power to declare war would inhibit the ability of one person to start war;⁷⁴ a letter from James Madison to Thomas Jefferson stating that the Constitution "vested the question of war in the Legis[ature]";⁷⁵ the decision by the Constitutional Convention to change Congress's power from "make" war to "declare" war;⁷⁶ and a speech by James Wilson during the Pennsylvania ratifying convention stating that the Constitution's allocation of war powers was designed to "not hurry us into war."⁷⁷

Fisher's companion piece to this Article demonstrates the methodological problems that undermine the pro-Congress approach. In

congressional power). The debate between Calabresi and Prakash and their critics, however, revolves around whether the power of "administration" is fully executive in nature, rather than whether warmaking is executive or legislative.

⁷³ See Fisher, *Unchecked Presidential Wars*, *supra* note 1, at text accompanying notes 52-53.

⁷⁴ See 3 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 570, at 410-11 (Ronald D. Rotunda & John E. Nowak eds., Durham, Carolina Academic Press 1987) (1833).

⁷⁵ Letter from James Madison to Thomas Jefferson (Apr. 2, 1798), in 6 THE WRITINGS OF JAMES MADISON 312 (Gaillard Hunt ed., 1906).

⁷⁶ 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 318-19 (Max Farrand ed., 1966) (1911).

⁷⁷ 2 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION 583 (Merrill Jensen ed., 1976) [hereinafter DOCUMENTARY HISTORY].

brief, Fisher uses sources in an anachronistic manner that treats statements as distant as forty-five years after the ratification as if they expressed the understanding of the Framers who actually had drafted and adopted the Constitution. For example, while Joseph Story may have believed that the power to declare war included the power to decide to begin a military conflict, his views could not possibly have influenced or demonstrated a common understanding by the ratifiers: Story's book appeared almost a half-century after the ratification—Story himself was only eight years old during the Philadelphia Convention.⁷⁸ Story may have been a prodigy, but he was no Mozart. While other scholars rely upon Madison's letter to Jefferson, he wrote it in 1798, not 1787, and in private.⁷⁹

Even if one were to treat the secret proceedings of the Philadelphia Convention—which could only propose, not adopt, the Constitution—as authoritative, its decision to amend Congress's power from "make" to "declare" war actually cuts against the pro-Congress reading. This change demonstrates that the Framers understood that the broader power of making war existed, and that they decided explicitly to take that power away from Congress and replace it with the narrower power of declaring war.⁸⁰ Attempting to draw any firmer conclusions from the brief debate on the Clause, which occupies only one page out of the Convention's 1273-page record, imposes far too much order on the confusion that surrounded the Framers' discussion.

Finally, while James Wilson's single statement came during a state

⁷⁸ See Ronald D. Rotunda & John E. Nowak, *Introduction* to STORY, *supra* note 74, at v-xiv (providing Story's biographical details).

⁷⁹ While those who rely upon Madison's 1794 Helvidius essays are at least four years closer to the ratification, they often do not make clear the context of the papers, which renders dubious their usefulness as evidence of the original understanding that obtained during the ratification. Not only did his remarks come six years after the ratification, but Madison was not trying to represent the Constitution's meaning to those who were to adopt it. Rather, in these essays, Madison was engaging in a fierce partisan debate with Alexander Hamilton over the Neutrality Proclamation and relations with Europe. Further, Madison does not appear to have been consistent on this point with his statements during the ratification, *see infra* text accompanying notes 98-101, which should make his comments in 1794 even less probative. Those who rely on Jefferson's comments about the war powers clauses suffer from similar methodological problems. *See* Fisher, *Unchecked Presidential Wars*, *supra* note 1, at text accompanying note 37; Stromseth, *supra* note 1, at 852-64 (relying on several of these post-ratification exchanges between and among the Framers). Jefferson was not even present in the United States during the Philadelphia Convention or the ratification process.

⁸⁰ For a fuller discussion of the few pages of debate concerning the Federal Convention's change of the Declare War Clause, *see* Yoo, *Original Understanding*, *supra* note 10, at 256-69.

ratifying convention, it is difficult to generalize his beliefs as representing the widespread understanding of war powers held by those who ratified the Constitution. Only one person, Wilson may have been referring only to the type of formal wars between broad alliances that had beset Europe during the eighteenth century.⁸¹ Wilson was neither clearly equating a declaration of war with the first steps toward total war, nor addressing low intensity conflict—what eighteenth-century writers called “imperfect” war.⁸² Fisher and others seek to buttress Wilson’s arguments by referring to comments made during the North and South Carolina ratifying conventions.⁸³ Reliance upon these conventions underscores the problems with Fisher’s use of history and his conception of the original understanding. The North Carolina debates usually cited by pro-Congress scholars took place after the Constitution had received the necessary nine votes it needed to take effect. North Carolina did not actually ratify the Constitution until November 21, 1789. To provide some context, this was after the election of Washington as President, the passage of legislation establishing the three executive departments of government, the delivery of the Bill of Rights from Congress to the states, and the passage of the Judiciary Act of 1789. To make matters worse, in its first state ratifying convention in August 1788, which provides the source for pro-Congress scholars, North Carolina rejected the Constitution by a decisive 184-84 vote.⁸⁴ North Carolina’s refusal to ratify makes it difficult to treat the explanations of the Constitution offered there as authoritative.⁸⁵ While focusing on these questionable sources, Fisher and others fail to examine records from key turning points in the ratification contest, such as the Virginia convention, where the Framers extensively discussed war powers. These discussions will be examined in the next section.

⁸¹ See Yoo, *Clio*, *supra* note 12, at 1183-85.

⁸² *Id.* at 1185.

⁸³ See Fisher, *Unchecked Presidential Wars*, *supra* note 1, at text accompanying note 53.

⁸⁴ See JONATHAN ELLIOT, 4 THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION, AS RECOMMENDED BY THE GENERAL CONVENTION AT PHILADELPHIA, IN 1787, at 250-51 (William S. Hein & Co. 1996) (2d ed. 1891).

⁸⁵ We have very sketchy records from the South Carolina convention, which was considered politically unimportant, unlike those in Pennsylvania, Massachusetts, Virginia, and New York.

C. *The Original Understanding of War Powers*

Approaching history with a deeper appreciation of the context surrounding the Constitution's framing produces a very different picture than the one painted by pro-Congress scholars. In order to reconstruct the allocation of war powers as originally understood by the Constitution's ratifiers, we must examine the institutional history of warmaking during the period leading up to the Framing.⁸⁶ Three elements of the historical context suggest that late-eighteenth-century Americans would have understood the Constitution to create a flexible warmaking system, one in which the President had the authority to initiate hostilities, subject to Congress's power over the purse. First, American knowledge of the practical workings of the British constitution indicates that they would not have understood the Declare War power to have borne the immense significance given to it by pro-Congress scholars. Rather, British history suggests that the Framers would have expected the deeper structural relationship between the executive and legislative branches to govern war. Second, American experience during the colonial and early national periods indicates that they sought to continue, rather than consciously disavow, the traditional Anglo-American system of war powers. Third, statements during the ratification process lend strong support to the thesis that the Framers did not understand the Constitution to represent a sharp break from the customary institutional allocation of war powers. If anything, several Federalist leaders believed that the Constitution would duplicate the basic outlines of the British war powers system, rather than erase them.

We ought to pay close attention to the British constitutional system of the eighteenth century because, as former subjects of the British Empire, the Framers operated within its intellectual, constitutional, and legal context. Not only did the British constitution provide concepts and phrases, such as "commander-in-chief," "executive power," and "Declare War," that the Framers imported directly into their new plan of government, but recent British political history provided a track record of how the distribution of these powers would work in practice. A review of this legal and political context indicates that it is unlikely that a typical Framer would have understood the power to declare war as equivalent to the domestic authority to initiate military hostilities.⁸⁶ Rather, the power to declare war only gave Congress the authority to transform hostilities into a "perfect" war under

⁸⁶ See Yoo, *Original Understanding*, *supra* note 10, at 196-217.

international law. In other words, the power to declare war was almost a judicial one, in which Congress issued its declaration that the legal state between the United States and another nation had switched from peace to war. In other respects, the American Constitution left the allocation of war powers relatively untouched.

Several sources suggest that we ought to read the power to declare war as granting no more than the authority to define the nation's legal relationships, under international law, with other countries. First, the international and British legal authorities of the seventeenth and eighteenth centuries, such as Grotius, Vattel, and Blackstone, discussed a declaration of war as a form of notice, which informed both enemy nations and one's own citizens that the laws of war were to apply.⁸⁷ Once a nation had declared war, both enemy states and neutrals knew that the nation's actions were now governed by the rules of war; its citizens and forces legally could undertake hostile acts forbidden in peacetime. War vested what would normally be lawless private acts with the sanction of the state. As Blackstone observed, a declaration of war was necessary

not so much that the enemy may be put upon his guard . . . but that it may be certainly clear that the war is not undertaken by private persons, but by the will of the whole community; whose right of willing is in this case transferred to the supreme magistrate by the fundamental laws of society.⁸⁸

None of the important legal writers of the period believed that a declaration of war was necessary for domestic constitutional purposes, in the manner claimed by critics of executive warmaking.

Second, practice under the British constitution indicates that the British did not believe a declaration of war to be an indispensable precursor to military hostilities. In the two most significant military conflicts of the two centuries before the Revolution, Britain's entry into the Thirty Years' War in 1624 and the Seven Years' War against France from 1756-1763, the Crown did not declare war until at least a year had passed after the start of military hostilities.⁸⁹ In the period

⁸⁷ See, e.g., BLACKSTONE, *supra* note 65, at *250; 2 HUGO GROTIUS, *DE JURE BELLI AC PACIS LIBRI TRES* [THREE BOOKS ABOUT THE LAW OF WAR AND PEACE] 633 (Francis W. Kelsey trans., 1925) (1646); EMMERICH DE VATTTEL, 3 *LE DROIT DES GENS, OU PRINCIPES DE LA LOI NATURELLE, APPLIQUES A LA CONDUITE ET AUX AFFAIRES DES NATIONS ET DES SOUVERAINS* [THE LAWS OF NATIONS OR THE PRINCIPLES OF NATURAL LAW, APPLIED TO THE CONDUCT AND TO THE AFFAIRS OF NATIONS AND OF SOVEREIGNS] 255 (Charles G. Fenwick trans., Carnegie Institution of Washington 1916) (1758).

⁸⁸ BLACKSTONE, *supra* note 65, at *258.

⁸⁹ See Yoo, *Original Understanding*, *supra* note 10, at 214-17.

between the Restoration and the American Revolution, Great Britain engaged in *eight* significant conflicts,⁹⁰ but declared war before or at the start of hostilities only *once*.⁹¹ Rather than domestic authorization for military operations, these declarations served their main purpose in international law by listing grievances against the other nation, demanding a remedy, and defining the war's international legal status. Indeed, the conflict that would have been freshest in the Framers' minds, the Seven Years' War, is particularly instructive. As early as July 1754, American colonials had joined British troops in attacking French positions in North America, leading to the British defeat in which George Washington first distinguished himself. The King would not declare war until May 1756.⁹² As Alexander Hamilton observed during the ratification, "the ceremony of a formal denunciation of war has of late fallen into disuse."⁹³ It seems evident from British political history that the British and Americans of the framing generation would not have considered the power to declare war as encompassing the very different power, under domestic constitutional law, that pro-Congress scholars attribute to it.

