

WINNER OF AMERICAN CONSTITUTION SOCIETY'S
NATIONAL STUDENT WRITING COMPETITION

FROM THE SHORES OF TRIPOLI TO THE DESERTS OF IRAQ:
CONGRESS AND THE PRESIDENT IN OFFENSIVE AND
DEFENSIVE WARS

Alex J. Whitman^{*}

INTRODUCTION

One of the most important powers the Constitution granted to Congress was the power to “declare war.”¹ In over two centuries since the Constitution was enacted, this monumental power has only been exercised in five conflicts: the War of 1812, the Mexican War, the Spanish-American War, World War I, and World War II.² On all five of these occasions, the President sought a declaration of war from Congress, and Congress proceeded to grant the President’s request.³ However, the concept of “undeclared war” has been in existence since before the founding of the nation;⁴ even in the early 19th century, American servicemen found themselves in combat against foreign powers without being authorized by a congressional declaration of war.⁵ Nonetheless, questions remain to this day as to when a decla-

* Judicial Clerk to the Honorable W. Royal Furgeson, Jr., United States Senior District Judge for the Northern District of Texas; J.D., with honors, Emory University School of Law (2010); B.A., *cum laude*, University of Florida (2007). My great thanks to Professor Hanah Volokh, Professor Charles Shanor, and Professor David Bederman for their invaluable guidance in writing this article. Thanks as well to the American Constitution Society for Law and Policy for giving me this opportunity, and to the staff of the *University of Pennsylvania Journal of Constitutional Law* for their diligence work and comments.

1 U.S. CONST. art. I, § 8, cl. 11 (“The Congress shall have Power To . . . declare War, grant Letters of Marque and Reprisal, and make Rules concerning Captures on Land and Water.”).

2 Lori Fisler Damrosch, Comment, *War and Uncertainty*, 114 YALE L.J. 1405, 1408 (2005) (discussing the instances where Congress has formally declared war).

3 See CHARLES A. STEVENSON, CONGRESS AT WAR: THE POLITICS OF CONFLICT SINCE 1789 12–15 (2007).

4 See Jeffrey A. Botelho, *Congressional Responsibility in Controlling the War Machine*, 21 ST. THOMAS L. REV. 305, 316 (2009) (noting that “[t]he Framers were no strangers to undeclared wars,” and referring to George Washington’s service with the British military during the undeclared French and Indian War against France).

5 See *infra* Part II (discussing the American military expeditions in North Africa fighting the Barbary States in the early 19th century).

ration of war by Congress is required, when the President may act without the approval of Congress, or when some form of congressional approval less than a declaration of war is sufficient.

This article proposes a framework distinguishing between offensive war, in which the decision should be made by Congress, and defensive war, where the President can act without congressional approval. This article ultimately determines that when the United States initiates a conflict, Congress should follow the Constitution's instructions and issue a declaration of war, but when a defensive war shifts to an offensive character, the President must seek congressional authorization that can be short of an actual declaration of war. This framework is based on the early views and practices of the Framers for the appropriate role of the President and Congress regarding the war-making power, drawing particularly from two of the United States' earliest undeclared wars known as the Barbary Wars. While these intermittent American conflicts with the Barbary States of North Africa in the early part of the 19th century are among the lesser-known conflicts in the history of the United States, the actions of the executive and legislative branches in these conflicts can help interpret the Framers' original understanding of the proper role for both Congress and the President in undeclared war.⁶ Determining those proper roles is especially relevant because wars conducted without a formal declaration from Congress have become increasingly common over the last sixty years; all five of the major conflicts in the post-World War II era⁷ were not accompanied by a congressional declaration of war.⁸ Regarding the 2003 invasion of Iraq, this article argues that the policy of preemptive war promoted by the Bush administration is inherently offensive because the United States is the nation initiating the conflict. The adoption of this policy calls for a revival of the declaration of war in the limited circumstance of initiat-

6 Many of the Framers and early thinkers of the Republic determined or criticized the nation's course of action during the Barbary Wars, including, as we shall see, Thomas Jefferson, Alexander Hamilton, James Madison, and many others.

7 Major wars fought by the United States since World War II include the Korean War (1950–53), the Vietnam War (1964–1973), the First Gulf War (1991), the War in Afghanistan (2001–present), and the Second Gulf War (2003–present). STEVENSON, *supra* note 3, at 12, 31. All five of these conflicts are discussed *infra* in Part IV.

8 Smaller-scale American uses of military force since World War II include combat deployments in Lebanon, Grenada, Panama, Haiti, and elsewhere; these conflicts were also not accompanied by a declaration of war. *Id.* at 30–31. Most recently, in March of 2011, the United States launched a bombing campaign using air and sea power against government forces as part of an international effort in Libya without a declaration of war. See *Libya Defiant Under Fire; Waves of Missile, Jet Attacks Batter Gadhafi Sites in Bid to Aid Rebels*, CHI. TRIB., Mar. 20, 2011, at C19.

ing an offensive war to restore Congress to its properly intended role. This way, Congress takes the strongest possible action in its arsenal, provides an effective check on the President in the crucial decision to go to war, and places the policy-making role in terms of the war power in the hands of Congress, where the early practices of the Framers indicated it should be.

I. THE WAR-MAKING POWER OF CONGRESS AND THE PRESIDENT

The Constitution meant to create a system where there was a separation of powers between Congress, the President, and the judiciary, rather than the significant amount of power concentrated in the executive that governed Great Britain and the colonies before the American Revolution. Establishing checks on the war power was especially important to the Framers.⁹ Under the British system, the king had near-total control of the deployment and use of the armed forces.¹⁰ Mindful of that power concentrated in the Crown, many delegates to the Constitutional Convention of 1787 were wary of placing the full extent of war powers in the executive branch.¹¹ As Louis Fisher wrote, “Legislative control over the deployment of military forces was widely supported by the framers.”¹²

The wariness of the delegates to the Constitutional Convention to vest the war-making power in the executive showed in their debates and discussions over the war power on August 17, 1787.¹³ When Pierce Butler of South Carolina advocated vesting the “war making power” in the President, Massachusetts delegate Elbridge Gerry responded that he “never expected to hear in a Republic a motion to empower the Executive alone to declare war.”¹⁴ The Constitution

⁹ See Alexander M. Bickel, *Congress, the President and the Power to Wage War*, 48 CHI.-KENT L. REV. 131, 131–32 (1971) (arguing that the Framers’ intent in granting the war power to Congress was to make it harder to start wars).

¹⁰ See LOUIS FISHER, *PRESIDENTIAL WAR POWER* 1 (2d. ed. 2004) (“The power to initiate war [in Great Britain] . . . remained a monarchical prerogative.”).

¹¹ See EDWARD KEYNES, *UNDECLARED WAR: TWILIGHT ZONE OF CONSTITUTIONAL POWER* 19 (1982) (“If the Framers suspected legislative power, they distrusted executive power. Motivated by their recent colonial history and Whig criticism of the Stuart kings, they denied the President most of the prerogatives that the Stuarts had exercised.”); see also FISHER, *supra* note 10, at 3–6 (noting the many proposals during the Constitutional Convention to limit powers expressly belonging to the King under the British model).

¹² Louis Fisher, *Historical Survey of the War Powers and the Use of Force*, in *THE U.S. CONSTITUTION AND THE POWER TO GO TO WAR: HISTORICAL AND CURRENT PERSPECTIVES* 11, 13 (Gary M. Stern & Morton H. Halperin eds., 1994).

¹³ CHARLES WARREN, *THE MAKING OF THE CONSTITUTION* 479–81 (1928).

¹⁴ *Id.* at 480–81 (internal quotation marks omitted).

therefore vested the war power in Congress,¹⁵ but a subtle change allowed for some flexibility. After a delegate suggested that Congress acted too slowly, James Madison, in a motion joined by Gerry, proposed that the language be changed from giving Congress the power to "make" war to giving Congress the power to "declare" war.¹⁶ As the eminent constitutional scholar Charles Warren observed, the purpose of this change was to give the President the ability "to repel sudden attacks."¹⁷ Roger Sherman of Connecticut elaborated by asserting that "the Executive should be able to repel and not commence, war."¹⁸

The decision to place the power to declare war with Congress reflected the Framers' desire to curb executive power; by entrusting this decision to the legislature, the Constitution took a traditionally executive function away from the President.¹⁹ Nonetheless, the President was still given extensive powers related to the military and national security. The President was declared to be "the Commander in Chief of the Army and Navy of the United States, and of the Militia of the several States, when called into the actual Service of the United States."²⁰ This role gave the President some undefined power over the day-to-day control of the armed forces, but his ability to use them faced significant and well-enumerated congressional checks. Con-

15 U.S. CONST. art. I, § 8, cl. 11 ("The Congress shall have Power to . . . declare War, grant Letters of Marque and Reprisal, and make Rules concerning Captures on Land and Water.").

16 WARREN, *supra* note 13, at 480.

17 *Id.* at 480 n.2; *see also* STEVENSON, *supra* note 3, at 8 (stating that the change "would give the executive the power to repel sudden attacks" (internal quotation marks omitted)). At that time, of course, the Framers had to take into consideration that Congress would only be in session for limited periods each term and that it could take weeks or even months to bring Congress together to declare war. Those concerns have since been abated due to modern technological advances, but the Framers' concerns about the proper role of Congress in actually commencing war, rather than repelling an attack, remain essential. *See generally* WILLIAM R. CASTO, *FOREIGN AFFAIRS AND THE CONSTITUTION IN THE AGE OF THE FIGHTING SAIL 174–75* (2006) (noting that, compared to the state of Congress during the Neutrality Crisis of 1793, in which Congress was not in session and unable to swiftly debate and act on legislation, today's legislators are swiftly able to communicate, travel, and spur action, and that "the immense logistical problems confronting the founders no longer exist").

18 STEVENSON, *supra* note 3, at 8.

19 *See* JOSEPH STORY, *COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES* 409 (Carolina Academic Press 1987) (1833) ("In Great Britain [the power to go to war] is the exclusive prerogative of the crown; and in other countries, it is usually, if not universally, confided in the executive department."); John C. Yoo, *War and the Constitutional Text*, 69 U. CHI. L. REV. 1639, 1678 (2002) ("There can be little doubt that the decision to deploy military force is 'executive' in nature and was traditionally regarded as such.").

20 U.S. CONST. art. II, § 2, cl. 1.

gress was given the power to “raise and support Armies,”²¹ to “provide and maintain a Navy,”²² to “make Rules for the Government and Regulation of the land and naval Forces,”²³ and to call forth the militia of the states to “execute the Laws of the Union, suppress Insurrections, and repel Invasions.”²⁴ The Constitution also gave Congress certain powers related to limited actions of war, such as the power to “grant Letters of Marque and Reprisal,” and to set rules on “Captures on Land and Water.”²⁵ This showed that the Framers intended for Congress to play a key role in authorizing and laying the legal groundwork for limited wars.²⁶

The original understanding of the Constitution’s role for the President and Congress appeared to be that the President had the power to respond when war was imposed on the nation by attack or declaration of war, but that the power to initiate offensive military action belonged to Congress.²⁷ While the President commanded and directed operations of military forces,²⁸ he could not make the decision to in-

21 *Id.* at art. I, § 8, cl. 12.

22 *Id.* at art. I, § 8, cl. 13.

23 *Id.* at art. I, § 8, cl. 14.

24 *Id.* at art. I, § 8, cl. 15. Notably, Congress’s ability to summon the militia of the states was limited to these three specific situations. Neither Congress nor the President was given the ability to call forth the militia to initiate *offensive* action. This omission may be due to the widespread disapproval of undertaking offensive war in the early conversations about the Constitution; the state militia was only made available for internal security and repelling attacks and presumably could not be utilized for offensive warfare beyond American borders. How the Framers would react to the National Guard being used overseas in an unprovoked offensive war, such as in the Iraq War, is an interesting question.

25 *Id.* at art. I, § 8, cl. 11.

26 In his concurring opinion in *Bas v. Tingy*, a decision regarding the salvaging of an American vessel recaptured from a French privateer during the United States’s undeclared war with France, Justice Samuel Chase noted Congress’s power to wage limited war, writing: Congress is empowered to declare a general war, or congress may wage a limited war; limited in place, in objects, and in time. If a general war is declared, its extent and operations are only restricted and regulated by the *jus belli*, forming a part of the law of nations; but if a partial war is waged, its extent and operation depend on our municipal laws.

Bas v. Tingy, 4 U.S. 37, 43 (1800) (Chase, J., concurring).

27 See Joseph R. Biden & John B. Ritch, Commentary, *The War Power at a Constitutional Impasse: A “Joint Decision” Solution*, 77 GEO. L.J. 367, 374 (1988) (noting that “there appears little doubt that the Framers’ aim was to empower the President to respond when war was imposed on the nation, but not to empower him to undertake war on his own”); Francis D. Wormuth, *The Nixon Theory of the War Power: A Critique*, 60 CALIF. L. REV. 623, 628 (1972) (“The framers knew that an attack upon the United States imperiled national security. They left to Congress the right to decide when other events imperil national security.”).