Eighteenth-century Americans would not have considered a transfer of the declare war power to be a monumental shift in the balance of powers because the basic principles of Anglo-American constitu-

⁹⁰ These were: the Second Anglo-Dutch War (1665-1667), the Third Anglo-Dutch War (1672-1674), the War of the Grand Alliance (1689-1697), the War of the Spanish Succession (1702-1713), the War of the Quadruple Alliance (1718-1720), the War of the Austrian Succession (1739-1748), the Seven Years' War (1756-1763), and the American Revolution (1775-1783). See generally JEREMY BLACK, *A SYSTEM OF AMBITION?: BRITISH FOREIGN POLICY 1660-1793* (1991). England declared war before hostilities only in 1689, at the start of the War of the Grand Alliance. This period also included numerous minor conflicts in which no declaration of war was issued. See *id.* at 214 n.252; J.F. MAURICE, *HOSTILITIES WITHOUT DECLARATION OF WAR 12-79* (London, Her Majesty's Stationery Office 1883) (detailing 107 instances of hostilities without a declaration of war between 1700-1798).

⁹¹ See BLACK, *supra* note 89, at 214-15.

⁹² See, e.g., DOUGLAS EDWARD LEACH, *ARMS FOR EMPIRE: A MILITARY HISTORY OF THE BRITISH COLONIES IN NORTH AMERICA, 1607-1763*, at 210, 340-41, 380-81 (1973) (describing military activities in 1754 and the declaration of war in 1756).

⁹³ THE FEDERALIST NO. 25, at 165 (Alexander Hamilton) (Clinton Rossiter ed., 1961). Publius was defending the Constitution's authorization of the maintenance of standing armies in peacetime because of the dangers of a surprise attack without a formal declaration of war. *Id.* ("The steady operations of war against a regular and disciplined army, can only be successfully conducted by a force of the same kind."). Other Federalists and Anti-Federalists shared Hamilton's judgment. See *Brutus X*, N.Y. J. (Jan. 24, 1787), reprinted in 15 DOCUMENTARY HISTORY, *supra* note 77, at 462-67; *Marcus IV*, NORFOLK & PORTSMOUTH J. (Mar. 12, 1788), reprinted in 16 DOCUMENTARY HISTORY, *supra* note 77, at 379-86.

tionalism already recognized the legislature's ample authority to check executive warmaking. Years of political strife under the Stuarts, the Civil War, and the Glorious Revolution had made clear that the Crown could conduct no military operations without Parliament's political and financial cooperation.⁹⁴ Parliament's check, however, did not take the form of authorizing legislation. Rather, it exercised plenary control over the funding of the military and its wartime operations. British history during the period leading up to the Revolution indicates that Parliament was able to use its power of the purse to win a functional veto over decisions of war and peace.⁹⁵ As one historian has described it, Parliament's creation of, and control over, the financial system became "the sinews of power" that made possible England's military and political rise in the eighteenth century.⁹⁶ An American legislature would not need the power to declare war to contain the executive's military initiatives because the lessons of British constitutional history taught that the power of the purse would give Congress sufficient control.⁹⁷

American experience under the colonial and early national charters buttressed the understandings generated by the British system. Under the colonial charters, royal governors exercised formal authority over the commencement of military hostilities, subject to the assemblies' plenary control over appropriations.⁹⁸ When they rebelled, the revolutionaries could have transferred warmaking authority from their executives to their legislatures. They did not. Retaining the general allocation of war powers, the drafters of the revolutionary

⁹⁴ See Yoo, *Original Understanding*, *supra* note 10, at 209-14.

⁹⁵ See *id.* at 208-14.

⁹⁶ See generally JOHN BREWER, *THE SINEWS OF POWER: WAR, MONEY AND THE ENGLISH STATE, 1688-1783* (1989).

⁹⁷ In this regard, Fisher, like other pro-Congress scholars, exaggerates the British monarch's war powers in order to make the Constitution's transfer of powers to Congress all the more intentional. If the Framers, Fisher argues, had intended to maintain the King's executive war powers in the President, they would have given the executive the powers to declare war, to issue letters of marque and reprisal, to raise armies, and to regulate the military. See Fisher, *Unchecked Presidential Wars*, *supra* note 1, at text accompanying note 57. Fisher, however, mistakenly believes that the King possessed all of these powers at the time of the framing. By the turn of the seventeenth century, for example, the Crown had lost the power to raise armies without statutory authorization and Parliament had assumed the power to regulate the military in addition to its sole control over funding of the military. See Yoo, *Original Understanding*, *supra* note 10, at 213. The Constitution's sole alteration in the British allocation of war powers was to transfer to the legislature those powers involving the declaration of a nation's status and relationship with other nations under international law.

⁹⁸ See Yoo, *Original Understanding*, *supra* note 10, at 219-21.

state constitutions instead experimented with the fragmentation of the executive's institutional unity.⁹⁹ When these efforts proved chaotic, some states adopted constitutions—widely admired by those who would lead the ratification fight—that re-centralized power in a single executive.¹⁰⁰ As historian Gordon Wood has told the story, American leaders sought to temper the tyranny of the majority by restoring the powers of the executive branch and resurrecting its unity and independence.¹⁰¹ That recent political history set the backdrop for the Framers' understanding of the Constitution.¹⁰²

Two specific points about the early national period are worth noting. First, the Articles of Confederation, drafted in 1777 and ratified in 1781, provided the Continental Congress with "the sole and exclusive right and power of determining on peace and war."¹⁰³ The use of this phrase shows that the Framers knew how to vest the power to initiate war when they wanted to, and that they understood that the power to declare war was a narrow subset of the larger power to decide on and make war. Some have argued that the Articles' vesting of the war power in Congress demonstrates a re-conception of war as a legislative function.¹⁰⁴ This conclusion errs in mistaking the Continental Congress for a legislature. As historians have recognized, the Continental Congress served primarily as an executive body, which as-

⁹⁹ See *id.* at 221-28.

¹⁰⁰ See *id.* at 228-34.

¹⁰¹ See GORDON S. WOOD, *THE CREATION OF THE AMERICAN REPUBLIC, 1776-1787*, at 446-53 (1969); see also CHARLES C. THACH JR., *THE CREATION OF THE PRESIDENCY, 1775-1789: A STUDY IN CONSTITUTIONAL HISTORY* 34-35 (1922).

¹⁰² An effort to relocate war powers from the executive to the legislature would have been surprising, for as Professor William Treanor has put it, "[f]or [the Framers] to believe that such a decision was appropriate, there would have had to have been some concern causing them to turn against the great tide of constitutional history." Treanor, *supra* note 1, at 721; see also John C. Yoo, *Treaties and Public Lawmaking: A Textual and Structural Defense of Non-Self-Execution*, 99 COLUM. L. REV. 2218, 2224 (1999) [hereinafter Yoo, *Treaties and Lawmaking*]. Treanor believes, however, that the Framers' fear of fame-seeking provides sufficient ground to conclude that the Framers did attempt to act counter-cyclically on the issue of war powers. I have argued elsewhere that Treanor's level of analysis is far too general to support any concrete conclusions about the original understanding of war powers. See Yoo, *Clio*, *supra* note 12, at 1212.

¹⁰³ ARTICLES OF CONFEDERATION art. IX (1777).

¹⁰⁴ See FISHER, *supra* note 1, at 6 (arguing that the Constitution intentionally made the war powers a legislative power in contrast to England); Berger, *supra* note 59, at 33 (noting that the Articles dispensed with the executive); Arthur Bestor, *Separation of Powers in the Domain of Foreign Affairs: The Original Intent of the Constitution Historically Examined*, 5 SETON HALL L. REV. 527, 567-68 (1974) (noting that the Articles required two-thirds of the states to approve foreign affairs, especially those relating to military actions, in order to ensure legislative deliberation).

sumed the functions that were formerly the responsibility of the Crown.¹⁰⁵ In fact, the Continental Congress lacked those powers—such as the power to directly regulate individual conduct—that we normally associate with a legislature. Vesting the war power in the Continental Congress indicates that, throughout the early national period, the Framers continued to view warmaking as primarily an executive function.

Second, the state constitutions, as the next most important public law documents of their day, provide another significant context against which to evaluate the Framers' work. While almost all of the revolutionary state constitutions maintained the traditional allocation of war powers between executive initiative and legislative control over finances, one state, South Carolina, took a different path. In its 1778 Constitution, South Carolina declared that "the governor and commander-in-chief shall have no power to commence war, or conclude peace, or enter into any final treaty" without legislative approval.¹⁰⁶ If the Framers held a common understanding that war powers had become legislative in function, then South Carolina's declaration would have been unnecessary. If "declare" commonly meant "initiate" or "commence," as pro-Congress scholars suggest, we would not have expected South Carolina to use "commence." Most importantly, if the Framers had intended to adopt a legislature-dominated system of war powers, they simply would have followed South Carolina's example. Instead, the South Carolina Constitution suggests that the Framers did not choose to transfer the initiative in warmaking from the executive to Congress.

One final source of historical context that should guide the interpretation of war powers is the constitutional ratification process. To

¹⁰⁵ See JERRILYN GREENE MARSTON, *KING AND CONGRESS: THE TRANSFER OF POLITICAL LEGITIMACY, 1774-76*, at 303 (1987) (arguing that the Congress was the administrative and executive successor to the King); Eugene R. Sheridan & John M. Murrin, *Introduction to CONGRESS AT PRINCETON: BEING THE LETTERS OF CHARLES THOMSON TO HANNAH THOMSON, JUNE-OCTOBER 1783*, at xxxiv-xxxviii (Eugene R. Sheridan & John M. Murrin eds., 1985) (explaining that Congress took "the powers of the imperial crown" in 1775-1776).

¹⁰⁶ S.C. CONST. of 1778, art. XXXIII, *reprinted in* 6 *THE FEDERAL AND STATE CONSTITUTIONS, COLONIAL CHARTERS, AND OTHER ORGANIC LAWS* 3255 (Frances Newton Thorpe ed., 1909). In its temporary 1776 Constitution, South Carolina also included a provision that required the governor to receive the consent of both the state assembly and the council before making war or peace. See S.C. CONST. of 1776, art. XXVI, *reprinted in* 6 *id.* at 3247 ("That the president and commander-in-chief shall have no power to make war or peace, or enter into any final treaty, without the consent of the general assembly and legislative council.").

be sure, the subject of war powers did not consume the attention of the Framers as did, for example, questions of federalism. While this Article is not the place to conduct an extensive review of the ratification,¹⁰⁷ Virginia's ratifying convention ought to receive close attention. As home to many of the political leaders of the day, Virginia was perhaps *the* veto gate through which the Constitution had to pass in order for the new nation to survive.¹⁰⁸ Led by the fiery oratory of Patrick Henry, Anti-Federalists in the state attacked the Constitution for centralizing military powers of a dictatorial nature in the President. "If your American chief, be a man of ambition, and abilities, how easy is it for him to render himself absolute!" Henry exclaimed.¹⁰⁹ "The army is in his hands, and, if he be a man of address, it will be attached to him; and it will be the subject of long meditation with him to seize the first auspicious moment to accomplish his design . . ."¹¹⁰ In response, Federalists relied upon the separation of powers and the legislature's control over war finances, not the Declare War Clause. Leading the ratification fight in Virginia, for example, Madison predicted that Congress would enjoy the same powers over warmaking as did Parliament: "The sword is in the hands of the British King. The purse is in the hands of the Parliament. It is so in America, as far as any analogy can exist."¹¹¹ Federalists had every incentive to raise the Declare War Clause as an important check on the executive's powers, but they did not. Instead, they argued, as did Madison, that "[t]he purse is in the hands of the Representatives of the people. They have the appropriation of all monies. They have the direction and regulation of land and naval forces. They are to *provide* for calling forth the militia . . ."¹¹² Meanwhile, "the President is to have the command; and, in conjunction with the Senate, to appoint the officers."¹¹³ Other leading Federalists echoed Madison's reliance upon the legislature's traditional funding powers as the primary check on the President's initia-

¹⁰⁷ I have undertaken that task in Yoo, *Original Understanding*, *supra* note 10, at 241-86.