28 This power was granted to the President through the Commander in Chief Clause. U.S. CONST. art. II, § 2, cl. 1 (“The President shall be Commander in Chief of the Army and Navy of the United States, and of the Militia of the several States.”).

itiate war on his own; the power to “engage the country in war” remained in the hands of Congress.²⁹

The Constitution, however, was silent on the *scope* of the President’s power in responding to attack. It was well established that the President could repel attacks and use defensive force,³⁰ but under what circumstances the President could respond offensively after the nation had been attacked or after another nation had declared war was contested.³¹ On several occasions in the decades after the Constitution went into effect, the United States faced attacks from foreign powers, spurring debate on how the President could respond. One of the earliest examples involved the nation’s conflicts with Native American tribes during the presidency of George Washington. In the early 1790s, elements of the Creek Nation launched attacks against American settlements on the frontier.³² President Washington wrote to South Carolina Governor William Moultrie that he hoped to launch an “offensive expedition” against the Creek Nation

whenever Congress should decide that measure to be proper and necessary. The Constitution vests the power of declaring war with Congress; therefore no offensive expedition of importance can be undertaken [against the refractory part of the Creek Nation] until after [Congress] shall have deliberated upon the subject, and authorized such a measure.³³

In noting that “no offensive expedition of importance” could be waged without congressional authorization, it was clear that Washington believed that any major decision about the scope and objectives of an offensive military action must be determined by Congress.³⁴ President Washington’s Secretary of War, Henry Knox, echoed this view in the context of a conflict with a different tribe, writing that the

29 See Note, *Congress, the President, and the Power to Commit Forces to Combat*, 81 HARV. L. REV. 1771, 1773 (1968) (“When the proposal to substitute ‘declare’ for ‘make’ was introduced, the debates over the issue indicate that the new wording was not intended to shift from the legislature to the Executive this general power to engage the country in war.”).

30 WARREN, *supra* note 13, at 480 n.2 (discussing the President’s power to “repel sudden attacks”).

31 See Botelho, *supra* note 4, at 316 (“On the surface, the intention of the Framers seems clear—Congress has the power to initiate offensive hostilities, while the President has the power to repel sudden attacks; however, the scope of the President’s power to make defensive war was never defined.”).

32 See Randolph C. Downes, *Creek-American Relations, 1790–1795*, 8 J. S. HIST. 350, 356–57 (1942) (discussing guerilla attacks by groups of Creeks on Americans in the early 1790s).

33 Saikrishna Bangalore Prakash, *The Separation and Overlap of War and Military Powers*, 87 TEX. L. REV. 299, 314–15 (2008) (quoting Letter from George Washington to William Moultrie (Aug. 28, 1793), in 33 THE WRITINGS OF GEORGE WASHINGTON FROM THE ORIGINAL MANUSCRIPT SOURCES, 1745–1799, at 73 (John C. Fitzpatrick ed., 1940)).

34 See *infra* note 124.

President “does not conceive himself authorized to direct offensive operations against the Chickamaggas. If such measures are to be pursued they must result from the decisions of Congress who solely are vested with the powers of War.”³⁵ As the political institutions of the United States developed, it was commonly accepted that it was appropriate for Congress to play a central role in regulating the military and setting the scope, conditions, and objectives of military operations.³⁶

Perhaps the most prominent debate of the time over the war power involved the dueling views of Alexander Hamilton and James Madison, writing as “Pacificus” and “Helvidius” respectively, which took place before any of the major undeclared wars that involved the United States during the early years of the Republic. These commentaries did not arise out of a presidential act of responding to foreign attack; to the contrary, the debate was spurred by President Washington’s declaration of neutrality in response to the expanding conflict on the European continent arising out of the French Revolution.³⁷ Nonetheless, President Washington’s declaration spurred controversy over the roles of the President and Congress in foreign affairs, which inevitably led to commentary on the war powers of each branch.

Alexander Hamilton, writing under the pseudonym “Pacificus,” argued that the President had the power to use the full force of the American military in any way when war was forced upon the nation. Hamilton believed that if a foreign power declared war upon the United States, Congress did not need to play a direct role by invoking the power to “declare war” because war had already been declared.³⁸ Hamilton did, however, acknowledge that the actual decision to transfer from a state of peace to a state of war belonged to the legislative branch, not the President, writing that “the Legislature can alone declare war, can alone actually transfer the nation from a state of

³⁵ Letter from Henry Knox to William Blount (Nov. 26, 1792), in 4 THE TERRITORIAL PAPERS OF THE UNITED STATES 220, 221 (Clarence Edwin Carter ed., 1936).

³⁶ See Louis Fisher, *The Barbary Wars: Legal Precedent for Invading Haiti?*, in THE CONSTITUTION AND THE CONDUCT OF AMERICAN FOREIGN POLICY 313, 313–17 (David Gray Adler & Larry N. George eds., 1996) (discussing a “pattern” established by Presidents Washington and Adams, and followed by their successors during the Barbary Wars, that “Congress had to authorize offensive military actions in advance”); Prakash, *supra* note 33, at 303 (“Contrary to the modern view that the Commander in Chief enjoys exclusive operational authority, early legislators systematically regulated military operations.”).

³⁷ See generally ABRAHAM D. SOFAER, WAR, FOREIGN AFFAIRS AND CONSTITUTIONAL POWER: THE ORIGINS 103–16 (1976) (discussing Washington’s proclamation of neutrality).

³⁸ Cf. FRANK LAMBERT, THE BARBARY WARS: AMERICAN INDEPENDENCE IN THE ATLANTIC WORLD 131 (2005) (discussing Hamilton’s criticism of President Jefferson’s belief that there was a limitation on the President’s war power when the nation had been attacked).

peace to a state of hostility” and thus “[i]t is the province and duty of the executive to preserve to the nation the blessings of peace. The Legislature alone can interrupt them by placing the nation in a state of war.”³⁹ Later, in the context of the Barbary Wars, Hamilton criticized President Thomas Jefferson for expressing any deference to Congress when the nation’s shipping had been raided without provocation.⁴⁰ At this point, he argued that the President possessed inherent power to respond to attack.⁴¹

In response to Hamilton’s assertions during the neutrality controversy, James Madison, writing as “Helvidius,” supported a strong congressional role in the war power and distinct limitations on the President despite the powers granted to him. As recounted by Robert J. Morgan, Madison argued that the President’s power as Commander in Chief of the army, navy, and militia when called into service “is in no way analogous to that of *declaring* war.”⁴² Instead, Madison believed that the powers to actually enter into a war and conduct the operations of war had to be placed in separate branches; in fact, the Commander-in-Chief power was “a striking demonstration of the incompatibility of vesting the powers of making war and directing its operations in the same branch of government.”⁴³ The reason for this, according to Madison, was that those who had responsibility for conducting the operations of war inherently could not safely determine when a war should be started, stopped, or continued; this power had to rest with a party less connected to the actual implementation of the conflict.⁴⁴ The very functioning of this “great principle of free government” was grounded in the bedrock constitutional principle

³⁹ Michael D. Ramsey, *Textualism and War Powers*, 69 U. CHI. L. REV. 1543, 1549 (2002) (quoting Letter of Pacificus No. 1 (June 29, 1793), in 4 THE WORKS OF ALEXANDER HAMILTON 432, 443 (Henry Cabot Lodge ed., 1904)). Writing earlier under the pseudonym “Publius” in *the Federalist Papers*, Hamilton also noted the limited nature of the President’s war powers:

[The President’s authority] would amount to nothing more than the supreme command and direction of the military and naval forces, as first General and Admiral of the Confederacy: while that of the British King extends to the *declaring* of war and to the *raising* and *regulating* of fleets and armies; all which by the Constitution under consideration, would appertain to the Legislature.

THE FEDERALIST NO. 69 (Alexander Hamilton).

⁴⁰ See *infra* text accompanying notes 95–96.

⁴¹ *Id.*

⁴² ROBERT J. MORGAN, JAMES MADISON ON THE CONSTITUTION AND THE BILL OF RIGHTS 100 (1988).

⁴³ *Id.*

⁴⁴ See *id.* (“The reason is that those who are to conduct the operations of war cannot ‘in the nature of things’ be safe judges of whether a war ought to be started, continued, or stopped.”).

that “the power of enacting laws is separated from that of executing them.”⁴⁵ For Madison, then, the war power was merely an extension of this basic foundational principle underlying the Constitution.

Even before the undeclared Barbary Wars, Congress demonstrated both its concern with extensive presidential war powers and its willingness to play a major role in an undeclared or limited war. Most prominently, Congress forcefully showed its concern with extensive executive power over the military during the so-called Quasi-War with France of 1798–1800. During the presidencies of George Washington and John Adams, tensions with France, which was engulfed in revolution and war on the European continent, had risen dramatically.⁴⁶ During this crisis, the Adams administration sought broad authority over military matters, including, most controversially, the power to raise an army at the President’s discretion.⁴⁷ Due to widespread concern in Congress (largely amongst the opposition Republicans) that such an authorization would put far too much power into the hands of the executive, or could even be considered unconstitutional, the final amended bill passed by Congress placed temporal and situational restrictions on the President’s power to raise an army. The finished bill “authorize[d] the President, ‘till the next meeting of Congress,’ to raise troops ‘in the event of a declaration of war against the United States, or of an actual invasion . . . or of imminent danger to such invasion, discovered, in his opinion, to exist.’”⁴⁸ This concededly granted much discretion to the President, as the language indicated the ability to determine whether there was a threat of “imminent invasion,” which would trigger the President’s ability to raise an army, rested within the judgment of the President himself.⁴⁹ However, the views expressed in the bill accurately reflected the concerns expressed during the Constitutional Convention, particularly that the President should be able to act in *response* to an immediate threat or

⁴⁵ *Id.* (internal quotation marks omitted).

⁴⁶ See James Morton Smith, *Background for Repression: America’s Half-War with France and the Internal Security Legislation of 1798*, 18 HUNTINGTON LIBR. Q. 37, 39 (1954) (describing the belligerent military and diplomatic actions of France toward the United States in the 1790s that led to the Quasi-War of 1798–1800).

⁴⁷ See SOFAER, *supra* note 37, at 144 (“By far the most heated delegation debate . . . was over the proposal to authorize the President to raise a substantial army when he deemed it necessary.”).

⁴⁸ *Id.* at 145 (quoting Act of May 28, 1798, ch. 47, 1 Stat. 558) (alteration in original).

⁴⁹ See William J. Murphy, *John Adams: The Politics of the Additional Army, 1798–1800*, 52 NEW ENG. Q. 234, 237 (1979) (“A careful reading of this act indicates that the provisional army was an emergency force to be organized only in case of an immediate crisis between the second and third sessions of the Fifth Congress.”).

attack, but should not be able to act aggressively without the consent of Congress.

Hamilton and Madison did not settle the debate; scholars have interpreted the balance of power between the branches in various ways since the Constitution's inception. Louis Fisher, for example, argued that the power of the President was very limited indeed, asserting that the President was given a "carefully limited" power to "repel sudden attacks in an emergency when Congress was not in session."⁵⁰ This power was seen as restricted to situations when the United States was attacked on the mainland or on the seas.⁵¹ In an article condemning President Harry Truman's use of force in Korea without the approval of Congress, Fisher wrote, "[t]he decision to place U.S. troops in combat and to take the nation from a condition of peace to a state of war requires approval by Congress in advance. That was the constitutional principle in 1787. It has not changed today."⁵² Michael D. Ramsey demonstrated that the meaning of a "declaration of war" at the time the Constitution was written was considered both armed attack and formal declaration.⁵³ He therefore concluded, "[b]ecause war can be declared by commencing hostilities as well as by formal announcement, it should be clear from the text that Congress has power over both sorts of declarations, and the President does not."⁵⁴ Congress thus had the main authority regarding the power to make war. Francis Wormuth and Edwin Firmage emphasized that the debates during the Constitutional Convention stressed "that Congress was to have the policy-making role of 'judging . . . the causes of war' . . ."⁵⁵ In terms of war, therefore, Congress was to have the "policy-making" role.⁵⁶ Wormuth and Firmage believed that Congress needed to play a crucial role in the United States' involvement in a war no matter how it started, asserting that "the President's war power was to be limited both by the exigencies of the 'sudden attack' giving rise to its use *and by the responsibility to defer to the policy-making*

50 Fisher, *supra* note 12, at 13.

51 *Id.*

52 Louis Fisher, *The Korean War: On What Legal Basis Did Truman Act?*, 89 AM. J. INT'L L. 21, 37 (1995).

53 See Ramsey, *supra* note 39, at 1545 (observing that, at the time the Constitution was drafted, "'declaring war' meant initiating a state of war by a public act, and it was understood that this could be done either by a formal declaration *or* by commencing armed hostilities").

54 *Id.* at 1546. Ramsey also acknowledged that, under the understanding of war at that time, the President did have the power to respond to attack. *Id.*

55 FRANCIS D. WORMUTH & EDWIN B. FIRMAGE, *TO CHAIN THE DOG OF WAR: THE WAR POWER OF CONGRESS IN HISTORY AND LAW* 70 (2d. ed. 1989) (alteration in original).

56 *Id.*

*branch of the government at the earliest possible moment.*⁵⁷ Other scholars, most prominently John C. Yoo, argued that the President has the ability to initiate hostilities without consent of Congress.⁵⁸ Yoo asserted that the language of the text did not create a “Congress-first” methodology for who decides to initiate war,⁵⁹ and that the Constitution creates a more flexible system in which the President has greater powers than many pro-Congress advocates argue.⁶⁰

Overall, it seems clear that the original interpretation of the Constitution meant for Congress to be the key actor in initiating or declaring war, while the President was meant to have the authority to act defensively when the nation was attacked. However, the Constitution was silent on a type of conflict that has now become predominant: undeclared war. The Framers were certainly familiar with the concept of undeclared war,⁶¹ and the United States fought in several such conflicts in the early 19th century. The response of the United States to the aggression of the Barbary States of North Africa toward American vessels during the presidencies of Thomas Jefferson and James Madison show how many of these early thinkers believed undeclared war should be handled.