¹⁰⁸ See McNollgast, *Positive Canons: The Role of Legislative Bargains in Statutory Interpretation*, 80 GEO. L.J. 705, 707 (1992) (discussing the concept of veto gates).

¹⁰⁹ Patrick Henry, The Virginia Convention Debates (June 5, 1788), in 9 DOCUMENTARY HISTORY, *supra* note 77, at 964.

¹¹⁰ *Id.*

¹¹¹ James Madison, The Virginia Convention Debates (June 14, 1788), in 10 DOCUMENTARY HISTORY, *supra* note 77, at 1282.

¹¹² *Id.*

¹¹³ *Id.*

tive in matters of war.¹¹⁴

A more careful examination of the relevant historical context, therefore, shows that the Framers did not understand the proposed Constitution to demand anything like the massive transfer of warmaking authority claimed by pro-Congress scholars. Instead, the ratifiers of the Constitution adhered to the traditional Anglo-American approach to the distribution of war powers, in which the legislature used its sole control over funding to check and balance the executive's authorities over military affairs. Rather than a strict procedure for going to war, the Constitution's text and its original understanding establish a system in which the branches pursue their policies concerning war by relying on their plenary constitutional powers. If the two branches agree on foreign policy goals, the Constitution allows for effective and swift cooperation. If the branches are in conflict, they can use their powers to stymie and check each other until a political consensus is reached. Instead of a realm of finely-tuned processes governed by rules and judicial review, the exercise of war powers has developed in the realm of politics within the broad constitutional bounds established by the Framers.¹¹⁵

¹¹⁴ See, e.g., George Nicholas, *The Virginia Convention Debates* (June 14, 1788), in 10 DOCUMENTARY HISTORY, *supra* note 77, at 1281.

¹¹⁵ Fisher attempts to counter the weight of this evidence by arguing that the Constitution establishes a sharp distinction between offensive and defensive war. See Fisher, *Unchecked Presidential Wars*, *supra* note 1, at text accompanying notes 115-21. We agree that, at a minimum, the Declare War Clause reserves to Congress the power to place the United States in a state of total war under international law. We part ways, however, when Fisher reads the Declare War Clause to preclude the President from waging any type of offensive military operations and to limit executive warmaking authority solely to cases in which the United States or its forces are attacked. Fisher provides no reason why we must understand "war" to mean "all offensive uses of force." Fisher is imposing a modern notion of offensive/defensive war upon the different understandings of the framing generation. While some mentioned the idea during the confused Philadelphia Convention debate, none of the prominent actors in the ratification made this distinction in discussing war powers. This is telling, given that the Federalists had every reason to make any arguments that they could to downplay the scope of presidential powers.

Much of Fisher's evidence falls short in demonstrating the understanding held by the Framers when they ratified the Constitution. In determining the original understanding of the meaning of "war," the observations of the Supreme Court almost 80 years after the ratification, see *id.* at notes 116-18 and accompanying text, do not seem relevant. Even the holdings of the Marshall Court or of lower federal courts in the early nineteenth century, cited by Fisher, do not provide support for his reading. None of these cases raised directly the question of which branch had the authority to initiate offensive military hostilities, nor can they be taken as signs of the original understanding, as they came after the Constitution was ratified.

*D. The Original Understanding, Modern Conflict, and
the War Powers Resolution*

Under the flexible model of war powers outlined in this Article, President Clinton's decision to commit American forces to hostilities in Kosovo met constitutional requirements. As the Constitution makes the President the commander-in-chief, and as military forces were funded and authorized without any congressional prohibition as to their use, President Clinton had full constitutional authority to initiate military hostilities in the Balkans. Further, Congress had an adequate opportunity to use its plenary power over funding to review the merits of the war. Congress voted to authorize the supplemental appropriations necessary to conduct military operations in Kosovo, and in that context it debated the merits of the war itself. If Congress had disagreed with the intervention, all it had to do was do nothing. The federal courts properly stayed out of the matter, as they have neither competence nor any call to intercede, as both branches have more than sufficient powers at their disposal to defend their prerogatives.¹¹⁶ President Clinton did not wage war by secretly diverting funds appropriated to one purpose and shifting them to the war, nor did he defy any judicial orders or even any Kosovo-related legislation.

One might respond that it is unreasonable to expect Congress to use its appropriations powers to cut off troops in the field. Surely members of Congress will not take actions that might be interpreted as undermining the safety and effectiveness of the military, once committed and in the midst of hostilities. We should not, however, mistake a failure of political will for a violation of the Constitution. Congress undoubtedly possessed the power to end the Kosovo war; it simply chose not to use it. Affirmatively providing funding for a war, or at the very least refusing to cut off previous appropriations, represents a political determination by Congress that it will provide minimal support for a war, but that ultimately it will leave it to the President to receive the credit either for success or failure. Congress can use its constitutional powers over appropriations and the legal aspects of hostilities to severely constrain executive warmaking or to leverage a greater political role for itself, just as it has in many domestic areas of regulation. Not wanting to appear to have failed to support the troops is a decision of political, not constitutional, significance. Re-

¹¹⁶ See JESSE H. CHOPER, JUDICIAL REVIEW AND THE NATIONAL POLITICAL PROCESS: A FUNCTIONAL RECONSIDERATION OF THE ROLE OF THE SUPREME COURT 260-379 (1980).

cent wars show only that Congress has refused to exercise the ample powers at its disposal, not that there has been an alarming breakdown in the constitutional structure.

The flexible system of warmaking suggests that Congress's power over funding, rather than broad framework statutes like the War Powers Resolution, provides the legislature with the right to participate in the decision to initiate hostilities. Indeed, the original understanding indicates that the War Powers Resolution is unconstitutional because it attempts to enact general rules limiting the President's commander-in-chief and executive powers to engage in hostilities that do not rise to the level of total war. When constitutional critics complained that the President might exercise such a power recklessly, Federalists such as Madison did not respond by asserting that Congress could pass a statute, or use its Declare War authority, to check the executive. Rather, they responded that Congress would use its appropriations power to frustrate presidential warmaking that was not in the nation's interest.¹¹⁷ The War Powers Resolution's inconsistency with the Constitution's text, history, and original understanding explains, perhaps, why none of the branches, including Congress itself, has respected or enforced its terms. Attempting to place a statutory straightjacket on war powers undermines the very flexibility—swift and decisive presidential action combined with congressional participation via the funding power—that the Framers understood the Constitution to establish.

Indeed, the conclusion that Congress has given some blanket form of approval for wars such as Kosovo, despite the dormancy of the Declare War Clause, seems almost inescapable. Even after the end of the Cold War, Congress continues to authorize standing armed forces capable of conducting large-scale military operations around the world. It funds weapons systems that allow the United States to engage in a wide variety of interventions, from quick, surgical cruise missile strikes to power projection by carrier groups to invasions by heavy armored forces. By providing long-term funding for a permanent military capable of such operations, Congress has given the executive the means to send the troops immediately into combat overseas. By not taking the step of placing conditions on their use, as is often done with domestic spending programs, Congress has given implicit approval for their deployment. Indeed, by keeping the funds flowing once hostilities in Kosovo had begun, Congress ratified the executive's exercise of initiative in war. The decision to go to war in Kosovo op-

¹¹⁷ See *supra* text accompanying notes 111-14.

erated well within the boundaries set by the constitutional text and the original understanding of war powers.

III. MULTILATERALISM AND THE CONSTITUTIONAL FUTURE

The debate over the constitutionality of military operations in Kosovo is as old as the Constitution itself. The American political system has struggled with the question of executive war powers ever since Alexander Hamilton and James Madison squared off in the *Pacificus-Helvidius* debates.¹¹⁸ This Article has demonstrated that the original understanding of the Constitution permits war powers to be exercised as they have over the last two centuries. Kosovo, however, provokes questions that go beyond the usual struggle between the executive and the legislature in managing war. Kosovo involves perhaps the most important issue facing the American public law system as it enters this century: how the Constitution will adapt to the globalization of political, economic, and security affairs. As this Part will explain, American intervention in Kosovo via multilateral organizations is merely an example of broader developments in economic, environmental, and security affairs. In each of these areas, problems that have become increasingly transnational in scope have called for regulatory solutions from international institutions, rather than solely through national self-help.

Kosovo provides an early example of the constitutional issues that will arise with increasing frequency as governmental power comes to be exercised by international institutions. During the Kosovo operation, the Clinton administration apparently delegated federal authority to non-U.S. officers, suggested that treaty obligations provided justification for the intervention, and acted inconsistently with international law. Future military and nonmilitary cooperation with other nations may raise similar issues about the domestic legal authority of international organizations, the relationships between treaties and constitutional authority, and conflicts between international and domestic law. This Part will address these issues by describing globalization and its effects on the American legal system, discussing the ability of American troops to serve in multilateral operations, and exploring the President's authority over treaty obligations and international law.

¹¹⁸ See STANLEY ELKINS & ERIC MCKITRICK, *THE AGE OF FEDERALISM* 360-62 (1993) (describing legal and political context of *Pacificus-Helvidius* exchange).

A. Globalization and the American Legal System

It is commonplace to hear that globalization is disrupting different aspects of everyday life. Markets and corporate operations today easily stretch across national borders. Advances in technology, communications, and transportation have allowed events abroad to impact domestic markets and institutions more quickly and more profoundly than in the past. Environmental problems that once were considered domestic, such as pollution, have become international in scope. Certain forms of crime, such as the distribution of illegal drugs and money laundering, now stretch across national borders. Even issues vital to national security, such as the proliferation of nuclear, biological, and chemical weapons, have expanded to include the activities of many nations. These problems, once viewed as wholly within the powers of individual nations to address, often now require international solutions to be fully comprehensive and effective. Correspondingly, policy initiatives have created new forms of international cooperation that include multiple parties, establish independent international organizations, and pierce the veil of the nation-state and seek to regulate individual private conduct. Kosovo is an example of these developments in international regulation and public law, and as such, it demonstrates the constitutional difficulties that may afflict other efforts to enforce public policy through international organizations, rather than domestic organs of government.

While perhaps necessary to meet international goals, these novel arrangements and institutions create difficulties because of their intrusiveness into what was once under the exclusive preserve of the domestic political and legal system. In this century, the American legal system must determine how or whether it will allow governmental sovereignty to be transferred to international policymakers, consistent with the Constitution. Events in Kosovo serve as a prime example of the sharpening tension between the demands of international cooperation and the domestic legal system. Historically, the Balkans have been a tinderbox for broader European wars that have called upon American intervention to restore peace and stability. American and European policymakers feared that conduct that once was considered domestic now threatened to cause wider disruptions to European security. Serbia's course of repression, for example, produced a stream of refugees that threatened to destabilize neighboring countries, and ultimately our European allies. Widespread human rights violations not only offended European and international norms, but might even have provoked intervention by regional powers, raising the possibility

of conflict between greater powers and perhaps NATO allies.¹¹⁹

Responses to this transnational problem seemed to require a multilateral solution. No individual European nation had the military or political wherewithal to force Serbia to end its aggression. It was equally unlikely that the United States would unilaterally intervene so far from home, in a nation with close cultural and historical ties to its former Cold War enemy, where its direct national interests were hard to define. Operating through the multilateral structure of NATO allowed member nations to gather their collective resources to address the risks posed by events in Kosovo. Multilateralism allowed the NATO nations, particularly the United States, to submerge the identification of any single nation's interest as dominant in the operation. NATO may have presented a less threatening front to nations, such as Russia, that sympathized with Serbia and might have feared an intervention so close to its own borders. Kosovo signaled the transformation of NATO from a defensive alliance, whose primary goals were to contain Soviet expansionism and to promote European reconstruction,¹²⁰ to a multilateral organization that engaged in pro-active operations to pre-empt threats to regional security.

B. Sovereignty and Multilateralism: The Case of Military Command

Notwithstanding the benefits of multilateral action, intervention in Kosovo raises difficult questions concerning the interaction of international organizations with domestic constitutional structures. One significant issue is whether the President can send American troops to serve under foreign command. During the Kosovo operation, for example, overall command of the intervention remained in the hands of General Wesley Clark, an American officer, who served both as NATO's Supreme Allied Commander Europe ("SACEUR") and as commander-in-chief of the U.S.-European Command. Although he answered to President Clinton, the Secretary General of NATO, and the heads of NATO's member nations, Clark's dual role meant that strategic command of U.S. forces rested in the hands of an American general. American troops, however, could serve under

¹¹⁹ For a general discussion of the political and military background to the American and NATO intervention in Kosovo, see generally *Editorial Comments: NATO's Kosovo Intervention*, 93 AM. J. INT'L L. 824 (1999) (essays by Professors Henkin, Wedgwood, Chancey, Chinkin, Falk, Franck, and Reisman on Kosovo).

¹²⁰ See, e.g., THOMAS ALAN SCHWARTZ, *AMERICA'S GERMANY: JOHN J. MCCLOY AND THE FEDERAL REPUBLIC OF GERMANY passim* (1991).

Clark's various subordinates, some of whom were non-U.S. officers, such as British General Sir Michael Jackson, who commanded the 16,000 NATO troops stationed in Macedonia during the air war, and then led the NATO ground forces that essentially have occupied Kosovo.¹²¹ In other deployments ordered by President Clinton, such as those in Somalia and Bosnia, American forces attacked military targets at the instruction of non-U.S. commanders acting under the authority either of NATO or the U.N.¹²²

President Clinton's willingness to send American troops into combat under non-U.S. officers appears to be unprecedented. Before analyzing the constitutional nature of the administration's approach to multilateral operations, it is useful first to distinguish among four different levels of military command. First is policy command, which refers to policies that guide the conduct of international relations and national strategy.¹²³ Second, these policies establish the objectives for strategic command, which translates national policy into more concrete military plans. These are developed by the Joint Chiefs of Staff and the Secretary of Defense.¹²⁴ Third, strategic plans guide officers who exercise operational command over corps and divisions and are charged with supervising subordinate officers, organizing forces, and directing their missions, but who do not actually issue orders directly to troops.¹²⁵ Fourth, those officers that directly control troops, who employ units in combat and determine their specific use, exercise tactical command.¹²⁶

American experience in modern alliance warfare suggests that while the political branches have allowed the transfer only of certain levels of command to non-U.S. officers, they have reserved most forms of command solely for American military officers. President Woodrow

¹²¹ See DOD News Briefings (visited Apr. 21, 2000) <http://www.defenselink.mil/news/Jun1999/t06111999_t0611asd.html>; <<http://www.defenselink.mil/news/Jun1999/990611J-0000K-002.jpg>>; <<http://www.defenselink.mil/news/Jun1999/990611J-0000K-003.jpg>>.

¹²² See David Kaye, *Are There Limits to Military Alliance? Presidential Power to Place American Troops Under Non-American Commanders*, 5 TRANSNAT'L L. & CONTEMPORARY PROBLEMS 399, 438-43 (1995) (describing U.N. and NATO presence in Bosnia and U.S. presence in Somalia).

¹²³ See EDWARD LUTTWAK & STUART KOEHL, *THE DICTIONARY OF MODERN WAR* 466 (1991) (defining policy).

¹²⁴ See JOINT CHIEFS OF STAFF, *DEPARTMENT OF DEFENSE DICTIONARY OF MILITARY AND ASSOCIATED TERMS* 349-350 (1987).

¹²⁵ See *id.* at 262; LUTTWAK & KOEHL, *supra* note 123, at 442 (defining operational).

¹²⁶ See JOINT CHIEFS OF STAFF, *supra* note 124, at 363; LUTTWAK & KOEHL, *supra* note 123, at 598 (defining tactical).

Wilson and General John Pershing, for example, resisted efforts during World War I to incorporate American troops immediately into British and French units. Throughout the conflict, President Wilson maintained policy command, General Pershing retained operational command, and subordinate American officers exercised tactical command of the American Expeditionary Force. In response to Germany's last-ditch offensive in March 1918, however, the allied political leadership delegated strategic command to French General Foch, although American officers from General Pershing on down retained operational and tactical command.¹²⁷ During World War II, President Roosevelt and General George Marshall decided to develop both policy and strategic plans jointly with the British Prime Minister and the British chiefs of staff.¹²⁸ Although officers of different nationalities could exercise operational command—British Field Marshal Bernard Montgomery led the Normandy invasion, under the command of the Supreme Allied Commander in Europe, General Dwight Eisenhower—tactical command of units generally remained in the hands of their national commanders. Only American officers exercised the authority to both coerce and discipline American units and troops.¹²⁹

Postwar conflicts do not appear to have changed this practice. Although the United Nations Charter called for the creation of a U.N. military force composed of national units placed at the Security Council's policy, strategic, and operational command,¹³⁰ the ideal of an international military force died with the advent of the Cold War.¹³¹ Like other major military powers, the United States never concluded

¹²⁷ See Michael J. Glennon & Allison R. Hayward, *Collective Security and the Constitution: Can the Commander in Chief Power Be Delegated to the United Nations?*, 82 GEO. L.J. 1573, 1584-86 (1994) (discussing Americans serving under foreign command); Kaye, *supra* note 122, at 420-25 (explaining that non-American officers sometimes shared strategic and operational command in First World War); see also DAVID F. TRASK, *THE UNITED STATES IN THE SUPREME WAR COUNCIL* 23-24 (1961) (discussing the establishment of the Supreme War Council); Tasker H. Bliss, *The Evolution of the United Command*, FOREIGN AFF., Dec 15, 1922, at 29-30 (discussing unified command under General Foch).

¹²⁸ See Kaye, *supra* note 122, at 425-28 (discussing the consolidation of British and American authority).

¹²⁹ See *id.* at 428 (stating that American troops were not subjected to British Commanders' "coercive" authority); see also Richard M. Leighton, *Allied Unity of Command in the Second World War: A Study in Regional Military Organization*, 67 POL. SCI. Q. 399, 402, 425 (1952) (discussing the power to coerce).

¹³⁰ See U.N. CHARTER art. 43.

¹³¹ See Glennon & Hayward, *supra* note 127, at 1574 (asserting that the superpower deadlock of the Cold War halted the development of collective security forces).

the necessary agreements to place designated units under U.N. command and control. In the two large-scale military conflicts sanctioned by the U.N., the Korean War and the Persian Gulf War, American generals exercised strategic command over the allied military, while American officers maintained operational and tactical command over American troops.¹³² As purely American interventions, the use of force in places such as Vietnam, Grenada, and Panama did not raise questions of multilateral command.

Bucking this history, the Clinton administration for the first time assigned American troops to the operational and tactical command of non-U.S. officers. Responding to congressional efforts to stop this new policy,¹³³ the administration claimed a broad constitutional power in the President to delegate military command authority to any person. In an opinion by the Office of Legal Counsel of the U.S. Department of Justice ("OLC"), the administration asserted that congressional proposals to prohibit foreign command of U.S. troops violated the President's commander-in-chief and foreign affairs powers.¹³⁴ According to OLC, the commander-in-chief Clause "commits to the President alone the power to select the particular personnel who are to exercise tactical and operational control over U.S. forces."¹³⁵ To prevent the President from "acting on [his] military judgment concerning the choice of the commanders," even if that commander is an agent of the United Nations, would impermissibly violate both his Commander-in-Chief power and his constitutional ability to conduct diplomacy.¹³⁶ Because "U.N. peacekeeping missions involve multilateral arrangements that require delicate and complex accommoda-

¹³² See generally DEAN ACHESON, PRESENT AT THE CREATION 402-13, 420-25, 445-55, 467-77 (1969) (Korea); GEORGE BUSH & BRENT SCOWCROFT, A WORLD TRANSFORMED 302-492 (1998) (Persian Gulf).

¹³³ In response, Congress considered legislation in 1996 to prohibit the expenditure of any funds for American armed forces that served under U.N. operational or tactical command. Section 3 of H.R. 3308, 104th Cong. (1996), required that "funds appropriated or otherwise made available for the Department of Defense may not be obligated or expended for activities of any element of the armed forces that after the date of the enactment of this section is placed under United Nations operational or tactical control." The bill defined U.N. "command" as command by an official acting on behalf of the U.N. in a peacekeeping or similar operation, where the senior military commander of the force is not an active duty U.S. military officer. *Id.*

¹³⁴ See Memorandum from Alan J. Kreczko, Special Assistant to the President and Legal Adviser to the National Security Council, *Placing of United States Armed Forces Under United Nations Operational or Tactical Control* (May 8, 1996) <http://www.usdoj.gov/olc/mem_ops.htm>.