II. EARLY WARS WITHOUT CONGRESSIONAL DECLARATIONS: INTERACTIONS OF CONGRESS AND THE PRESIDENT DURING THE BARBARY WARS

The unique situation of undeclared war provides an effective way to look at the early views on the proper roles of the President and Congress. Congress did declare war on Britain in 1812, marking the first declared war in the nation’s history.⁶² However, Presidents Thomas Jefferson and James Madison both faced situations of undeclared war against foreign powers. Their actions demonstrate the common

⁵⁷ *Id.* (emphasis added).

⁵⁸ See Yoo, *supra* note 19, at 1641–42 (constructing a theory of presidential war power “that provides presidents with authority to initiate hostilities”).

⁵⁹ See John C. Yoo, *Kosovo, War Powers, and the Multilateral Future*, 148 U. PA. L. REV. 1673, 1691 (2000) (comparing the Declare War Clause to other sections of the Constitution and arguing that “if the Framers had intended to impose a strict, Congress-first, warmaking process, they would have used different language”).

⁶⁰ See Yoo, *supra* note 19, at 1662 (emphasizing the “flexib[ility]” of the constitutional system of war powers).

⁶¹ See Botelho, *supra* note 4, at 316.

⁶² DAVID LOCKE HALL, *THE REAGAN WARS: A CONSTITUTIONAL PERSPECTIVE ON WAR POWERS AND THE PRESIDENCY* 35 n.146 (1991) (stating that President James Madison’s acts as Commander in Chief during the War of 1812 were not unilateral since the war had been declared by Congress).

early idea that it was within the province of Congress to decide whether to go to war and what its scope should be and that the President should defer to Congress in such broad decisions of policy related to war.

A. *President Jefferson and the First Barbary War: Establishing Congress's Role*

One of the first situations that tested how the President should act without a congressional declaration of war was President Jefferson's handling of attacks on American shipping by several North African nations known as the "Barbary States." These conflicts consisted of acts of unprovoked aggression against the United States. The Barbary States of Tunis, Tripoli, Algiers, and Morocco threatened European powers' Mediterranean commerce essentially as a matter of policy; from threats or actual violence, these states collected hefty sums in bounties, bribes, and tributes.⁶³ Upon the establishment of the United States, the Barbary States extended those actions to American shipping.⁶⁴ For the first two decades of America's independence, the Washington and Adams administrations attempted to maintain the security of American ships by paying off the North African warlords through congressional appropriation of funds.⁶⁵ Despite the American attempts to appease the Barbary States, there were intermittent incidents of ships and pirates backed by the North African states attacking and capturing American commercial vessels, and even enslaving American sailors.⁶⁶ Upon his ascension to the presidency in 1801, Thomas Jefferson was determined to respond to these attacks with military force rather than continuing to pay tributes, which to this point had been ineffective and, in his opinion, wasteful.⁶⁷ He con-

63 See generally JOSHUA E. LONDON, VICTORY IN TRIPOLI: HOW AMERICA'S WAR WITH THE BARBARY PIRATES ESTABLISHED THE U.S. NAVY AND BUILT A NATION 17-26 (2005) (discussing the threat of the Barbary piracy in the Mediterranean).

64 MICHAEL B. OREN, POWER, FAITH, AND FANTASY: AMERICA IN THE MIDDLE EAST, 1776 TO THE PRESENT 20 (2007).

65 See KENNETH B. MOSS, UNDECLARED WAR AND THE FUTURE OF U.S. FOREIGN POLICY 50-51 (2008) (discussing the difficulties that the Barbary States posed to the Washington and Adams administrations). In the earliest days of the Republic, when the United States was at its weakest on the world stage, Congress was not above essentially appropriating bribe money to the Barbary States to prevent attacks on American shipping. See OREN, *supra* note 64, at 28, 33.

66 MOSS, *supra* note 65, at 51.

67 LAMBERT, *supra* note 38, at 124.

vened his Cabinet in March of 1801 to discuss how to respond to the Barbary acts of aggression.⁶⁸

Jefferson had already written approvingly of the Constitution's placing of the power to declare war with Congress; he wrote to James Madison in 1789, "[w]e have already given in example one effectual check to the Dog of war by transferring the power of letting him loose from the Executive to the Legislative body."⁶⁹ The power to react defensively, however, remained unclear. Jefferson's advisors urged that the President authorize the use of military force to retaliate against the Barbary States rather than seek an actual declaration of war.⁷⁰ Only one member of the Cabinet, Attorney General Levi Lincoln, was skeptical of the President's power to respond unilaterally.⁷¹ The Cabinet reconvened in May to again discuss the issue; at this point, the Cabinet was unanimous that some action should and could be taken. There was still debate over whether the President could authorize the use of offensive force; Attorney General Lincoln maintained that American naval vessels should be limited to the ability to "repel an attack on individual vessels, but after the repulse, may not proceed to destroy the enemy's vessels generally."⁷²

President Jefferson's initial response was unilateral executive action: he authorized sending an American fleet to the Mediterranean without consulting Congress. Historians such as Joseph Wheelan have argued that this action by President Jefferson "established the president's authority to unilaterally send armed forces abroad."⁷³ However, Jefferson's actual instructions reflected concerns about overstepping the authority of the executive under the Constitution.⁷⁴ Accordingly, Jefferson sided with Attorney General Lincoln's view, which historian Frank Lambert described as "close adherence to the letter of the Constitution."⁷⁵ Jefferson gave detailed instructions to

68 See LONDON, *supra* note 63, at 92 (discussing Attorney General Levi Lincoln's expressed disapproval during the Cabinet meeting about going to war against the Barbary pirates).

69 Letter from Thomas Jefferson to James Madison (Sept. 6, 1789), in 15 THE PAPERS OF THOMAS JEFFERSON, 27 MARCH 1789 TO 30 NOVEMBER 1789, at 392, 397 (Julian P. Boyd, ed., 1958).

70 LONDON, *supra* note 63, at 94.

71 *Id.* at 92.

72 LAMBERT, *supra* note 38, at 126 (internal quotation marks omitted).

73 JOSEPH WHEELAN, JEFFERSON'S WAR: AMERICA'S FIRST WAR ON TERROR 1801-1805, at 105 (2003). However, Wheelan concedes that Jefferson's actions were taken with contemporary practical considerations in mind regarding the time it would take for members of Congress to travel to Washington. *Id.*

74 See LAMBERT, *supra* note 38, at 126 ("[A]s strict constructionists, Jefferson and his Republican colleagues wanted to ensure the constitutionality of their action.").

75 *Id.*

Commodore Dale, the commander of the flotilla, to act in defense of American ships and not initiate hostilities unless a declaration of war had been issued by Tripoli or another of the Barbary States.⁷⁶ Specifically, Dale was given instructions to “sink, burn, capture, or destroy vessels *attacking those of the United States*.”⁷⁷ Jefferson therefore conditioned the use of offensive force on fending off attacks against American ships and sailors.⁷⁸ His approach suggests some important limitations on the President’s power to respond to attacks. First, he authorized the use of naval force to combat Tripoli’s use of naval force; the action was equal to Tripoli’s action. He did not send marines or ground troops to subdue Tripoli as his initial response to the Tripolitan aggression. Only later, after Congress passed a statute supporting “warlike operations against the regency of Tripoli, or any other of the Barbary powers,”⁷⁹ did American marines participate on land in the Barbary conflict.⁸⁰ Second, by only instructing the flotilla commander to attack ships already attacking those of the United States, he emphasized that, if he acted unilaterally, he only had the authority to act defensively.

The implications of the President’s deployment of the naval force without congressional consent or guidance were demonstrated in one of the first battles between American and Tripolitan forces. In August of 1801, the American schooner *Enterprise* encountered the *Tripoli*, a Tripolitan pirate vessel, and proceeded to overwhelm the enemy ship with superior firepower, killing many of the crew and disabling the enemy ship without a single casualty.⁸¹ However, the commander of the *Enterprise*, aware that Congress had not declared war on Tripoli and had only authorized defensive action, actually released the captured Tripolitan survivors and the ship itself.⁸² The lack of a declara-

⁷⁶ HALL, *supra* note 62, at 31–32.

⁷⁷ ANN VAN WYNEN THOMAS & A.J. THOMAS, JR., THE WAR-MAKING POWERS OF THE PRESIDENT 53 (1982) (emphasis added).

⁷⁸ As Frank Lambert recounted, Jefferson “instructed the navy to engage any enemy vessel that attacked American shipping, *but not to pursue corsairs in offensive engagements nor to take them as prizes*.” LAMBERT, *supra* note 38, at 126 (emphasis added).

⁷⁹ Act of Mar. 26, 1804, ch. 46, 2 Stat. 291.

⁸⁰ *See generally* LOUIS B. WRIGHT & JULIA H. MACLEOD, THE FIRST AMERICANS IN NORTH AFRICA: WILLIAM EATON’S STRUGGLE FOR A VIGOROUS POLICY AGAINST THE BARBARY PIRATES 1799–1805, at 158, 172–74 (Greenwood Press 1969) (1945) (describing the participation of a small number of American marines and sailors in a ground campaign against Tripoli); WHEELAN, *supra* note 73, at 111–12 (discussing the composition and dynamic of the American military personnel involved in the Barbary conflict).

⁸¹ LAMBERT, *supra* note 38, at 128–30.

⁸² *Id.* at 130. As Michael B. Oren recounted, the *Tripoli* “was allowed to limp home” after defeat, where her commander was “publicly flogged and pelted with tripe” for his failure. OREN, *supra* note 64, at 56.

tion of war, or guidance from Congress to act in an offensive matter, heavily constrained the power of the President and the military.⁸³ Based on the understanding of the Constitution at the time, the captain of the *Enterprise* declined to go beyond a defensive posture without guidance or approval from Congress.

Upon seeing the practical effects of not having congressional approval to act *offensively*, Jefferson went to Congress in December 1801 to describe the American victory over the *Tripoli* and ask for congressional sanction of more aggressive measures. In his message to Congress, President Jefferson wrote:

Unauthorized by the Constitution, without the sanction of Congress, to go beyond the line of defense, the [defeated Tripolitan] vessel, being disabled from committing further hostilities, was liberated with its crew. The Legislature will doubtless consider whether, by authorizing measures of offence also, they will place our force on an equal footing with that of its adversaries. I communicate all material information on this subject, that, in the exercise of this important function confided by the Constitution to the Legislature exclusively, their judgment may form itself on a knowledge and consideration of every circumstance of weight.⁸⁴

Jefferson's assertion that he was "unauthorized by the Constitution, without the sanction of Congress, to go beyond the line of defense" reflected the deference that the Framers meant for the President to have to Congress in matters of offensive war.⁸⁵ Jefferson also appropriately noted that "[i]t was up to Congress to authorize 'measures of offense also.'"⁸⁶ Jefferson wanted more authority to act offensively against the Barbary pirates but recognized that he was effectively constrained by how the legislature authorized and defined war.⁸⁷ In February of 1802, the Congress granted the President the ability to act offensively by passing an "Act for the Protection of Commerce and Seamen of the United States, against the Tripolitan Cruisers."⁸⁸ Congress did not officially declare war; however, as historian Frank Lambert observed, "[Congress] eliminated constitutional reservations" and authorized the President to use full offensive force.⁸⁹

83 LAMBERT, *supra* note 38, at 130. Lambert wrote that this action "revealed a flaw in the Constitution's allocation of war-making powers." *Id.*

84 Sofaer, *supra* note 37, at 212 (quoting 11 ANNALS OF CONG. 12 (1801)).

85 See *supra* text accompanying notes 13–18 (discussing the debate over the war power during the Constitutional Convention of 1787).

86 Fisher, *supra* note 10, at 34; see *supra* text accompanying note 84.

87 See LAMBERT, *supra* note 38, at 130 ("While respecting the constitutional requirement that the legislature declare and define war, Jefferson sought greater authority to defeat the Barbary States.").

88 Act for the Protection of Commerce and Seamen of the United States, Against the Tripolitan Cruisers, ch. 4, 2 Stat. 129 (1802).

89 LAMBERT, *supra* note 38, at 132–33.

Jefferson's actual view on the war power of the President is still debated by legal scholars. Louis Fisher argued that President Jefferson's decision was indicative of his view that deference to Congress in matters of offensive war was proper under the Constitution.⁹⁰ Others, including Ann Van Wynan Thomas and A.J. Thomas, Jr., argued that Jefferson's view of presidential war power was actually quite broad, "at least when confronted with a declaration of war from another state."⁹¹ Jefferson's approach to Congress to obtain authority for offensive action, they argue, was in fact a political maneuver to persuade Congress to *explicitly* provide authority to act offensively.⁹² David Locke Hall, basing his argument on Jefferson's instructions to Commodore Dale,⁹³ asserted that Jefferson believed in the President's ability to unilaterally make war.⁹⁴ Even Hall, however, tempered that assertion by noting that while the behavior of the first three presidents indicated that "the idea of presidential war-making was acceptable to the Founding Fathers," such unilateral executive action was appropriate only "under some circumstances," seemingly limited to when the United States had not instigated the conflict.⁹⁵

A major question still remains: while President Jefferson's actions were appropriate, were they necessary? At the time, Alexander Hamilton argued that Jefferson's deference to Congress was not a constitutional requirement. Hamilton wrote that the President's ability to respond to a foreign nation's attack or declaration of war meant that Congress needed not play a role at all; at that point, "any declaration on the part of Congress is nugatory; it is at least unnecessary."⁹⁶ Although Hamilton was critical of any executive deference to Congress

90 See FISHER, *supra* note 10, at 36.

91 THOMAS & THOMAS, *supra* note 77, at 53.

92 See *id.* ("The limited tenor of [Jefferson's] language to the Congress was tactical to help persuade Congress to provide expressly for offensive action, which was indeed forthcoming. It did not indicate a belief that power to act offensively by the President was not constitutional.").