¹³⁵ *Id.*

¹³⁶ *Id.*

tions of a variety of interests and concerns, including those of the nations that provide troops or resources," OLC argued, a mission's success may depend upon the commander's nationality, or on the "degree to which the operation is perceived as a U.N. activity" and not that solely of the United States.¹⁹⁷

While it identifies and addresses the heart of the issue, the Clinton administration's justification fails to convince, primarily because it constructs a boundless principle that does not account for historical practice. According to OLC, the President's Commander-in-Chief power allows him to select anyone at all to lead American troops into potentially life-or-death situations, even non-U.S. officials. OLC appears to maintain that the President has complete discretion over the decision; he need not even believe that delegating all aspects of command authority is necessary for reasons of national security. OLC's opinion also seems to contemplate that the President could delegate command to individuals, regardless of their relationship, if any, to the federal government. Under OLC's reasoning, the President could place in command a Senator or Supreme Court Justice, any state official, or even private individuals, in addition to international officials, foreign officials, or even foreign private citizens, without having to appoint them officers of the United States. This is not to say that the President cannot "deputize" American private citizens to assist him in executing the laws, only that when he does so they must become officers of the United States, as required by the Appointments Clause, and become subject to the oath requirement of Article VI.¹⁹⁸ The Appointments Clause, in combination with other provisions of Article I, however, seem to bar the appointment of foreign officials as officers of the United States without specific congressional consent.¹⁹⁹

¹⁹⁷ *Id.* (emphasis omitted).

¹⁹⁸ All officers of the United States are required to take an oath to support the Constitution. See U.S. CONST. art. VI, § 3. If the President could delegate authority to individuals who are not officers of the United States, they could wield federal power but without any responsibility to uphold and defend the Constitution.

¹⁹⁹ OLC did not claim that Congress had given the President the statutory authority to appoint, or deputize, non-officers to U.S. military command in certain situations. Even if such a statutory authority exists, it would come into conflict with Article I, Section 9, Clause 7, which declares that:

No Title of Nobility shall be granted by the United States: And no Person holding any Office of Profit or Trust under them, shall, without the Consent of the Congress, accept of any present, Emolument, Office, or Title of any kind whatever, from any King, Prince, or foreign State.

U.S. CONST. art. I, § 9. This section seems to create a rule that an officer of the United States cannot serve as an official in any foreign government, which might make perfect sense given the concerns that the Framers might have had about potentially conflicting

Further, OLC's argument runs up against the unbroken historical practice of previous commanders-in-chief. Presidents apparently have never agreed to delegate either policy or tactical command to non-U.S. officers. Indeed, in only one instance, under the specter of an Allied collapse in World War I, has a President transferred strategic command outside the U.S. command structure. Even though Presidents have granted operational control to foreign commanders, they have circumscribed that delegation by reserving coercive and disciplinary authority over American troops for American commanders only. Even in the recent war against Serbia, American military leaders have sought to avoid continuous service by American troops under foreign command by giving each national military contingent a separate sector of Kosovo to administer. OLC's approach, however, would allow the President to vest even tactical control over American forces to foreign commanders, would permit foreign commanders to exercise coercive and disciplinary authority over American soldiers, and would even provide for the amalgamation of American soldiers into foreign or international military units—something that no President has ever dared before.

Most importantly, the Clinton administration's legal justification for its recent multilateral command policy fails to respect the Constitution's limitations on the transfer of federal power to entities that are not directly responsible to the American people. In a different context, I have outlined the constitutional difficulties with delegating governmental power outside of the national government.¹⁴⁰ First, placing American troops under foreign command seems inconsistent with the Supreme Court's recent jurisprudence interpreting the Appointments Clause.¹⁴¹ While much recent academic writing on the Clause has focused on the relative roles of the President and Senate in

loyalties to the United States. While Section 9 says that Congress can grant a person an exception to this rule on a case-by-case basis, it seems doubtful that Congress could enact a general rule waiving the constitutional provision in all cases whatsoever.

¹⁴⁰ See generally John C. Yoo, *New Sovereignty and the Old Constitution: The Chemical Weapons Convention and the Appointments Clause*, 15 CONST. COMMENTARY 87, 116 (1998) [hereinafter Yoo, *New Sovereignty*].

¹⁴¹ The Appointments Clause declares that the President shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other public Ministers and Consuls, Judges of the supreme Court, and all other Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law: but the Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, to the Courts of Law, or in the Heads of Departments.

U.S. CONST. art. II, § 2, cl. 2.

appointing judges,¹⁴² the Court has articulated the Clause's broader function in ensuring that federal power is exercised only by federal officers accountable to the people's elected representatives.¹⁴³ As first stated by the Court in *Buckley v. Valeo*, the Appointments Clause requires that those exercising substantial authority under federal law must undergo appointment according to the Clause's terms.¹⁴⁴ According to the Court's subsequent opinions, this rule prevents Congress from transferring executive law enforcement authority to individuals not responsible to the President or his subordinates.¹⁴⁵ The transfer of military command, pursuant to NATO or U.N. obligations, threatens this principle by allowing the President or the treaty-makers to transfer executive power to individuals independent of presidential control.¹⁴⁶

Furthermore, the Appointments Clause plays more than a separation of powers role in maintaining the balance between the Congress, the treaty-makers, and the President. As Chief Justice Rehnquist has written for the Court, "The Clause is a bulwark against one branch aggrandizing its power at the expense of another branch, but it is more: it 'preserves another aspect of the Constitution's structural integrity by preventing the diffusion of the appointment power.'"¹⁴⁷ According to

¹⁴² See John O. McGinnis, *The President, the Senate, the Constitution, and the Confirmation Process: A Reply to Professors Strauss and Sunstein*, 71 TEX. L. REV. 633, 638-39 (1993); David A. Strauss & Cass R. Sunstein, *The Senate, the Constitution, and the Confirmation Process*, 101 YALE L.J. 1491, 1502-12 (1992); John C. Yoo, *Criticizing Judges*, 1 GREEN BAG 2d 277, 278 (1998).

¹⁴³ See, e.g., *Edmond v. United States*, 520 U.S. 651, 663 (1997); *Ryder v. United States*, 515 U.S. 177, 180-84 (1995); *Weiss v. United States*, 510 U.S. 163, 169-76 (1994); *Freytag v. Commissioner*, 501 U.S. 868, 884 (1991); *Buckley v. Valeo*, 424 U.S. 1, 135 (1976).

¹⁴⁴ See *Buckley*, 424 U.S. at 132.

¹⁴⁵ See *Edmond*, 520 U.S. at 659; see also *Printz v. United States*, 521 U.S. 898, 922-23 (1997).

¹⁴⁶ There can be little doubt that if the President delegates command over American troops to foreign or international officers, those officers will exercise substantial authority under federal law. Under the Code of Military Justice, an American soldier who refuses to obey the orders of a superior officer is subject to potentially severe penalties, including death or long-term imprisonment. See 10 U.S.C. § 890(2) (1994) (disobeying a superior commissioned officer, during time of war, is punishable by death or other punishment as a court-martial may direct); 10 U.S.C. § 891(2) (1994) (disobeying a warrant, noncommissioned, or petty officer can be punished as court-martial shall direct); 10 U.S.C. § 892(1) (1994) (disobeying a lawful general order or regulation shall be punished as a court-martial shall direct); 10 U.S.C. § 892(2) (1994) (disobeying any other lawful order shall be punishable as court-martial may direct).

¹⁴⁷ *Ryder v. United States*, 515 U.S. 177, 182 (1995) (quoting *Freytag*, 501 U.S. at 878).

the Court, the Clause prevents the diffusion of federal power by limiting its exercise only to those who undergo the appointment process.¹⁴⁸ The Framers, the Justices believed, centralized the appointments power because they feared the vesting of power in officeholders who were not accountable to the electorate, as had occurred during the colonial period.

A centralized appointments process prevents the national government, as a whole, from concealing or confusing the lines of governmental authority and responsibility so that the people may hold the actions of the government accountable. Allowing the transfer of command authority to non-U.S. officers threatens this basic principle of government accountability. International or foreign officials have no obligation to pursue American policy, they do not take an oath to uphold the Constitution, nor can any American official hold them responsible for their deeds. Granting military command to such individuals undermines the Clause's purpose in promoting a certain level of government accountability because it transfers federal power to those who lie outside the control of the people.

Second, the Constitution's creation of a unitary executive militates against the delegation of command authority to a foreign commander. Whether one agrees with the formalist or functionalist side in the debate over the separation of powers,¹⁴⁹ transferring power outside of the federal government fundamentally conflicts with the concept of unified executive power. For formalists, any exercise of federal authority by an individual who is not a member of the executive branch, and thus is not removable by the President, violates the separation of powers because it prevents the President from fully controlling the implementation of federal law.¹⁵⁰ Once the President delegates authority to a foreign commander, he cannot issue orders to that commander, backed up by the threat of removal and discipline, as he could to an American officer, even though that foreign official may issue directives to subordinate American soldiers. In fact, as the Clinton administration has noted, the independence of such foreign commanders from American control is crucial to the success of their

¹⁴⁸ See *id.* at 182-84 (noting that the Clause prevents diffusion of the appointment power).

¹⁴⁹ See, e.g., Steven G. Calabresi & Saikrishna B. Prakash, *The President's Power to Execute the Laws*, 104 YALE L.J. 541 (1994) (formalist); Martin S. Flaherty, *The Most Dangerous Branch*, 105 YALE L.J. 1725 (1996) (functionalist); Lawrence Lessig & Cass R. Sunstein, *The President and the Administration*, 94 COLUM. L. REV. 1 (1994) (functionalist).

¹⁵⁰ See Calabresi & Prakash, *supra* note 149, at 593-99.

missions.¹⁵¹ One of the very purposes of multilateralism is to create the impression that a military operation falls under the aegis of a neutral international organization and hence does not represent the interests of a single nation. While functionalists may be willing to accept some conditions on the removal power, they have not endorsed the delegation of federal power to those who are completely insulated from presidential control.¹⁵² Further, functionalists could object to foreign command of American troops because it would undermine accountability in government. Voters cannot hold either the President or Congress accountable if decisions are made by those who are not members of either branch.¹⁵³

Third, the non-delegation doctrine reinforces the limitations imposed by the Appointments Clause and the unitary executive on the delegation of command authority outside of the American military. Recent decisions by the Supreme Court and the U.S. Court of Appeals for the D.C. Circuit suggest that the federal courts have begun to take the non-delegation doctrine more seriously than in the past.¹⁵⁴ As formulated by the Court, the doctrine prohibits Congress from delegating its enumerated power to another branch unless it has stated an objective, prescribed methods to achieve it, and articulated intelligible standards to guide administrative discretion.¹⁵⁵ These standards provide the courts, Congress, and the public with some objective factors to review whether the power is being exercised within the limits of the

¹⁵¹ See *supra* text accompanying notes 136-37.

¹⁵² See, e.g., *Morrison v. Olson*, 487 U.S. 654, 691-92 (1988) (noting that "good cause" removal of the independent counsel still allows the President to retain authority over the counsel's duties); see also Lessig & Sunstein, *supra* note 149, at 106-16 (claiming that although there are numerous independent agencies, complete independence from the President would still raise constitutional problems).

¹⁵³ One might respond to this argument by pointing out that if the President disapproves of the actions of the foreign commander, he or she may take back the power of command—in a sense, removing the foreign officer. This point, however, is not fully convincing. First, the question whether a delegation of power violates the non-delegation doctrine does not turn on whether Congress can terminate the delegation; Congress can always enact another statute to reverse an earlier delegation. Second, a presidential decision to undo a delegation of command may prove to be too little, too late, for an American military unit engaged in combat or in the midst of a dangerous situation as a result of a foreign commander's decisions.

¹⁵⁴ See, e.g., *Clinton v. New York*, 524 U.S. 417, 442-47 (1998) (striking down the President's use of the Line Item Veto Act where its effect was to amend acts of Congress, thus violating the Presentment Clause); *American Trucking Ass'n v. EPA*, 175 F.3d 1027, 1033 (D.C. Cir. 1999) (per curiam).

¹⁵⁵ See *Mistretta v. United States*, 488 U.S. 361, 371-79 (1989) (approving a congressional delegation of power where the goals were clearly set out, the purposes asserted, and the scope of the delegation was definitively confined).

delegation. Transfer of military command to foreign or international officials threatens the purposes of this rule. If the President delegates command authority over American troops entirely outside of the federal government, neither Congress nor the public can determine whether foreign or international commanders are exercising their authority according to American standards, nor can they enforce their policy wishes through the usual legal or political methods available when power is delegated within the executive branch.

A brief examination of the original understanding supports this reading of the Constitution's promotion of government accountability. Rejecting the idea that sovereignty resided in a king, or even in the government, the revolutionaries located sovereignty in the people, for whom government officials served as agents.¹⁵⁶ One of the colonists' chief complaints against the British was the rule of imperial officials, who were appointed by a king, and the lack of representation in government. "There is," John Adams wrote in 1776, "something very unnatural and odious in a Government 1000 Leagues off. [A] whole government of our own Choice, managed by Persons whom We love, revere, and can confide in, has charms in it for which Men will fight."¹⁵⁷ The ideal of popular sovereignty, which infused the revolutionary and ratification periods, conceived of all government servants as ultimately answerable to the people. In drafting a new system of government, the Framers sought to advance this principle by dividing the appointments power between the President and Senate to prevent either a single individual or a legislative faction from abusing appointments to their personal or group advantage.¹⁵⁸

¹⁵⁶ See WOOD, *supra* note 101, at 344-62 (chronicling the development of popular sovereignty); Akhil R. Amar, *Of Sovereignty and Federalism*, 96 YALE L.J. 1425, 1429-37 (1987) (examining constitutional debate on where sovereignty resided and its ultimate relocation from government to the people).

¹⁵⁷ WOOD, *supra* note 101, at 78.

¹⁵⁸ See Yoo, *New Sovereignty*, *supra* note 140, at 109. Forcing the President and Senate to share the appointments power opens up the selection and performance of public officials to public scrutiny, and thereby enhances responsibility and accountability in government. As Alexander Hamilton wrote in *Federalist No. 77*, because the executive had to send nominees to the Senate, "the circumstances attending an appointment, from the mode of conducting it, would naturally become matters of notoriety; and the public would be at no loss to determine what part had been performed by the different actors." THE FEDERALIST NO. 77, at 461 (Alexander Hamilton) (Clinton Rossiter ed., 1961). If the branches approved an unsuitable nominee, both would suffer at the hands of the public. "If an ill appointment should be made," Hamilton wrote, "the executive for nominating and the senate for approving would participate though in different degrees in the opprobrium and disgrace." *Id.* In contrast, for a state such as New York where secrecy prevailed over appointments, "all idea of responsibility is lost."

Delegation of military command to foreign or international officers undermines these principles. Under recent Clinton administration initiatives, individuals who have not undergone the executive, congressional, and public scrutiny that attends appointments, and who are not responsible to the American political system, enjoy the authority to issue orders to American soldiers in life-threatening situations. Independent of the executive branch, foreign commanders need not obey presidential directives, need not follow American laws and regulations, and cannot be removed or disciplined by the President. If Congress or the people disagree with military policy or disapprove of the execution of a military operation, they have no political avenue to oversee the officials who are in command. They cannot demand that the President remove an official for incompetence, failure to obey orders, or disagreement over policy. This runs counter to the Appointments Clause's basic goal of guaranteeing that the people have a voice in the selection of officials who exercise federal powers, and of allowing the people, through the political system, to hold their elected representatives accountable for "an ill appointment."¹⁵⁹

Although previous presidents have allowed command to flow through foreign commanders, particularly those allied with the United States in World Wars I and II, they did so in very different, and important, ways. The precise structure assumed by those forms of cooperation, however, preserved rather than undermined principles of government accountability. It appears that no commander-in-chief before President Clinton has delegated policy or tactical command to non-U.S. officers, nor has any President allowed a non-U.S. officer to coerce or discipline American troops. It also appears that strategic command over American troops has been clearly exercised by a non-U.S. officer only once.¹⁶⁰ When presidents have delegated command, it has usually been at the operational level.¹⁶¹ Operational command, however, does not raise the same problems posed by tactical or policy command. It does not vest foreign officers with the power to actually issue directives to American soldiers that have the force of law behind

Id. at 11. A shared appointment power allows the people to carefully evaluate their agents as they are appointed, and to hold their representatives responsible should the appointees abuse the public trust. See Yoo, *New Sovereignty*, *supra* note 140, at 110-11. By forcing the government to conduct appointments in an open manner, the Constitution promotes government accountability, and ultimately representative democracy.

¹⁵⁹ THE FEDERALIST NO. 77, at 461 (Alexander Hamilton) (Clinton J. Rossiter ed., 1961).

¹⁶⁰ See *supra* text accompanying notes 125-33 (discussing the Normandy invasion as led by British Field Marshall Bernard Montgomery).

¹⁶¹ See *supra* notes 122-32 and accompanying text.

them. Rather, American military officers, in consultation with American political and military leaders—who still retain policy and strategic command—can determine whether to comply with those orders at the tactical level.¹⁶²

On this point, the delegation of operational command resembles the relationship of American domestic law to certain international norms. International organizations and conventions can place legal obligations upon the United States, such as a WTO panel finding that American environmental regulations violate GATT national treatment rules, or they can even call upon the United States to meet some non-binding, aspirational goal.¹⁶³ The United States still remains free, however, to choose how to implement its international obligations, or even whether to violate them and suffer retaliation. In either case, officers of the United States make the decisions and exercise the power of federal law to enforce them. Similarly, if non-U.S. commanders possess operational command, but do not have the authority to coerce or discipline American troops who disobey their orders, they exercise no greater power than any other international organization whose rulings the United States is free, as a matter of domestic law, to adopt or reject. American commanders at the policy and strategic levels still may countermand any order, and American officers at the tactical level are responsible for deciding whether to implement orders of non-U.S. commanders. American officers still retain the authority of federal law in coercing and disciplining American troops. The decision, therefore, whether and how to harmonize the actions of the American government with international requirements still rests with officers of the United States, who are appointed pursuant to the Ap-

¹⁶² NATO's military structure for the occupation of Kosovo attempts to minimize the likelihood that U.S. troops will have to serve on a regular basis under foreign or international command. Each nation that has contributed troops to the NATO force—the United States, Great Britain, Germany, France, and Italy—bears primary control over a different geographic sector in Kosovo. The forces in each sector are commanded by a brigade commander from the same nation (thus, in the United States sector the troops are under the control of an American officer) who in turn reports to General Sir Michael Jackson, a British officer. General Jackson, who holds operational command, reports to the theater commander, Admiral Ellis, who in turn reports to General Wesley Clark, Supreme Allied Commander in Europe. See <http://www.defenselink.mil/news/Jun1999/t06111999_t0611asd.html>. This arrangement does not preclude the forces of one nation from engaging in operations in a sector under the control of another NATO country, and thus serving under the tactical command of a foreign officer.

¹⁶³ See John C. Yoo, *Globalism and the Constitution: Treaties, Non-Self-Execution, and the Original Understanding*, 99 COLUM. L. REV. 1955, 1968 & n.57 (1999) [hereinafter Yoo, *Globalism and the Constitution*].

pointments Clause and remain accountable in the American political system.

In raising the prospect that non-U.S. officers may receive tactical command, the Clinton administration threatens to introduce an unprecedented approach to American military intervention in this century. In seeking to submerge appearances of American unilateralism within broader multilateral organizations, President Clinton has placed American forces at the disposal and command of foreign or international officials. While this may be necessary in order to achieve the goals of working through an independent, neutral international organization, it creates significant tension with American constitutional principles of government accountability and popular sovereignty, as promoted by the Appointments Clause, the unitary executive, and the non-delegation doctrine. One approach that might resolve this potential conflict between international cooperation and American constitutionalism is for presidents and military leaders to transfer only strategic or operational command to non-U.S. officers. Retaining policy and tactical command, combined with the right to coerce and discipline soldiers, would ensure that control over the exercise and enforcement of federal law would remain with individuals responsible to the American government, as required by the Constitution.

C. *The President, Treaty Obligations, and International Law*

Beyond the issue of military command, Kosovo raises issues of a constitutional dimension concerning the relationship between international organizations and law, on the one hand, and American domestic law and institutions, on the other. Although the Clinton administration failed to provide a legal justification for its use of military force in the Balkans, the President referred to American obligations to NATO as one of the primary reasons for the war. The absence of international law commentators from the debate notwithstanding, some foreign relations law scholars in the past have suggested that fulfilling our treaty obligations could provide the President with the constitutional authority to use force without further congressional authorization.¹⁶⁴ Such a claim raises two significant foreign relations

¹⁶⁴ See, e.g., Thomas M. Franck & Faiza Patel, *Agora: The Gulf Crisis in International and Foreign Relations Law, UN Police Action in Lieu of War: "The Old Order Changeth,"* 85 AM. J. INT'L L. 63, 68 (1991). For a trenchant criticism of Franck and Patel, see Glennon & Hayward, *supra* note 127, at 1598 n.144.

law questions: whether the President can use treaty obligations to conduct wars without congressional cooperation, and whether the President can take the United States into war in violation of international law. Practice during the Kosovo war indicates, contrary to the claims of many international law scholars, that the President gains little additional constitutional authority when acting pursuant to a treaty, but that he remains free to violate international law in the national interest. If the Presidents of this century intend to involve the United States more deeply in multilateral military operations, these questions will arise with greater frequency as future commanders-in-chief make war more often pursuant to treaties and the demands of international organizations.

This Article's vision of war powers suggests that the President need not rely upon treaty obligations in order to conduct wars without congressional authorization. One would not have gotten this impression, however, from the previous debates among international lawyers. In the aftermath of the Persian Gulf War, for example, several prominent international law commentators argued about the relevance to domestic war powers of the U.N. Security Council Resolution authorizing the use of force against Iraq.¹⁶⁵ Professor Thomas Franck, for example, has maintained that if the Security Council issues a resolution authorizing military intervention, then the President has the independent constitutional authority to send American troops into hostilities. "Such compliance by the President with international law is not prohibited," Professor Franck and Faiza Patel write, "indeed, it is required—by the Constitution."¹⁶⁶ In the case of the Persian Gulf War, according to Professor Franck, once the Security Council issued Resolution 678, the President had the authority, indeed had the constitutional obligation, to attack Iraq.¹⁶⁷ Professor Michael Glennon, for one, takes the opposite tack. He responds that even if Resolution 678 imposed a mandatory obligation on member nations, a United Nations obligation cannot alter the domestic allocation of war powers.¹⁶⁸ Because Professor Glennon is one of the many academics who believes

¹⁶⁵ See S.C. Res. 678 (Nov. 29, 1990), reproduced in *United Nations: Security Council Resolutions Concerning Iraqi Aggression*, 29 I.L.M. 1565 (1990).