93 Hall called Jefferson's instructions "so belligerent that it cannot be read in any way which denies President Jefferson's clear intention to wage war unilaterally at any provocation." HALL, *supra* note 62, at 32.

94 See *id.* ("For the purpose of legal analysis, it is enough to suggest that the operating order to Commodore Dale establishes that in practice Jefferson believed in unilateral presidential war-making."). John Yoo also expressed this opinion of Jefferson handling of the situation, writing that his message to Congress "presents an example of a President's rhetoric not matching his actions." See JOHN YOO, *CRISIS AND COMMAND: THE HISTORY OF EXECUTIVE POWER FROM GEORGE WASHINGTON TO GEORGE W. BUSH* 113 (2009).

95 HALL, *supra* note 62, at 32.

96 Alexander Hamilton, *Examination of Jefferson's Message to Congress of December 7, 1801*, in 7 THE WORKS OF ALEXANDER HAMILTON 744, 747 (John C. Hamilton ed., New York, John F. Trow 1851).

when the United States was reacting to a declaration of war or hostile conduct, he acknowledged that the power to actually “go to war,” that is, to initiate war, was entirely within the power of Congress.⁹⁷

Whether Jefferson’s deference to Congress was actually necessary is still unclear. Michael Ramsey argued that, according to the ideas of war around the time of the founding, Jefferson’s request for congressional authorization was not necessary.⁹⁸ Ramsey argued that war itself could be declared in three ways: declaration by Congress, delegation of the authority to declare war to the President, or declaration of war by the foreign state.⁹⁹ Once a state of war existed via any of these three methods, the President’s conduct of the war, whether defensive or offensive, was authorized.¹⁰⁰ Because Tripoli had declared war on the United States, under Ramsey’s approach, Jefferson already had the authority to act offensively, and did not need to seek approval of such actions from Congress.¹⁰¹ While Ramsey’s view has a solid grounding in the historical understanding of war at the time of the Founding, it inadequately takes into account the decision-making role of Congress in war. Acting in defense of an attack is a presidential prerogative, but the actual decision to expand or change the objectives of a war was meant to be entrusted to Congress. Ramsey therefore ignores the crucial decision- and policy-making authority of Congress by declaring that the President has unlimited power over war-making when another nation attacks the United States. In fact, as Louis Fisher observes, Jefferson’s actions were appropriately deferential to the decision-making branch.¹⁰²

The interaction of President Jefferson and Congress in response to the Barbary threat helps to establish a framework of the early views of how the President could respond to a foreign attack and when he needed to obtain congressional sanction for his actions. President Jefferson had the ability to dispatch naval forces to the Mediterranean to protect American shipping. As American civilian vessels were being attacked by a belligerent power, it was well within Jefferson’s power as expressed during the Constitutional Convention to repel

97 *Id.* at 746; MOSS, *supra* note 65, at 51–52.

98 Ramsey, *supra* note 39, at 1629–30.

99 *Id.* at 1631.

100 *See id.* at 1630 (“In short, the power to wage a defensive war included both the tactical defensive and the tactical offensive: The key question was how it was begun, not how it was fought.”).

101 *See id.* at 1631 (asserting that “[o]nce the state of war is created in any of these three ways, the President has full power to pursue it to the end”).

102 *See* FISHER, *supra* note 10, at 35–36.

such a “sudden attack.”¹⁰³ However, Jefferson was rightly concerned that his options were limited to responding to Tripoli’s aggressive actions by *defending* the American ships. This belief was reflected by the actions of the *Enterprise* in merely disabling the Tripolitan ship that was preying on American commerce.¹⁰⁴ Jefferson thus went to Congress, which he staunchly believed had the power to authorize offensive war; in fact, Jefferson turned to Congress ten times for various authorizations to use force against the Barbary pirates.¹⁰⁵ Jefferson’s actions reflected his view that the proper time for the President to act unilaterally, without the consent of Congress, was when the very survival and safety of the nation, or its citizens, was at risk.¹⁰⁶ When the military operation was to take an offensive character, Jefferson appropriately believed that congressional consent was required.¹⁰⁷

B. President Madison and the Second Barbary War: Ensuring Congressional Authorization

In the weeks and months following the end of hostilities with Great Britain in 1815, the American government finally turned its attention back toward the Barbary States. Encouraged by the British,¹⁰⁸ the Dey of Algiers refused to accept American offers of tribute beginning in 1812, and proceeded to capture and impress American ships and sailors.¹⁰⁹ After the Treaty of Ghent ending the war with Great Britain was ratified in February 1815, President Madison was infuriated by the Dey of Algiers’s continued preying on American shipping and refusal to release American sailors whom his forces had enslaved.¹¹⁰ However, unlike his predecessor, Thomas Jefferson, Madison did not immediately order American naval forces to the Mediterranean. Instead, he formally asked Congress to declare “the existence of a state of war between the United States and the Dey and Regency of Algiers.”¹¹¹

103 See *supra* text accompanying notes 13–18.

104 See *supra* text accompanying notes 81–83.

105 MOSS, *supra* note 65, at 51.

106 See Fisher, *supra* note 12, at 36 (arguing that Jefferson “was not opening the door to any and all presidential initiatives” but advocating “presidential actions in response to emergencies that threatened the survival of the nation”).

107 *Id.*

108 The British had offered their support and protection to Algiers if they would interrupt the shipping of their American enemies as the War of 1812 started. LAMBERT, *supra* note 38, at 183–84.

109 *Id.* at 188.

110 *Id.* at 189.

111 *Id.* (internal quotation marks omitted).

Congress debated the issue in late February and early March of 1815.¹¹² On March 3, Congress declined President James Madison's request for a formal declaration of war against Algiers,¹¹³ but did instead issue an authorization for the President to use military force similar to the congressional authorization issued in 1802.¹¹⁴ Congress specifically laid out its grant of power, giving American vessels the authority "to subdue, seize, and make prize of all vessels, goods and effects of or belonging to the Dey of Algiers."¹¹⁵ President Madison thus had the authority to conduct naval operations against Algiers, without any of the constraints President Jefferson or Commodore Dale saw themselves as having due to a lack of congressional guidance in 1801.¹¹⁶

President Madison built upon the opinion of President Jefferson that deferring to Congress was essential to undertaking offensive operations. At the time Madison went to Congress, he had the ability under the Constitution to send a fleet to the Mediterranean once again to defend American ships and sailors under attack. However, perhaps with the limitations Jefferson had in 1801 in mind, he went to Congress first to ensure he had authority for both defensive and offensive military action. By obtaining such authority, Madison continued the standard practice of the time of deferring to Congress as the policy-making body in matters of war.

C. *Implications of the Barbary Wars*

Both Barbary Wars demonstrate two essential facts about what is required for the United States to fight in a war. First, an official declaration of war is not necessary to undertake military action against another nation. The President can order the armed forces to respond to a direct attack on the United States, even if it is beyond its borders, without consulting Congress. The first Barbary War demonstrates this example: shortly after being inaugurated, President Jefferson responded to the aggression of Tripoli by sending an American naval force with instructions to defend American commercial

112 *Id.*

113 This was one of only two times in American history that Congress has voted on a declaration of war that failed to pass. The other was in 1999, when there was a 213–213 tie vote on the decision to declare war on Serbia prior to the NATO air campaign aimed at stopping the genocide taking place in Kosovo. Michael Hahn, Note, *The Conflict in Kosovo: A Constitutional War?*, 89 GEO. L.J. 2351, 2377 (2001).

114 STEVENSON, *supra* note 3, at 17.

115 Act of Mar. 3, 1815, ch. 90, 3 Stat. 230.

116 *See supra* text accompanying notes 81–89.

ships. Second, the nation can engage in offensive warfare through a congressional authorization short of a declaration of war. This took place during both of the major Barbary conflicts. These observations lead to the important question of what the intended role for each branch is when the United States is faced with a foreign conflict. The answer, as the next Part discusses, may be determined by how the conflict begins and whether the United States is initiating or reacting to the use of force.

III. THE BARBARY FRAMEWORK: THE ROLES OF CONGRESS AND THE PRESIDENT IN WAR

The Barbary Wars lay the groundwork for the key distinction between legislative and executive war-making power. Defensive warfare lies within the power of the President, while the decision to undertake offensive warfare is the responsibility of Congress. This Part first discusses the constitutional, historical, and scholarly views that support this distinction and then defines what scenarios fall within the meaning of “offensive war” and “defensive war.”

A. *Congress and the President in “Offensive” and “Defensive” War*

The original perspectives regarding undeclared war and their implementation during the Barbary Wars present an opportunity to forge a framework reflecting the original meaning of the Constitution for the proper roles of Congress and the President in war. Where a foreign nation had actually attacked the United States or declared war on the United States, the President would have the power to respond immediately.¹¹⁷ The scope of the President’s power to respond to attack, however, was limited. As Peter Raven-Hansen observed, “the history of the framing and ratification supports an implied constitutional authority of the President to repel a sudden attack. But nothing in that history suggests that this authority extends beyond literally repelling the attack.”¹¹⁸ It was generally ac-

117 In 1863, the Supreme Court, in approving President Lincoln’s authority to institute a blockade on the rebelling southern states, supported the view that the President could react to foreign attack or rebellion without congressional approval. See *The Brig Amy Warwick (The Prize Cases)*, 67 U.S. 635, 668 (1863) (“If a war be made by invasion of a foreign nation, the President is not only authorized but bound to resist force by force. He does not initiate war, but is bound to accept the challenge without waiting for any special legislative authority.”).

118 Peter Raven-Hansen, *Constitutional Constraints: The War Clause, in THE U.S. CONSTITUTION AND THE POWER TO GO TO WAR* 29, 35 (Gary M. Stern & Morton H. Haperin eds., 1994).

knowledged in the early years of the United States' existence that the president had to go to Congress if he wanted to go beyond self-defense and undertake offensive action.¹¹⁹ Therefore, in an undeclared war started by a foreign power, the President should be authorized by Congress to use of offensive force. By contrast, if the United States is to initiate or "declare" war, the Constitution explicitly places that power with Congress.¹²⁰

Based on the early views surrounding the war power, the most plausible approach is that the need for congressional approval is triggered when the conflict takes an offensive character. Congress, after all, was intended by the Framers to be the "policy-making branch" in the context of war;¹²¹ the question of extending a war from defending the United States to offensive measures against the attackers is certainly a question of policy, not just a question of strategy. Furthermore, as Francis Wormuth and Edwin Firmage recognized, the Framers intended for the President's war power "to be limited . . . by . . . the responsibility to defer to the policy-making branch of the government at the earliest possible moment."¹²² Saikrishna Prakash effectively summarized early presidential views: "No early President felt free to wage war merely because another nation had declared war on the United States. Each understood that to wage war was to declare it, a power the Constitution granted Congress and not the President."¹²³ Having the President turn to Congress for authority to conduct offensive operations places that important policy-making responsibility in the hands of the branch that the Framers intended for it to be.¹²⁴ This reflects the Jeffersonian view of warfare; as Louis Fisher observed, "Jefferson . . . distinguished between defen-

119 *See id.* (noting that early customary law showed that "presidents conceded the need for congressional authority to go beyond immediate self-defense").

120 U.S. CONST. art. I, § 8, cl. 11.

121 WORMUTH & FIRMAGE, *supra* note 55, at 70.

122 *Id.*

123 Saikrishna Prakash, *Unleashing the Dogs of War: What the Constitution Means by "Declare War,"* 93 CORNELL L. REV. 45, 51 (2007).

124 President Washington's actions seem to accord with this view. As recounted by Saikrishna Prakash, in the context of Creek and Chickasaw offensive actions against the United States in 1792 and 1793,

Various governors wrote to the President seeking authority for offensive operations against the tribes. Washington and his Cabinet agreed that only Congress could authorize offensive measures because only Congress could declare war. At the same time, Washington and his Cabinet concluded that defensive measures designed to repel attacks were permissible because such measures did not usurp Congress's Declare War power Because defensive uses of force were not declarations of war, the Executive could order defensive measures without running afoul of the congressional monopoly on declaring war.

Prakash, *supra* note 33, at 359 (citations omitted).

sive and offensive military operations, permitting presidential initiatives for the former but not the latter."¹²⁵

The extent of Congress's involvement, however, need not always be a declaration of war. An actual declaration is the strongest action that Congress could take; therefore, it is appropriate that Congress be required to declare war if the United States is to *initiate* hostilities without provocation. When the United States itself is attacked, however, the President should have the authority to defend the nation, but must seek congressional approval to begin offensive operations. Because war has been initiated by another country, a declaration should be unnecessary; nonetheless, congressional approval should be sought in a lesser form, such as simple authorization to use offensive force.