¹⁶⁶ Franck & Patel, *supra* note 164, at 72.

¹⁶⁷ See *id.* at 74.

¹⁶⁸ See Michael J. Glennon, *Agora: The Gulf Crisis in International and Foreign Relations Law, UN Police Action in Lieu of War: The Constitution and Chapter VII of the United Nations Charter*, 85 AM. J. INT'L L. 74, 81 (1991). Professor Glennon expands on these views and applies them to more recent interventions in Glennon & Hayward, *supra* note 127, at 1595-1601.

that Congress must authorize all uses of force, he argues that a treaty obligation cannot eliminate the need for congressional approval of the use of force. Under this view, a treaty obligation would count for little more than, as Professor Eugene Rostow once famously said, a letter from one's mother.¹⁶⁹

The text and history of the constitutional allocation of war powers indicate that this argument is beside the point. Because the President already has the domestic constitutional authority to initiate military hostilities without any authorizing legislation, he need not rely upon treaty obligations for legal justification. President Clinton did not require the U.N.'s permission to deploy troops into Haiti or Somalia or to send the Air Force into combat in Bosnia, because his commander-in-chief and executive powers already gave him sufficient constitutional power to do so. This is not to say, of course, that the treaty demands of the U.N. or of our allies should not affect the President's decisionmaking concerning the use of force. It should be made clear, however, that treaties exert an impact in the realm of international politics and foreign policy, rather than in constitutional law. Even if treaties had some constitutional emanations on war decision making, the President's duty to implement treaties (due to his Article II, Section 3 duty to faithfully execute the laws), and to terminate treaties unilaterally allows him to override or obey any treaty obligation.

A more interesting and difficult question is what impact treaties should have, if any, upon the other domestic actors in the struggle over the use of force. Even though treaties may provide no constitutional boost to the President's discretion as commander-in-chief, some still may believe that treaties should exert a pull upon Congress in support of presidential warmaking. Under Professor Franck's theory, for example, a President armed with a Security Council Resolution could claim that Congress had the constitutional responsibility to fund any use of force authorized by the U.N. or NATO.¹⁷⁰ Similarly, according to Professor Henkin, "Congress is internationally obligated, and has the power under the Constitution, to enact laws necessary and proper to carry out the obligations and responsibilities of the United States under the [U.N.] Charter."¹⁷¹ If treaties are laws of the land, then until they are repealed, these scholars argue, Congress has a con-

¹⁶⁹ See Michael J. Glennon, *The Senate Role in Treaty Ratification*, 77 AM. J. INT'L L. 257, 264 (1983).

¹⁷⁰ See Frank & Patel, *supra* note 164, at 74.

¹⁷¹ LOUIS HENKIN, *FOREIGN AFFAIRS AND THE U.S. CONSTITUTION* 252 (2d ed. 1996).

stitutional duty to fulfill a treaty's terms even if it disagrees with executive foreign policy or the objectives underlying the treaty.¹⁷²

Such claims can trace their roots back to Alexander Hamilton. In 1796, Jeffersonians claimed that Congress could doom the controversial Jay Treaty by refusing to enact implementing legislation.¹⁷³ Hamilton responded that because the Supremacy Clause made treaties the law of the land, the House had no right to consider the treaty on the merits or to refuse to enact the necessary legislation. Wrote Hamilton,

Each house of Congress collectively as well as the members of it separately are under a constitutional obligation to observe the injunctions of a [treaty] and to give it effect. If they act otherwise they infringe the constitution; the theory of which knows in such case no discretion on their part.¹⁷⁴

To make treaties dependent on legislative execution, Hamilton concluded, would render the treaty power hollow.¹⁷⁵ "[T]here is scarcely any species of treaty which would not clash, in some particular, with the principle of those objections," Hamilton declared.¹⁷⁶ "[T]he power to make treaties granted in such comprehensive and indefinite terms and guarded with so much precaution would become essentially nugatory."¹⁷⁷ Hamilton's theory would require Congress to fund automatically presidential warmaking, if those wars were undertaken pursuant to valid treaty obligations—which Hamilton argued in 1791 was for the executive branch to determine.

This approach—essentially the theory underpinning the doctrine of self-executing treaties—is inconsistent with the balance struck by the Constitution between the treaty and the legislative powers.¹⁷⁸ Both

¹⁷² This reading, however, conspicuously ignores Article I, Section 7's requirement that "No Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law," which requires bicameralism and presentment for the authorization of any expenditure of funds. U.S. CONST. art. 1, § 7.

¹⁷³ See Yoo, *Globalism and the Constitution*, *supra* note 163, at 2082-86.

¹⁷⁴ Alexander Hamilton, *The Defence No. 36*, HERALD (New York), Jan. 2, 1796, in 20 THE PAPERS OF ALEXANDER HAMILTON, *supra* note 72, at 4. Hamilton argued more fully that a treaty could legislate on any matter within Congress's Article I, Section 8 power, and that any effort to read the treaty power as limited by congressional authority would make it impossible for the nation to enter into treaties. See also *The Defence No. 37*, HERALD (New York), Jan. 6, 1796, in 20 THE PAPERS OF ALEXANDER HAMILTON, *supra* note 72, at 16-22.

¹⁷⁵ See 20 THE PAPERS OF ALEXANDER HAMILTON, *supra* note 72, at 18-22.

¹⁷⁶ *Id.* at 18.

¹⁷⁷ *Id.*

¹⁷⁸ For a more detailed explanation, see generally John C. Yoo, *Globalism and the*

the British constitutional struggles of the seventeenth and eighteenth centuries, and the events of the framing and ratification of the Constitution, indicate that the Framers understood the legislative power to serve as a crucial check upon the executive's control over foreign affairs generally, and the treaty power specifically.¹⁷⁹ The Framers saw a tension between the Supremacy Clause's efforts to make treaties binding on the nation and Article I's vesting of all federal legislative power in Congress. They resolved this problem by explicit analogy to the British model, which allocated legislative authority to Parliament and treaty-making power to the executive. Treaties continued to be executive in nature, as they were under the British constitution, but they could not exercise the legislative authority granted to Congress in Article I. While the executive would enjoy the freedom to manage international relations through the treaty-making power, the Framers believed that the legislative power—with its monopoly over the regulation of domestic affairs—would provide a crucial constitutional and political check on executive power and policies.¹⁸⁰ As Parliament had done *vis-à-vis* the Crown, Congress might use its legislative and spending powers to frustrate or even counteract treaty obligations, independent of the wishes of the treaty-makers.

Article I's vesting of legislative power in Congress gives it a blocking role in treaty making. By withholding implementing legislation or funding, Congress can prevent a treaty from taking domestic effect. In light of this understanding of the Constitution, Congress remains free to exercise its constitutional authorities as it sees fit, regardless of the President's claims that he is upholding treaty requirements. Even if the U.N. or NATO directed its member nations to intervene militarily, and even if these directives were considered valid treaty obligations that amounted to the law of the land, Congress has the constitutional discretion to use its funding and legislative powers to prevent the executive from fulfilling those duties. While refusing to fund actions necessary to fulfill our treaty obligations might violate international law, such action does not violate the Constitution. In invoking our obligations under NATO, therefore, the President may have provided a political justification for the Kosovo war, but not one that could have constitutionally compelled Congress to approve or support the intervention. Congress's refusal to provide authorization for the war, and its debate on the merits of funding, indicate that international law

Constitution, *supra* note 163, and Yoo, *Treaties and Lawmaking*, *supra* note 102.

¹⁷⁹ See Yoo, *Globalism and the Constitution*, *supra* note 163, at 1955.

¹⁸⁰ See *id.*

scholars' views on the treaty power found little purchase during consideration of the Kosovo war.

American intervention renewed a second, long-running debate—whether the President has a constitutional duty to obey international law. Kosovo appears to have answered this question, in that President Clinton violated international law—without domestic objection—by attacking a sovereign nation without Security Council approval. Under the U.N. Charter, which guarantees the sovereignty and independence of its member states, it appears that the attack upon Serbia violated international law. Article 2(4) of the Charter decrees that members shall “refrain . . . from the threat or use of force against the territorial integrity or political independence of any state.”¹⁸¹ Article 2(3) calls upon nations to settle their international disputes “by peaceful means in such a manner that international peace and security, and justice, are not endangered,”¹⁸² and Article 2(7) declares that nothing in the Charter “shall authorize the United Nations to intervene in matters which are essentially within the domestic jurisdiction of any state.”¹⁸³ Unless one can substantiate the difficult claim that Serbian activities rose to the level of genocide, which would be a crime against humanity that any nation would be authorized to stop, it seems that the tragedies in Kosovo represented domestic matters internal to Yugoslavia, the resolution of which the Charter rules out the use of force.

A state may still use force, in keeping with the Charter, under two conditions. First, if a nation is attacked in violation of Article 2(4),¹⁸⁴ it may act in self-defense. Second, a nation may use force against another nation if acting pursuant to Security Council authorization. Under Article 42, the Security Council may call on member nations to engage in “demonstrations, blockade, and other operations by air, sea, or land forces” that it thinks “necessary to maintain international peace and security.”¹⁸⁵ Under Article 39, the Security Council may is-

¹⁸¹ U.N. CHARTER art. 2(4).

¹⁸² *Id.* art. 2(3).

¹⁸³ *Id.* art. 2(7).

¹⁸⁴ *See id.* art. 51.

¹⁸⁵ *Id.* art. 42. Many have argued, however, that the Security Council cannot require nations to intervene under Article 42 unless it has at its disposal national military forces, pursuant to special agreements under Article 43. *See* Glennon, *supra* note 168, at 77-80 (collecting sources). No agreements between the U.N. and member nations under Article 43 ever took effect. This, however, only prevents the Security Council from requiring member nations to take military action, not from requesting that they do so voluntarily. The Charter also allows the Security Council to authorize police ac-

sue recommendations that ask member nations to voluntarily take military action to restore international peace. Unless a nation is acting in self-defense, the U.N. Charter appears to require that the Security Council must authorize all other uses of force. While one can make (and I might subscribe to) the argument that a nation must be able to use force to defend its national interests, even if a cross-border invasion has not occurred, the U.N. Charter and most international legal scholars exclude this possibility.

If this interpretation of the U.N. Charter is correct, then the United States cannot engage in military hostilities unless attacked or unless authorized by the Security Council. As Professor Henkin has argued: "By adhering to the Charter, the United States has given up the right to go to war at will."¹⁸⁶ Under this approach, the Clinton administration's military attack upon Serbia violated international law. The United States and its allies attacked the civilian and military assets of another sovereign nation. They did not receive either a Security Council decision under Article 42 to engage in a police action, or an authorization under Article 39 to use force to restore international peace and security. It is difficult to claim, with a straight face, that American intervention in Kosovo was necessary for purposes of national self-defense. American-led attacks in Kosovo and Serbia, therefore, violated international law under the theories of most international law scholars.

Under the view promoted by many foreign relations law scholars, the President's violation of international law should have made Kosovo presumptively unconstitutional. For example, many leading commentators argue that the President has a constitutional duty to enforce customary international law.¹⁸⁷ International law—either through treaty or as federal common law—is part of the "Laws of the Land" under Article VI's Supremacy Clause. Article II's requirement that the President enforce the laws, according to these scholars, means that international law must be obeyed by the President. A President may not violate international law, just as he cannot violate a

tions by regional organizations. See U.N. CHARTER art. 53 ("The Security Council shall, where appropriate, utilize such regional arrangements or agencies for enforcement action under its authority.").

¹⁸⁶ HENKIN, *supra* note 171, at 250.

¹⁸⁷ See, e.g., Michael J. Glennon, *Raising the Paquete Habana: Is Violation of Customary International Law by the Executive Unconstitutional?*, 80 NW. U. L. REV. 321, 325 (1985); Louis Henkin, *International Law As Law in the United States*, 82 MICH. L. REV. 1555, 1567 (1984); Jules Lobel, *The Limits of Constitutional Power: Conflicts Between Foreign Policy and International Law*, 71 VA. L. REV. 1071, 1179 (1985); see also Agora: *May the President Violate Customary International Law?*, 80 AM. J. INT'L L. 913 (1986).

statute, unless he believes it to be unconstitutional. As Professor Henkin has written: "There can be little doubt that the President has the duty, as well as the authority, to take care that international law, as part of the law of the United States, is faithfully executed."¹⁸⁸ While some admit that certain forms of constitutional or statutory authority might allow the President to violate international law,¹⁸⁹ others go farther in claiming that the President cannot violate certain forms of international law regardless of his domestic authority.¹⁹⁰ These differences aside, many foreign relations scholars seem to agree that the federal courts ought to exercise judicial review and invalidate executive action that contravenes international law.

Although the inclusion of customary international law as federal common law is open to potentially crippling doubts,¹⁹¹ such arguments might be on firmer ground when it comes to treaties, which are explicitly mentioned in the Supremacy Clause.¹⁹² If foreign relations law scholars were correct about the binding nature of even customary international law on the executive branch, then certainly courts could enjoin the President from violating a more concrete form of international law—namely the U.N. Charter—that had been adopted through the treaty process. Nonetheless, Kosovo demonstrates that international law imposed little restraint upon presidential action, and

¹⁸⁸ Henkin, *supra* note 187, at 1567; see also Louis Henkin, *The President and International Law*, 80 AM. J. INT'L L. 930, 937 (1986).

¹⁸⁹ See, e.g., Glennon, *supra* note 187, at 325; Henkin, *supra* note 188, at 936-37.

¹⁹⁰ See Lobel, *supra* note 187, at 1075.

¹⁹¹ See Curtis A. Bradley & Jack L. Goldsmith, *Customary International Law As Federal Common Law: A Critique of the Modern Position*, 110 HARV. L. REV. 815, 817 (1997); see also ALFRED RUBIN, *ETHICS AND AUTHORITY IN INTERNATIONAL LAW* 185-206 (1997); Philip R. Trimble, *A Revisionist View of Customary International Law*, 33 UCLA L. REV. 665, 672-673 (1986); Arthur M. Weisburd, *The Executive Branch and International Law*, 41 VAND. L. REV. 1205, 1269 (1988). For some of the responses to Professors Bradley and Goldsmith, see Harold H. Koh, *Is International Law Really State Law?*, 111 HARV. L. REV. 1824, 1827 (1998); Gerald L. Neuman, *Sense and Nonsense About Customary International Law: A Response to Professors Bradley and Goldsmith*, 66 FORDHAM L. REV. 371, 371 (1997); Beth Stephens, *The Law of Our Land: Customary International Law As Federal Law After Erie*, 66 FORDHAM L. REV. 393, 396-97 (1997). Bradley and Goldsmith have responded to their critics several times. See Curtis A. Bradley & Jack L. Goldsmith III, *Federal Courts and the Incorporation of International Law*, 111 HARV. L. REV. 2260 (1998); Curtis A. Bradley & Jack L. Goldsmith, *The Current Illegitimacy of International Human Rights Litigation*, 66 FORDHAM L. REV. 319, 330 (1997); cf. Bradford R. Clark, *Federal Common Law: A Structural Reinterpretation*, 144 U. PA. L. REV. 1245 (1996).

¹⁹² I have argued elsewhere that the inclusion of treaties in Article VI places duties upon the political branches to take measures to execute them, but that they do not impose a constitutional duty upon the courts to execute treaties without implementing legislation. See generally Yoo, *Globalism and the Constitution*, *supra* note 163; Yoo, *Treaties and Public Lawmaking*, *supra* note 102.

that federal courts were not about to enforce treaty obligations so as to restrict the commander-in-chief power.¹⁹³ What was striking in the American public debate over Kosovo was the almost complete absence of any arguments, especially from international law scholars, that the war's apparent violation of international law should pose any domestic legal difficulties for President Clinton.

Kosovo demonstrates why these theories are flawed. The constitutional text nowhere brackets presidential or federal power within the confines of international law. When the Supremacy Clause discusses the sources of federal law, it only enumerates the Constitution, "the Laws of the United States which shall be made in Pursuance thereof,"¹⁹⁴ and treaties, not international law. As I have argued elsewhere, even the inclusion of treaties in the Supremacy Clause does not render treaties automatically self-executing in federal court, not to mention self-executing against the executive branch.¹⁹⁵ Constitutional text aside, allowing the federal courts to rely upon international law and treaty obligations to enjoin presidential warmaking would raise deep structural problems. Relying upon international law and treaty obligations to block presidential warmaking could undermine the President's control over foreign relations, his commander-in-chief authority, and even his freedom to participate in the making of international law. Allowing international law and treaties to interfere with the President's war power would expand the federal judiciary's authority into areas where it has little competence, where the Constitution does not textually call for its intervention, and where it risks defiance by the political branches.¹⁹⁶ At the level of democratic theory, conceiving of international law as a restraint on presidential warmaking would allow norms of questionable democratic origin to constrain actions validly taken under the U.S. Constitution by popularly accountable national representatives.

Some might argue, however, that if the President is acting pursu-

¹⁹³ In fact, it was telling that unlike previous conflicts, no prominent international law scholars stepped forward to criticize President Clinton's war in Kosovo as a violation of international law, and hence a violation of the Constitution, or to file a lawsuit on that basis.

¹⁹⁴ U.S. CONST. art. VI, § 2.

¹⁹⁵ See Yoo, *Globalism and the Constitution*, *supra* note 163, at 1971; Yoo, *Treaties and Public Lawmaking*, *supra* note 102, at 2239. Non-self-execution demonstrates, in fact, that treaty obligations often will not bind the President, which strongly indicates that customary international law cannot do so as well.

¹⁹⁶ I discuss the problems with judicial intervention in war powers disputes at more length in Yoo, *Original Understanding*, *supra* note 10, at 194-96, 287-90, 300-02.

ant to an inherent constitutional authority, he may violate international law. Kosovo might not directly raise the question of the relationship between the President and international law, then, because President Clinton was acting pursuant to his commander-in-chief powers. While this had been the past suggestion of Professor Henkin, it is not the view shared by scholars such as Professors Glennon, Franck, and Jules Lobel, who appear to believe that Presidents cannot unilaterally defy international law.¹⁹⁷ Such efforts, however, to save the primacy of international law demonstrate the internal contradictions of this approach. The President always must act pursuant to some authority either directly granted by the Constitution, or delegated to him by Congress. Otherwise, he is acting *ultra vires* and without legal authority of any kind. To say that the Commander-in-Chief Clause provides the President with the power to violate international law is to admit that virtually any valid presidential action can violate international law, whether it be taken pursuant to the Executive Power Clause, the President's sole organ power, or the war power.¹⁹⁸ Unfortunately for many international law scholars, Kosovo provides a clear demonstration of the manner in which presidents are not constitutionally or legally bound by international law.

CONCLUSION

From the standpoint of the separation of powers, Kosovo shows that international law amounts to nothing more than a constitutional placebo. It neither helps nor hurts the relative roles of any of the branches, no matter how much they might believe in it. As demonstrated by the Clinton administration's bombing of Serbian targets without U.N. sanction, international law has failed to place any real constraints upon the President's exercise of his commander-in-chief or executive war powers. The constitutional text and structure seems to indicate that the executive branch enjoys the constitutional freedom to exercise its foreign affairs powers consistent with, or in conflict with, international norms. Yet, international law provides no special constitutional impetus to presidential warmaking either. Even when they rely upon NATO or U.N. treaty obligations, presidents ought to

¹⁹⁷ Professor Glennon, who has perhaps the most sensible view, applies the *Youngstown* framework to argue that presidents cannot act in this area of shared authority without congressional support. See Glennon, *supra* note 187, at 325.

¹⁹⁸ One might make the argument that presidents cannot violate international law pursuant to a legislatively delegated power, but then one must argue that Congress cannot violate international law either.

receive no special deference from Congress when it considers whether to support a military intervention. The text and original understanding of the Constitution permits Congress to use its plenary legislative and funding powers to check the executive's conduct of foreign policy. In Kosovo, Congress performed this function by considering the merits of the war in the course of funding it.

Once we have removed international law from the mix, the central constitutional issue raised by Kosovo boils down to the familiar debate about the allocation of war powers between President and Congress. American international law scholars, who remained strangely silent during the conflict, had argued during past postwar conflicts that Presidents could not use military force without *ex ante* congressional authorization. Neither President Clinton, nor Congress, nor the federal courts, however, conducted themselves during Kosovo as if this were the operating principle. Rather, in keeping with recent historical practice, the President exercised the initiative to begin military hostilities, subject to Congress's control over the purse, which it used to consider the merits of the intervention. I believe that this outcome finds support in the text, structure, and history of the Constitution, which display no clear effort to undo the warmaking relationship between the executive and legislative branches that prevailed in the Anglo-American political system of the eighteenth century. Under this understanding, the Clinton administration's decision to use military force in Kosovo without a declaration of war or other statutory authorization fell within the formal boundaries established by the Constitution, as they would have been understood by the Framers.

War powers analysis only begins to address the most novel constitutional issue to arise from the Kosovo war. Kosovo now is the most prominent example of the growing efforts to develop multilateral solutions to the problems posed by globalization. In order to establish international institutions capable of neutral, yet effective action, the Clinton administration appears to believe it necessary to transfer public authority to foreign or international commanders who are not officers of the United States. Such multilateralism is in substantial tension with principles of government accountability and popular sovereignty, as promoted by the Appointments Clause, the unitary executive, and the non-delegation doctrine. Recent historical practice, however, suggests methods in which the United States can cooperate with other nations through international institutions without compromising the constitutional structures that safeguard representative

government at home.

Unfortunately, the Clinton administration's performance in Kosovo failed to strike the proper balance between international cooperation and democratic government demanded by the Constitution. Since Kosovo was but an early step in what likely will be an ongoing process in the twenty-first century, the next presidents will have the opportunity to provide greater respect to the principle that only American officials can exercise federal authority over American citizens. Regardless of the approach and justifications provided by the current administration, it seems certain that this same basic issue will arise in a variety of different guises, as nations engage in new forms of international cooperation in order to regulate truly global problems and conduct. In that respect, perhaps one of the most important constitutional issues that the next presidential election may determine will be how the nation reconciles military and regulatory multilateralism with domestic constitutionalism. Kosovo need not provide the precedent on that score for the future.

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