Both Barbary Wars reflect this proposed framework. In the first Barbary War, President Jefferson sent ships to the Mediterranean in response to Tripolitan attacks on American shipping, which eventually culminated in a declaration of war on the United States by Tripoli.¹²⁶ American ships proceeded to act only in a defensive nature. American naval forces only took an offensive posture when Congress granted full authority to do so to the President in 1802.¹²⁷ President Madison immediately went to Congress upon the conclusion of the War of 1812 and received the authority to act offensively before he sent American naval forces to confront the Dey of Algiers's pirate vessels.¹²⁸ However, a declaration of war from Congress was unnecessary in both situations; war had already been declared by Tripoli and Algiers, respectively. Instead, congressional authorization to act offensively was sufficient, fulfilling its role as the policy-making branch in decisions of war.

This approach reflects upon the original preference for Congress to be the key decision-maker in matters of war, and also balances the necessity of the President's responsibility to act as Commander in Chief. Under this framework, the President's ability to defend the nation is preserved. If the President acts defensively, the decision to go to war was made by another power, and the President's use of military force would not be acting outside of his constitutional authority. However, by seeking authorization from Congress to undertake offensive action, the Framers' desire for the legislative branch to play a central role in the question of war powers is preserved. This reflects

125 FISHER, *supra* note 10, at 36.

126 LONDON, *supra* note 63, at 95.

127 *See supra* text accompanying note 89.

128 *See supra* text accompanying notes 108–15.

on Saikrishna Prakash's proposal of a "[u]nitary [w]ar [p]ower" in Congress, in which Congress would have the authority to determine the parameters of war.¹²⁹ Furthermore, it preserves Congress as the true decision-making body when it comes to war. Defending the nation from attack does not so much involve a decision to use force; nations are essentially obligated to do so to defend their sovereignty and existence.¹³⁰ The President would have no decision to make; as Commander in Chief, he has the authority to direct the military to defend the nation, and the decision to use this force was made by the attacking nation. However, the ability to change the objectives of the war from defending the nation to an offensive posture, possibly involving attack and occupation, is a policy decision to be made, and that crucial decision must rest with Congress.

The fact that the Constitution vests the power to declare war in Congress indicates that the Framers wanted Congress to play at least some role in the decision to undertake offensive warfare, even if it stems from a defensive war that the President could unilaterally engage in. In his seminal book *War and Responsibility*, John Hart Ely laid out the reasons that such a momentous decision was placed in the hands of Congress:

It was *Congress's job* not simply to insist on getting the facts straight before giving the president a functional declaration of war, but also to decide for itself just how great an emergency there was. That's why we have separate branches. That's why the war power is vested in Congress.¹³¹

For these same reasons, Congress must have a say in a decision the Framers recognized was so important.

Importantly, under this framework, a declaration of war would not be necessary in all situations where the United States uses force; if war were to be thrust upon the United States by a foreign power, the President could act defensively. He would merely need congressional authorization to take the war to an offensive footing.¹³² This factor emphasizes that Congress is the ultimate possessor of the war power. If Congress were to decide not to authorize offensive war after the United States had been attacked, it would be its prerogative to do

129 See Prakash, *supra* note 123, at 60.

130 See U.N. Charter art. 51 ("Nothing in the present Charter shall impair the inherent right of individual or collective self-defense if an armed attack occurs against a Member of the United Nations . . .").

131 JOHN HART ELY, *WAR AND RESPONSIBILITY: CONSTITUTIONAL LESSONS OF VIETNAM AND ITS AFTERMATH* 20 (1993).

132 See KEYNES, *supra* note 11, at 38 ("The decision to engage the nation in offensive hostilities or limited war is a congressional decision.").

so.¹³³ If the power to change the status between the United States and another nation from peace to war rests with Congress, then Congress should also have some input in the decision to expand a war from inherently defensive to actually offensive. President Jefferson adhered to this requirement, explicitly telling Congress that it was within its authority to authorize offensive measures.¹³⁴

One could plausibly argue that such a system would restrict the President's ability to effectively prosecute a war initiated by another nation.¹³⁵ Indeed, certain scholars have rejected the necessity of congressional involvement of any sort when war is imposed upon the nation. John C. Yoo, in the context of the Barbary Wars, argued that "Presidents should not have to wait to seek authorization from Congress when another nation has already attacked or declared war upon the United States."¹³⁶ This criticism of a deferential approach to Congress reflects Alexander Hamilton's concern that the President would need to exercise the full might of the nation's military to respond to attack without restriction.¹³⁷ This can be countered in two ways. First, the nature and importance of the substantive policy implications of extending a war to an offensive posture is the reason that the power was placed in the hands of Congress in the first place.¹³⁸ Second, throughout the history of the nation, Congress has consistently acquiesced to a presidential request for authorization to use force when the nation has been attacked.¹³⁹ Even dubious assertions of foreign attacks on American troops abroad, such as the supposed North Vietnamese attacks on American patrol boats in the Gulf of Tonkin in August of 1964, have led to congressional acquiescence for the use of force.¹⁴⁰ If the President can effectively make a case that a foreign attack on the United States requires an offensive reaction, he still has the ability to convince Congress of the legitimacy of

133 As Saikrishna Prakash observed, "Whether Congress ultimately makes wise decisions or not, at least there is no obscure division of authority that might confuse the people." Prakash, *supra* note 123, at 61.

134 See *supra* text accompanying note 84.

135 See Yoo, *supra* note 19, at 1683 (arguing that a strict structure requiring presidents to receive authorizations to use force would "seriously hamper" the nation's efforts in combating enemies determined to attack the United States).

136 YOO, *supra* note 94, at 114.

137 See *supra* text accompanying note 39.

138 See STORY, *supra* note 19, at 409–11 (discussing the Framers' desire to place the decision of going to war with the legislature rather than the executive).

139 E.g., FISHER, *supra* note 10.

140 See ELY, *supra* note 131, at 20–21 (discussing circumstances surrounding the Tonkin Gulf Resolution).

that position.¹⁴¹ Further, the symbolic power of congressional approval of war can be essential to public confidence and approval.¹⁴² Even Alexander Hamilton, who was among the foremost proponents of executive power in the years after the Constitutional Convention, recognized the symbolic importance of a congressional role in the decision to use force; as Kenneth B. Moss observed, “[a] congressional decision to use force or declare war was a check on executive power that Hamilton realized needed to be in place to ensure public confidence and trust in the decision itself.”¹⁴³ The question of whether war is desirable, as John Hart Ely observed, “is precisely what Congress is supposed to decide.”¹⁴⁴

B. Defining “Offensive” and “Defensive” War

While the preceding analysis indicates that the President and Congress were meant to have varying authority in different types of war, one must attempt to clearly define offensive and defensive war. To categorize a war, one should look at the overall purpose and objectives of the military action. Of course, all military campaigns regardless of the goal require offensive and defensive actions; troops attacking a nation, for example, will still have to defend themselves from enemy counterattacks, and troops defending their nation against attack will ultimately undertake counteroffensives to drive the enemy from their territory and attempt to exploit the enemy’s weakness at any opportunity. These decisions belong with the executive branch because the President, as Commander in Chief, or his subordinates in the military structure, must direct the day-to-day operation of the military.¹⁴⁵ The point at which Congress should be required to step in should turn on the objective of the war itself. This avoids the confusion that could result in involving Congress in minor aspects of

141 See Prakash, *supra* note 123, at 60–61 (noting that a unitary war power in Congress “concentrates responsibility on Congress and thus does not permit confusion about who is responsible for going to war and who is accountable for the overall level of force being employed against the enemy”).

142 LOUIS HENKIN, *FOREIGN AFFAIRS AND THE UNITED STATES CONSTITUTION* 321 (2d ed. 1996) (noting that “in foreign relations as elsewhere . . . the Congress is in several senses the more representative branch and brings to bear the influences of public opinion, diversity, concern for local and individual rights”).

143 MOSS, *supra* note 65, at 26.

144 ELY, *supra* note 131, at 100.

145 U.S. CONST. art. II, § 2, cl. 1; see also Prakash, *supra* note 33, at 305 (noting that congressional micromanagement of a war is implausible by observing that “a bill ordering a platoon to capture a hill often will be rendered irrelevant by intervening events long before the bill becomes law and is conveyed to the platoon”).

a conflict, but preserves the policy-making role that the Framers originally meant for Congress to have in the realm of war.¹⁴⁶

The two extremes of offensive and defensive war are fairly easy to define. A purely defensive war would include situations such as repelling a direct invasion or responding to an attack on American soil; here, the President would have significant power to respond without congressional approval. Thomas Jefferson expressed this view throughout his presidency; as Louis Fisher observed, “[f]or purely defensive operations, Jefferson retained the right to act first and seek congressional approval later.”¹⁴⁷ For example, when a British vessel fired on the American ship *Chesapeake* off the American coast in June 1807, war between the United States and Britain appeared imminent.¹⁴⁸ President Jefferson approved a number of military expenditures to strengthen military installations in coastal cities, claiming his orders were justified by “the emergencies threatening us.”¹⁴⁹ This response was an appropriate unilateral presidential response in the context of defensive war, reflected by the overwhelming support Jefferson received for his actions in Congress; when the House of Representatives voted to retroactively fund Jefferson’s defensive measures after it reconvened in November 1807, the measure passed by an overwhelming vote of 124-2.¹⁵⁰

At the other end of the spectrum, a purely offensive war would include an initiation of hostilities against a nation without provocation. This is the only scenario where the Constitution gives explicit instructions: it is Congress who should declare war.¹⁵¹ Further reflecting the limited power of the President to “repel sudden attack,” the “decision to engage the nation in offensive hostilities” lies with Congress.¹⁵²

The most difficult task is determining which branch must act in situations that fall between these two concrete examples.¹⁵³ The first scenario is when a war that started defensively takes on an offensive character. This could take place, for example, when the United States or an ally is attacked and the President defensively responds to the attack. However, defeating the enemy often does not mean just repulsing him from friendly territory and can often include attacks

146 WORMUTH & FIRMAGE, *supra* note 55, at 70.

147 FISHER, *supra* note 10, at 36.

148 SOFAER, *supra* note 37, at 172.

149 *Id.* (internal quotation marks omitted).

150 *Id.* at 173.

151 U.S. CONST. art. I, § 8, cl. 11 (“The Congress shall have Power . . . to declare War . . .”).

152 KEYNES, *supra* note 11, at 38.

153 *See id.* at 40 (noting that “there is no clear-cut distinction between defensive and offensive warfare”).

on his territory to help disable the enemy's military capabilities. In this scenario, congressional approval should be required when the war's objectives change from inherently defensive to inherently offensive. In many recent American wars, the involvement of the United States was not defending itself but acting as an ally, such as in Korea or Vietnam.¹⁵⁴ In these situations, Congress should have a role in deciding whether to change the objective from defending the ally to attacking the enemy, largely because of the policy implications of this move.¹⁵⁵ As mentioned earlier, the Framers meant for Congress to be the policy-making branch in terms of war.¹⁵⁶ Historical experience shows that unilateral presidential actions in the context of wars being fought defensively have had massive policy implications; congressional consideration and approval therefore must be sought for these actions. Two fairly recent examples are instructive. In 1950, without congressional approval, President Truman decided to occupy the entire Korean peninsula rather than simply defend the territorial integrity of South Korea after an invasion by North Korea.¹⁵⁷ This action led to intervention by China and resulted in several years of stalemated war and thousands of American casualties.¹⁵⁸ In 1969 and 1970, President Nixon secretly decided to undertake a massive bombing campaign and later ground invasion of Cambodia, which was arguably beyond the scope of the war in Vietnam, whose objective was to defend South Vietnam.¹⁵⁹ While a small number of members of Congress were notified, Congress as a whole was not consulted, even though this was an escalation of combat operations to an entirely different country.¹⁶⁰ The fact that these unilateral presidential decisions

154 These are situations that the Framers may not have contemplated, as their conceptions of national defense shortly after independence were most likely geographically limited to territorial integrity and would not extend to the vast network of allies and national security interests possessed by the United States around the globe today. *Id.* at 39.

155 *Id.* at 38.

156 *See supra* text accompanying note 122.

157 *See infra* text accompanying notes 194–201.

158 *See infra* Part IV.A (discussing the implications of President Truman's decision to go on the offensive into North Korea during the Korean War).

159 ELY, *supra* note 131, at 98; *see also infra* Part IV.B.

160 *See ELY, supra* note 131, at 98 ("Although a small handful of cooperative members of Congress—I make it eight—apparently were told, those the administration subsequently identified understandably tended to belittle the extent of their notification, and in any event they did not pass the word along to their colleagues or the American people." (citations omitted)). Although the circumstances of the conflicts are quite different, the interaction of the executive and legislative branches regarding the military action in Cambodia has some parallels to the Obama administration's recent decision to intervene militarily in Libya. In the latter situation, President Obama notified certain members of Congress about his decision to order a bombing campaign against government forces in

produced serious complications exemplify why this power was placed with Congress. Decisions of such magnitude were not meant for the President to make alone; their importance was the reason that the Framers meant for Congress to make, or at least approve of, these decisions.¹⁶¹ Under these circumstances, the President must seek at least a congressional authorization for inherently offensive actions.

An examination of two modern examples can help clarify the difference between offensive and defensive war in more ambiguous situations. In the wake of the Iraqi invasion and occupation of Kuwait in August 1990, President George H.W. Bush, acting in the wake of a number of United Nations resolutions,¹⁶² prompted a build-up of American and allied military forces in Saudi Arabia in preparation to expel the Iraqi Army from Kuwait.¹⁶³ Congress voted on and authorized the use of force against Iraq in January of 1991.¹⁶⁴ American forces and their allies later attacked the Iraqi forces, but did not go beyond the established objective of expelling the Iraqis from Kuwait.¹⁶⁵ While this scenario is complicated because it involves American forces acting in defense of another nation,¹⁶⁶ President Bush acted properly in this scenario. Because he wisely gained congressional approval for this action,¹⁶⁷ President Bush did not have any

Libya several days in advance of the beginning of military operations, but did not bring the matter to Congress as a whole for authorization. See Press Gaggle, Jay Carney, Press Sec'y, The White House (Mar. 24, 2011) available at <http://www.whitehouse.gov/the-press-office/2011/03/24/press-gaggle-press-secretary-jay-carney-3242011> (discussing meetings between Obama administration officials and members of Congress and actions by Congress prior to military intervention in Libya).

161 See ELY, *supra* note 131, at 100 (“A fear that Congress might overturn (or complain about) executive policy is not a constitutional excuse for not telling it what’s going on.”)

162 JOHN LEHMAN, MAKING WAR: THE 200-YEAR-OLD BATTLE BETWEEN THE PRESIDENT AND CONGRESS OVER HOW AMERICA GOES TO WAR 21–22 (1992).

163 *Id.* at 33–34; SEAN WILENTZ, THE AGE OF REAGAN: A HISTORY, 1974–2008 at 296–99.

164 Authorization for Use of Military Force against Iraq Resolution, Pub. L. No. 102–1, 105 Stat. 3 (1991). Notably, the votes in the House and Senate that ultimately authorized the action were fairly close: 250 to 183 in the House, and 52 to 47 in the Senate. WILENTZ, *supra* note 163, at 300.

165 See WILENTZ, *supra* note 163, at 301–02 (noting that “the removal of Saddam [Hussein] had simply never been a stated goal for Bush or the United Nations”).

166 As discussed later in this article, although the broader objective was inherently defensive, because there was no attack on the United States, the decision to use military force against Iraq was a decision that implicated Congress’s decision and policy-making powers. Indeed, because Iraq’s offensive action was not against the United States but another nation that the United States had no obligation to defend, a declaration of war would have been appropriate. See *infra* Part IV.C. However, for the purposes of this Part, the factual scenario demonstrates an inherently defensive war in which the President did not go beyond its authorized defensive objective.

167 See WILENTZ, *supra* note 163, at 300 (discussing members of the Bush administration’s concerns about congressional involvement in the decision to go to war against Iraq in

constitutional problem. However, if President Bush actually changed the objective from liberating Kuwait, which would be inherently defensive as it would be expelling an offensive invasion, to invading Iraq and toppling the offending government or occupying the country, the nature of the war would have shifted from defensive in nature to offensive in nature. Under this framework, President Bush would have required congressional approval for his actions, as it implicates the policy-making authority of Congress. A situation similar to this hypothetical scenario took place in 1950, when President Truman began by acting in defense of South Korea when it was invaded by North Korea.¹⁶⁸ The defensive objective of defending South Korea, under this framework, is within the President's power. However, after American forces expelled the North Korean army from South Korean soil, Truman went beyond his rightful authority by changing the objective from defensive (defending South Korea) to offensive (occupying North Korea).¹⁶⁹ Here, President Truman overstepped his bounds and should have sought congressional authorization for his actions.¹⁷⁰

The President may have more extensive authority to react offensively if the attack is on the United States itself, rather than an ally.¹⁷¹ This has become more relevant in the past decade, as American interests were attacked by the foreign terrorist organization al Qaeda in 1998 and 2000,¹⁷² followed by a major terrorist attack on American soil on September 11, 2001.¹⁷³ President George W. Bush responded to this attack with an attack on al Qaeda and Afghanistan, which harbored the organization. The invasion of Afghanistan fell within the bounds of the President's authority to respond, as its purpose was to destroy al Qaeda's capability to strike the United States once again.¹⁷⁴ Importantly, President Bush did not act unconstitutionally under this Article's framework because Congress authorized the use of military

1991, but that President Bush had decided that "political prudence had demanded that he watch Congress go through with a vote anyway").

168 See *infra* Part IV.A.

169 *Id.*

170 *Id.* The constitutional questions regarding President Truman's actions are more fully discussed in Part IV.A.

171 See KEYNES, *supra* note 11, at 39 (noting the Framers' original ideas of defense were limited to expectations of attacks on American soil).

172 See WILENTZ, *supra* note 163, at 393-94, 406 (discussing al Qaeda attacks on American embassies in Africa in 1998 and the USS *Cole* in 2000).

173 *Id.* at 432-33 (discussing the after-effects of the September 11 attacks on the World Trade Center).

174 The constitutional questions surrounding the invasion of Afghanistan are more fully discussed in Part IV.D.

force shortly after the attacks.¹⁷⁵ Hypothetically, had President Bush not obtained this authority, he may have been able to respond under his defensive authority as President by disabling al Qaeda's ability to attack the United States again, and this would involve attacking al Qaeda training camps and strongholds in Afghanistan. However, if it was clear that the objective of the war was to oust the Taliban government of Afghanistan and occupy the nation, this would have activated Congress's policy-making authority, and would have required congressional approval. Because Congress passed the Authorization to Use Military Force,¹⁷⁶ however, this potential difficulty did not arise.

Recently, the United States has adopted a policy where the United States initiates hostilities but asserts a defensive reason for doing so. This policy, known as preemptive war, was adopted by President George W. Bush in advance of the American invasion of Iraq in 2003.¹⁷⁷ Its goal was to attack enemies of the United States before they have the capability to strike the United States.¹⁷⁸ However, the key feature of this policy for constitutional purposes is that, regardless of the justification, the United States initiates hostilities. Therefore, the use of preemptive war should be considered offensive war. The decision to engage in preemptive war should rest with Congress for two reasons. First, initiating hostilities is the only kind of warfare where the Constitution gives explicit instructions on who shall make that decision; Article I, Section 8 specifically instructs that Congress shall issue a declaration of war in this situation.¹⁷⁹ Congress must fulfill its specifically defined role when the nation is to initiate hostilities and declare war. Second, because the ultimate policy-making authority for war was meant to rest with Congress, this decision to initiate war is exactly the kind of authority that Congress must exercise.¹⁸⁰

The power of the President and Congress in war, based on early experience, seems to be a sliding scale. At one end would be purely offensive warfare; in this area, Congress has the most control. At the other end is purely defensive warfare; here, the President has the ability to respond without the consent or authorization of Congress. In the vast middle of these two extremes, however, the most effective way to determine who has the proper authority is to look at the overall objectives of the campaign. Congress was meant to have a broad

175 See *infra* text accompanying note 241.

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

177 See *infra* Part IV.E.

178 *Id.*

179 U.S. CONST. art. I, § 8, cl. 11.

180 See *supra* text accompanying notes 121-29.

say in the war power, and this should specifically be invoked whenever a campaign becomes offensive in nature. No matter what the initial nature of a conflict is, however, the President would be wise to gain congressional authorization at the earliest opportunity to avoid constitutional problems under this framework. However, as a policy of initiating preemptive war has emerged in the United States, the need has emerged for Congress to take its strongest possible action, as instructed by the Constitution.

IV. THE BARBARY FRAMEWORK AND MODERN UNDECLARED WARS

The power of the President in matters of war dramatically expanded throughout the 19th and 20th centuries. During the American Civil War, perhaps the most perilous time for the security and survival of the United States, President Lincoln undertook perhaps the greatest assertion of executive power to that point in the nation's history. Without the consent of Congress, President Lincoln suspended habeas corpus, raised armies, and imposed a blockade on the rebellious southern states.¹⁸¹ While he was ultimately justified in most of his actions, either by the Supreme Court¹⁸² or retroactively by Congress,¹⁸³ his actions marked a dramatic expansion of executive power.¹⁸⁴ By 1929, Charles Warren, commenting on the decision of the Constitutional Convention to place the power to declare war with Congress, wrote, "[i]n recent years, Congress has acquiesced in the assumption by the President" of the power given to Congress to declare war.¹⁸⁵ However, the key period for the expansion of presidential power over matters of war was the presidency of Franklin Roosevelt. In the wake of the Supreme Court's recognition of sweeping executive authority in the realm of foreign affairs in *United States v. Curtiss-Wright Export Corp.*,¹⁸⁶ President Roosevelt frequently acted unilaterally

181 DANIEL FARBER, *LINCOLN'S CONSTITUTION* 17–18 (2003).

182 *See, e.g.*, *The Brig Amy Warwick (The Prize Cases)*, 67 U.S. 635 (1863) (approving President Lincoln's decision to impose a blockade on the rebelling southern states without congressional approval).

183 *See* Act of Aug. 6, 1861, ch. 63, 12 Stat. 326.

184 *See* J.G. RANDALL, *LINCOLN* 123 (1947) ("No president has carried the power of presidential edict and executive order (independently of Congress) so far as . . . [Lincoln] did."), *cited in* Frank J. Williams, Nicole J. Dulude & Kimberly A. Tracey, *Still a Frightening Unknown: Achieving a Constitutional Balance Between Civil Liberties and National Security During the War on Terror*, 12 ROGER WILLIAMS U. L. REV. 675, 746 n.470 (2007).

185 WARREN, *supra* note 13, at 481.

186 299 U.S. 304, 319–20 (1936) (noting the role of the President as the "constitutional representative of the United States with regard to foreign nations" and recognizing the important and perhaps predominant role of the President in foreign affairs); *see also* Roy E.

in the years leading up to World War II, including ordering expanded U.S. naval patrols in the war-ravaged Pacific and transferring American military equipment to Great Britain without the consent of Congress.¹⁸⁷ At the time President Harry Truman assumed office in 1945, the President had become the predominant actor in terms of the war power.¹⁸⁸

This brief sketch of the changing nature of the balance of war powers between the President and Congress is helpful in discussing the United States' wars since 1945, in which the role of the President expanded significantly.¹⁸⁹ At the time of this writing, the congressional declaration of war seems to have faded into irrelevance. The wars of the latter half of the 20th century and the first decade of the 21st century have all been conducted without a formal congressional declaration of war. The framework discussed in Part III can be used to determine whether actions of the President and Congress regarding these undeclared wars would be acceptable under the original views of the war-making power. This Part applies the aforementioned framework to the most prominent undeclared wars of the last sixty years: the Korean War, the Vietnam War, the Persian Gulf War, the invasion of Afghanistan, and the invasion of Iraq in 2003. Each of these conflicts presents a different factual scenario with different levels of congressional involvement and presidential acquiescence to congressional guidance. Ultimately, the recent undeclared war in Iraq presented a scenario where a declaration of war was called for under the Barbary framework's interpretation of the original understanding of the war powers of Congress and the President.

A. *The Korean War: Defensive War to Offensive War Without Authorization*

With the expansion of the role of the United States in international affairs after World War II, and with the recognition that the United States was one of the only world powers with the ability and strength to defend other nations and keep the peace, the war-making

Brownell II, *The Coexistence of United States v. Curtiss-Wright and Youngstown Sheet & Tube v. Sawyer in National Security Jurisprudence*, 16 J.L. & POL. 1, 8 (2000) (noting that Curtiss Wright "has become the lodestar for advocates of Executive preeminence in national security affairs").

187 FISHER, *supra* note 10, at 76–77, 79.

188 *Cf. id.* at 80 (observing that many of the war powers that the President had obtained during World War II were not relinquished after the war's conclusion).

189 For a more in depth analysis of the historical trends surrounding the expansion of executive war power from the nation's early conflicts, including the Barbary Wars, to the beginning of the Cold War, see HAROLD HONGJU KOH, *THE NATIONAL SECURITY CONSTITUTION: SHARING POWER AFTER THE IRAN-CONTRA AFFAIR* 74–100 (1990).

power continued to heavily shift away from Congress and towards the President.¹⁹⁰ American national security concerns were no longer limited to American territory; after 1945, the United States found its national security interests heavily expanded to include a vast global network of allies and national security interests.¹⁹¹ Centralized presidential control of this network, and the intertwining of military issues with the foreign affairs power (traditionally within the realm of the President),¹⁹² helped shift the war power heavily towards the executive branch.

The undeclared Korean War further emphasized this trend. After World War II, the United States backed the non-communist government of South Korea with diplomatic and economic support, but withdrew its military forces from South Korea in 1949.¹⁹³ On June 25, 1950, the communist forces of North Korea invaded South Korea, and American troops swiftly became involved in the conflict.¹⁹⁴ Within two days, President Truman, without the consent of Congress, committed American troops to South Korea's defense.¹⁹⁵ In the first few months of the war, North Korean troops drove American, South Korean, and other international forces to the tip of the South Korean peninsula around Pusan.¹⁹⁶ In September 1950, the United States launched a successful counteroffensive, backed by an amphibious landing in occupied South Korean territory.¹⁹⁷ The counteroffensive eventually crossed the 38th parallel, which demarcated the border between South and North Korea, and eventually came close to occupying the entire peninsula.¹⁹⁸ As the American-led offensive approached the border with China, Chinese forces intervened on behalf of their North Korean allies and swarmed across the border,

190 See MOSS, *supra* note 65, at 73 ("The constitutional balance between Congress and president in war was irrevocably changed after the peace ending World War II in 1945.").

191 See KEYNES, *supra* note 11, at 39 ("By the mid-1960s, the United States had entered into bilateral and multilateral agreements with forty-two other nations, which represented a minimum commitment to consult with these nations in the event of an attack or threat to their security.").

192 See generally *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304 (1936) (asserting the dominant role of the President in foreign relations).

193 Russell D. Buhite, "Major Interests": *American Policy Toward China, Taiwan, and Korea, 1945–1950*, 47 PAC. HIST. REV. 425, 449 (1978).

194 PHILIP BOBBITT, *THE SHIELD OF ACHILLES: WAR, PEACE, AND THE COURSE OF HISTORY* 52 (2002).

195 Fisher, *supra* note 52, at 33.

196 BOBBITT, *supra* note 194, at 52.

197 Howard S. Levie, *How It All Started—And How It Ended: A Legal Study of the Korean War*, 35 AKRON L. REV. 205, 221 (2002).

198 BOBBITT, *supra* note 194, at 52.

catching American forces off guard and overstretched.¹⁹⁹ The result was a rout of American troops and a retreat closer to the original border between the two Korean nations at the 38th parallel.²⁰⁰ A stalemate ensued until a cease-fire was signed in 1953, with Korea still divided at close to its original border.²⁰¹

To analyze the Korean War under the framework laid out earlier in this article, the conflict must be considered in two stages. The first stage involved the President's immediate reaction to the North Korean invasion by sending troops and conducting military operations without congressional approval. Whether this action was justifiable under the Barbary framework depends on whether President Truman was in fact reacting to a sudden attack on the United States. There were no American military units stationed in South Korea, the United States having withdrawn its forces from the nation in 1949.²⁰² However, the United States was backing the South Korean government as part of the new global role of the United States of supporting many non-communist nations early in the Cold War.²⁰³ The President's decision to commit troops without consulting Congress was controversial; after all, only American interests were attacked, not American territory, civilians, or troops. Some argue that President Truman's actions were justified by a broad presidential authority to act in a time of crisis or emergency, including coming to the defense of American allies or interests.²⁰⁴ Other scholars, most prominently Louis Fisher, argue that the initial commitment of troops in defense of South Korea itself was unconstitutional because Congress did not authorize this action.²⁰⁵ John Norton Moore argues that, while President Truman should have had the authority to act in response to the North Korean attack, he should have immediately sought congressional au-

199 *Id.*

200 *Id.*

201 *Id.*

202 *See supra* text accompanying note 193.

203 *See supra* note 191 (noting expanded American military commitments in the years after World War II).

204 *See, e.g.,* John Norton Moore, *Emergency War Powers*, in *THE U.S. CONSTITUTION AND THE POWER TO GO TO WAR* 158, 165 (Gary M. Stern & Morton H. Halperin eds., 1994) ("Whatever the competing approaches to the underlying general war powers, there is broad support, although not unanimous in all settings, for presidential authority in emergency settings to respond to aggressive attacks against the United States, its interests, allies, forces, or citizens, whether at home or abroad, and whether low-level or high-level force is required to repel the attack.")

205 *See generally* Fisher, *supra* note 52, at 37 (concluding that President Truman's unilateral action against Korea violated the Constitution and is "not valid precedent for what President Bush planned" in his attacks against Iraq).

thorization.²⁰⁶ Whether President Truman's initial reaction to this situation, which was an emergency of a sudden attack facing an American ally and which he defended as acting in defense of South Korea, without the consent of Congress, is indeed debatable.²⁰⁷ Even Fisher conceded that President Truman's use of force may have been justifiable based on his formulation on when unilateral presidential action in an emergency may be acceptable: "a President may act without congressional authority (and without express legal or constitutional authority), trusting that the circumstances are so urgent and compelling that Congress will endorse his actions and confer a legitimacy that only Congress . . . can provide."²⁰⁸ Despite Truman's failure to seek either immediate or retroactive congressional authorization (a decision Fisher focused his criticism upon),²⁰⁹ it seems that President Truman's commitment of forces was at least partially consistent with Fisher's idea of acceptable constitutional unilateral presidential action. As John C. Yoo notes, there was substantial support for Truman's actions in Congress at the time of the North Korean attack, but Truman simply did not seek explicit congressional approval.²¹⁰ Nonetheless, Fisher's analysis does not adequately take into account the President's authority to repel a sudden attack. As established above, the President can act defensively in the face of attack. Undertaking an analysis of whether Congress would approve of his action would be both speculative of Congress's intent and difficult for the President to determine if his actions would be Constitutionally sound. Instead, a divide between pure presidential authority to act *defensively*, without congressional consent, and a need for congressional authority for *offensive* operations would allow the President to

206 John N. Moore, *The National Executive and the Use of Armed Forces Abroad*, 21 NAVAL WAR C. REV. 28, 32 (1969).

207 John Hart Ely, for example, wrote that the Truman administration's justification for intervening in Korea of acting in defense of South Korea was "at least initially true, but constitutionally irrelevant." ELY, *supra* note 131, at 11.

208 FISHER, *supra* note 10, at 100.

209 *Id.*

210 See John C. Yoo, *The Continuation of Politics by Other Means: The Original Understanding of War Powers*, 84 CALIF. L. REV. 167, 178 (1996) ("President Truman immediately committed American military forces without seeking Congressional approval, even though substantial support existed in Congress for the President's unilateral decision. Secretary of State Dean Acheson and Senate Majority Leader Scott Lucas both convinced Truman to rely on his Commander-in-Chief powers to support his actions, which led the President to refrain from seeking the congressional authorization he could have obtained easily."). Yoo also noted that Congress seemed to implicitly authorize President Truman's actions by passing appropriations bills and draft extensions in support of the war effort. *Id.*

act more freely when necessary but defer to Congress for the decision of expanding the war.

Therefore, more important for the purposes of the original constitutional framework was the second unique factor about the American involvement in Korea: President Truman authorized the military to go from defensive to offensive war without congressional approval. It is at this point that an analysis of whether the President has the proper authority to take action is of the greatest importance under this framework; not necessarily at the immediate inception of war, but when the inherent character of the war changes from defensive to offensive. Thus, President Truman's decision to order forces across the 38th parallel with the intent of unifying the Korean peninsula did not comply with this article's framework reflecting the original understanding of the Constitution's conception of presidential use of defensive force. Assuming that President Truman was acting in a genuine emergency that triggered his power to react defensively to sudden attack,²¹¹ he only had the authority under the Barbary framework to fulfill the defensive nature of his actions. This would include driving North Korean forces from South Korean territory, which is analogous to American naval ships defending their countrymen's vessels during the conflict with Tripoli in 1801 but declining to act offensively against the Tripolitan fleet, ports, and mainland without congressional consent.²¹² The moment American forces crossed the 38th parallel with the intention of occupying North Korea, the war changed from defensive to offensive. Congressional authorization was therefore needed at this point. President Truman's decision to shift the war from a defensive to an offensive nature was not his to make; that decision rightfully belonged to Congress.

The consequences of the American invasion of North Korea demonstrated the importance of congressional involvement in decisions regarding offensive warfare. While it is impossible to determine what would have happened had the United States maintained its defensive posture and stopped at the border between the two Korean states, the American invasion of North Korea resulted in the serious consequences of a military defeat in North Korea, Chinese intervention on the side of the North Koreans, and two more years of warfare and mounting casualties.²¹³ The unfortunate consequences of President

²¹¹ See *supra* text accompanying notes 204–08.

²¹² See *supra* text accompanying notes 73–89.

²¹³ See BOBBITT, *supra* note 194, at 52 (discussing the implications of the American counterinvasion of North Korea, including Chinese intervention and a lengthy, bloody stalemate).

Truman's unilateral exertion of offensive war reflect James Madison's concerns as "Helvidius" that the power to conduct war and the power to decide its scope in terms of when it should begin, *continue*, or end must reside in separate branches.²¹⁴ Indeed, President Truman's decision to cross into North Korea had major substantive implications beyond merely directing the conduct of the war; it triggered a host of new concerns, including potentially occupying and defending North Korea and risking expanding the war to involve China and the Soviet Union.²¹⁵ Such a momentous decision was meant by the Framers to rest with Congress, not the President.

B. The Vietnam War: Authorizing a Defensive Objective

The United States' role in the Vietnam War, as authorized by Congress, was ostensibly defensive in nature; however, the presidential interpretation of Congress's authorization involved more controversial initiatives. The United States' military presence in Vietnam was initially advisory, logistically supporting and training the South Vietnamese military in their efforts to stamp out a communist insurgency.²¹⁶ Although thousands of American troops were already present in Vietnam, the turning point of American involvement in the conflict took place in August of 1964, when North Vietnamese torpedo boats attacked American ships in the Tonkin Gulf.²¹⁷ President Lyndon Johnson subsequently sought congressional authorization to escalate American involvement in the conflict.²¹⁸ On August 7, 1964, Congress passed the Tonkin Gulf Resolution, which read in part "[t]hat the Congress approves and supports the determination of the President, as Commander in Chief, to take all necessary measures to repel any armed attack against the forces of the United States and to prevent further aggression."²¹⁹ This authorization appears vaguely worded, but the message appears clear that Congress authorized the use of force "to repel any armed attack" or "to prevent fur-

214 MORGAN, *supra* note 42, at 100; *see also* text accompanying notes 43–45.

215 *Supra* note 213.

216 *See* JAMES E. WESTHEIDER, *THE VIETNAM WAR 10–11* (2007) (discussing the increase in the number of American troops in Vietnam from 1961 to 1963); *see also* ELY, *supra* note 131, at 13 (same).

217 KOH, *supra* note 189, at 38 (describing the attack on American ships by North Vietnamese torpedo boats in the Tonkin Gulf and America's response).

218 *Id.* at 38–39 ("President Johnson . . . asked Congress for the Tonkin Gulf Resolution, a joint resolution of support that he subsequently construed as broad congressional authorization to escalate the Vietnam War.").

219 Tonkin Gulf Resolution of 1964, Pub. L. No. 88–408, 78 Stat. 384.

ther aggression.”²²⁰ Therefore, it appears that Congress did not authorize any military action beyond defending American forces in South Vietnam and countering North Vietnamese aggression.²²¹ Accordingly, despite the controversies surrounding American involvement in Vietnam, the use of military force for the defense of South Vietnam did not deviate from the Barbary framework of constitutional requirements.²²² However, during this conflict, Presidents Johnson and Nixon expanded the war beyond the borders of both North and South Vietnam, largely through bombing campaigns. Most notoriously, President Nixon ordered an incursion into Cambodia in 1970 aimed at disrupting the flow of supplies and manpower to communist forces in South Vietnam.²²³ It can certainly be argued that the goal of these actions was consistent with the broad congressionally authorized objective of defending South Vietnam.²²⁴ However, the ultimate result of these actions was the expansion of the war from a national conflict aimed at North Vietnam to a regional one involving operations in multiple nations, which certainly implicates the policy-making authority of Congress.²²⁵ At the very least, prior to expanding the scope of the war, Congress should have been consulted and convinced to authorize the expansion, which would have more appro-

220 *Id.*

221 *See* MOSS, *supra* note 65, at 87 (“Strategically, the war’s objective was not so much to defeat North Vietnam and absorb it into South Vietnam, but to coerce North Vietnam to accept South Vietnam . . .”).

222 Even John Hart Ely, who harshly criticized Congress’s failure to fulfill its constitutional obligations in authorizing the use of force, noted that Congress did act appropriately in giving its authorization to the President. ELY, *supra* note 131, at 12. Kenneth B. Moss, reaching the same conclusion, noted that “[j]ust because legislation is poorly considered and approved does not invalidate it.” MOSS, *supra* note 65, at 86.

223 *See* John Norton Moore, *Legal Dimensions of the Decision to Intercede in Cambodia*, 65 AM. J. INT’L L. 38, 44 (1971) (noting the “repeated United States protests against North Vietnamese and Viet Cong use of neutral Cambodian territory” in the period leading up to the American offensive into Cambodia); R.B. Smith, *The International Setting of the Cambodia Crisis, 1969–70*, 18 INT’L HIST. REV. 303, 315, 318–19 (1996) (describing American concerns about supplies directed toward Communist forces through Cambodia in 1969 and 1970).

224 *See* ELY, *supra* note 131, at 32 (arguing that the terms of the Tonkin Gulf Resolution authorized the President to conduct military operations in Cambodia as part of its defense of South Vietnam).

225 *See* Jules Lobel, *Conflicts Between the Commander in Chief and Congress: Concurrent Power over the Conduct of War*, 69 OHIO ST. L.J. 391, 404 (2008) (countering arguments that the expansion of the war into Cambodia was solely within the power of the President by noting that “such a use of American military power clearly reflected a major policy decision that escalated the conflict into other sovereign states and had important effects and consequences for U.S. foreign policy”).

priately deferred to Congress's intended policy-making role.²²⁶ Perhaps most importantly, however, the American experience in Vietnam reinforces the need for clear guidance from Congress. As Harold Hongju Koh noted, President Johnson construed the Tonkin Gulf Resolution as "broad congressional authorization to escalate the Vietnam War."²²⁷ A more specific authorization from Congress, clearly laying out the defensive objectives and permissible scope of the war, may have allowed the legislative branch to better implement its policy-making authority in terms of the war powers, and could have impacted the scope of the American military effort.²²⁸

C. The Persian Gulf War: Offensive War with a Defensive Objective

The Persian Gulf War saw the United States involved in a broader conflict that was not initiated by the United States; rather, an aggressor attacked another nation and the United States intervened to liberate that nation. In August 1990, Iraq invaded and occupied Kuwait, which prompted international condemnation and a build-up of international forces, led by the United States, in neighboring Saudi Arabia.²²⁹ In January 1991, Congress authorized the President to use military force against Iraq to expel its forces from Kuwait.²³⁰ Importantly, the congressional authorization was tailored as a response to Iraq's offensive operations against Kuwait and specifically noted that force was authorized "to achieve implementation" of United Nations Security Council resolutions, all of which condemned the Iraqi inva-

²²⁶ See Wormuth, *supra* note 27, at 651–52 (criticizing the Cambodian incursion as beyond the President's authority to repel sudden attacks). Congress only addressed the Cambodian incursion after it took place, passing legislation in 1971 forbidding the introduction of U.S. ground combat troops or advisers in Cambodia. Act of Jan. 12, 1971, Pub. L. No. 91–672, § 12, 84 Stat. 2053, 2055. Notably, this resolution did not mention aerial bombing, which was undertaken in theaters beyond South Vietnam until the end of the war.

²²⁷ KOH, *supra* note 189, at 39.

²²⁸ The Vietnam War is distinguishable from the other conflicts discussed in this Part because, rather than responding to a foreign power's sudden action against the United States, an ally, or another nation, the United States gradually committed military forces to an ally that was already facing an internal and external military threat. Harold Hongju Koh tellingly characterized Vietnam as an "undeclared creeping war[]" that started and built "before Congress . . . [and] the public . . . [were] fully aware." *Id.* It is therefore difficult to analyze this conflict under the Barbary framework, which contemplates direct attacks on the United States, or an ally in some cases. This Part's analysis therefore only discusses the broader policy and inherent defensive nature of the Vietnam War and comments upon its expansion to other nations without Congress's explicit authorization.

²²⁹ OREN, *supra* note 64, at 563–65 (discussing the Iraqi invasion of Kuwait); see also LEHMAN, *supra* note 162, at 52–53 (describing the U.S. attacks against Iraq).

²³⁰ Authorization for Use of Military Force against Iraq Resolution, Pub. L. No. 102–1, § 2, 105 Stat. 3 (1991).

sion and demanded Iraqi withdrawal from Kuwait.²³¹ Following Congress's authorization, President George H.W. Bush ordered a lengthy air campaign, which was followed with an American-led attack on Iraq that liberated Kuwait from the Iraqi military within a matter of days.²³² Although the operation reached southern Iraqi territory as part of its rout of the Iraqi military, President Bush ceased military operations upon the accomplishment of the objective of defeating the Iraqi military and liberating Kuwait, and did not go beyond the inherently defensive objective of repulsing an attack on another nation.²³³

The Persian Gulf War presents an important distinction from previous (at least initially) inherently defensive wars such as Korea and Vietnam. Kuwait, unlike South Korea and South Vietnam, was not an American ally with an American military presence when it was attacked by Iraq. Therefore, because there was no attack on the United States or American interests, there remains a question of whether a congressional declaration of war was necessary. Michael Ramsey argued that the Persian Gulf War was not inherently defensive because no state of war existed between the United States and Iraq before the beginning of Operation Desert Storm.²³⁴ Indeed, in this situation, the United States initiated a conflict against another nation that had not attacked the United States, and, therefore, a declaration of war would have been appropriate in this situation.²³⁵

However, although the method used to authorize the military action against Iraq may not have been proper in this situation, the Persian Gulf War is an effective example of the President conducting a war with a defensive objective within the bounds set by Congress. In this scenario, the actions of Congress and the President in the Persian Gulf War were consistent with the proper placement of policy-making authority under the Barbary framework. The President sought authorization for military action limited to a specific, defensive objec-

231 *Id.* (referencing twelve United Nations Security Council Resolutions passed between August and November of 1990 condemning the Iraqi invasion of Kuwait).

232 OREN, *supra* note 64, at 566–67.

233 *See id.* at 567–68 (discussing President Bush's decision to halt military operations before toppling Saddam Hussein's regime and occupying Iraq). Unlike in the Korean War, in which the United States sought to occupy and unify the entire Korean peninsula, the United States did not advance into Iraqi territory with the intent of occupying that nation; instead, American motives were limited to defeating the Iraqi military and expelling it from Kuwait. *See supra* text accompanying note 212.

234 Ramsey, *supra* note 39, at 1628.

235 *See* J. Gregory Sidak, *To Declare War*, 41 DUKE L.J. 27, 31–33 (1991) (describing the events surrounding and leading up to the Persian Gulf War, and concluding that due to the failure of Congress to declare war against Iraq, the war "lacked constitutional legitimacy despite its overwhelming support among the American electorate").

tive: liberating a nation who had been attacked. Congress approved of this proposed use of force, which did not expand beyond a defensive objective. Because the war was not expanded to an offensive objective, no further congressional authorization was needed.

Additionally, it is important to distinguish the objectives of the United States in its conflict with Iraq in 1991 as opposed to its conflict with the same nation in 2003. In the Persian Gulf War, the United States did not initiate the broader conflict, and went to war with the inherently defensive motive of expelling an aggressor from an occupied nation. By contrast, the 2003 invasion of Iraq, which was based upon the premise of preemptive war, was conducted with an inherently offensive objective.²³⁶ Therefore, although a declaration of war may have been an appropriate method of authorizing military force during the Persian Gulf War, the circumstances of the American invasion of Iraq in 2003 highlight the necessity for Congress to undertake its strongest possible action of declaring war when the nature of the American objectives is inherently offensive.²³⁷

D. The Invasion of Afghanistan: Authorizing an Offensive Response

The events leading up to the invasion of Afghanistan provide perhaps the clearest example of following the Barbary framework for the President and Congress's roles in war. On September 11, 2001, the United States was directly attacked by terrorists in New York, Washington, D.C., and Pennsylvania.²³⁸ Individuals affiliated with an international terrorist group known as al Qaeda hijacked planes and crashed them into civilian targets, the Twin Towers in New York, and a military target, the Pentagon, in Washington; a fourth plane crashed in rural Pennsylvania.²³⁹

One week after the attacks, on September 18, 2001, Congress passed the Authorization for Use of Military Force Against Terrorists [hereinafter *AUMF*].²⁴⁰ Section 2 of the AUMF declared:

(a) IN GENERAL—That the President is authorized to use all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001, or harbored such organiza-

²³⁶ See *infra* Part IV.E.

²³⁷ See *infra* text accompanying notes 257–58.

²³⁸ Michael Grunwald, *Terrorists Hijack 4 Airliners, 2 Destroy World Trade Center, Hit Pentagon; Hundreds Dead; Bush Promises Retribution; Military Put on Highest Alert*, WASH. POST, Sept. 12, 2001, at A1.

²³⁹ *Id.*

²⁴⁰ Authorization for Use of Military Force, Pub. L. No. 107–40, 115 Stat. 224 (2001).

tions or persons, in order to prevent any future acts of international terrorism against the United States by such nations, organizations or persons.²⁴¹

In October 2001, the United States, in conjunction with its allies in the North Atlantic Treaty Organization, began its attack on Afghanistan, where the al Qaeda leadership was headquartered with the protection of the Taliban government.²⁴²

This scenario is one in which the United States was attacked by a foreign power (if not a foreign nation); therefore, according to the Barbary framework, because the President has the power to “repel sudden attacks,”²⁴³ President George W. Bush had the constitutional authority to respond to this sudden attack and immediate threat to the nation. Solely on the basis of this power being triggered, however, the President would only have the capacity to act defensively. In the context of this attack, the President could have ordered operations against al Qaeda that would have protected American territory, interests, or civilians from further attacks without the approval of Congress. Nonetheless, the President’s decision to attack Afghanistan was entirely appropriate based on the Barbary framework because he obtained congressional consent to act offensively via the statutory language granting him the power to “use all necessary and appropriate force” against the perpetrators of the attacks and the nations that harbored them.²⁴⁴ While President Bush had the ability to act defensively because of the “sudden attack” on the nation, any significant limitation on his ability to act unilaterally disappeared when Congress granted him the authority to act offensively against al Qaeda.

E. The 2003 Invasion of Iraq: Initiating Purely Offensive War

The second of the Bush administration’s wars is more difficult to justify under the Barbary framework than the invasion of Afghanistan. The characteristics of the 2003 invasion of Iraq are distinguishable from every previous conflict that the United States entered with congressional authorization short of a declaration of war because the United States actually fired the first shot in the broader conflict without a declaration of war.²⁴⁵ In September of 2002, members of the

²⁴¹ *Id.* at § 2(a).

²⁴² WILENTZ, *supra* note 163, at 434.

²⁴³ *See supra* Part I.

²⁴⁴ Authorization for Use of Military Force Pub. L. No. 107–40, 115 Stat. 224 § 2(a) (2001).

²⁴⁵ As noted in Part IV.C, this situation is distinguishable from the Persian Gulf War because the United States did not initiate the broader conflict; rather, Iraq was the initial aggressor with its August 1990 invasion of Kuwait.

Bush administration began announcing to the American public and the United Nations that Iraq had aided terrorist groups that had targeted the United States and was developing weapons of mass destruction that could be used against the United States or provided to terrorist groups.²⁴⁶ Congress passed the Authorization for Use of Military Force Against Iraq Resolution of 2002, authorizing the President “to use the Armed Forces of the United States as he determines to be necessary and appropriate” against Iraq.²⁴⁷ In March of 2003, an American-led force invaded Iraq, occupying the country by the beginning of May.²⁴⁸ No weapons of mass destruction were ever found,²⁴⁹ and American troops remain in Iraq as of this writing.

Unlike the Barbary Wars, or other undeclared wars discussed earlier, the invasion of Iraq was not defensive in nature. The attack was premised on the Bush administration’s policy of preemptive war, as laid out under the National Security Strategy of the United States, published in 2002.²⁵⁰ The policy of preemptive war asserts to be defensive in nature, attempting to stop threats to the United States from other nations before they are able to attack.²⁵¹ However, in a preemptive war, the United States would still initiate the conflict because there would yet to be an attack on the United States by a foreign nation. The Constitution gives the power to “declare” war to Congress, and, as discussed previously, a crucial decision like beginning a war is an actual policy decision and was meant to be in the hands of the legislative branch, not the executive.²⁵² In other situations, where the United States or an ally is attacked, there is no policy decision to be made other than the means by which the President should use the military to defend the nation. However, determining that the United States should attack another nation that has not attacked the United

246 National Security Advisor Condoleezza Rice, for example, stated about Iraq’s intention to build and deploy weapons of mass destruction against the United States that “[w]e don’t want the smoking gun to be a mushroom cloud.” WILENTZ, *supra* note 163, at 443.

247 Authorization for Use of Military Force Against Iraq Resolution of 2002, Pub. L. No. 107-243, § 3, 116 Stat. 1498, 1501.

248 *See generally* BOB WOODWARD, *PLAN OF ATTACK* (2004) (describing the American invasion of Iraq).

249 WILENTZ, *supra* note 163, at 445 (“[T]he invasion force had found no trace of . . . [weapons of mass destruction] in Iraq—the declared reason for the invasion.”).

250 *See generally* THE NATIONAL SECURITY STRATEGY OF THE UNITED STATES OF AMERICA (2002), available at <http://georgewbush-whitehouse.archives.gov/nsc/nss/2002/nssintro.html> (announcing a new American policy of preemptive war).

251 *See id.* at 14 (“We must be prepared to stop rogue states and their terrorist clients *before* they are able to threaten or use weapons of mass destruction against the United States and our allies and friends.”) (emphasis added).

252 *See supra* text accompanying notes 129–31.

States requires important weighing of facts, intelligence, and policy considerations. Therefore, this *decision* belongs to Congress. Both this article's analytical framework and the explicit language of the Constitution support this conclusion. Even if the President proclaims that the United States is acting in preemptive defense, the reality is that the United States is *initiating* the conflict, and Congress must make that decision. This is especially apparent in light of the many unexpected difficulties in the occupation of Iraq and the violence that flared in the years after the invasion;²⁵³ these policy consequences were for Congress to consider, not the President, in the decision to invade Iraq.

Arguably, Congress did make this decision; after all, it authorized the President to act offensively. Some scholars would consider this sufficient for the President to subsequently begin an offensive war.²⁵⁴ However, unlike such prior undeclared wars as the Barbary Wars, the Korean War, the Persian Gulf War, or the invasion of Afghanistan, the United States was not repelling any sort of attack on itself, its interests, an ally, or even another nation. Under this Article's proposed framework, the United States initiating the use of offensive force must trigger the strongest possible action from Congress. The Framers meant for the power to initiate war to be with Congress and laid out the action Congress must take in the Declare War Clause.²⁵⁵ Where the decision is for the United States to *initiate* war, and especially when that war has an inherently offensive objective, Congress must be called upon to follow the instructions of the Constitution and issue a formal declaration of war. Congress failed to live up to its responsibilities regarding the invasion of Iraq; therefore, the war in Iraq was not properly authorized by the Constitution.²⁵⁶

The Iraq experience calls for Congress to more strongly assert its power under the Declare War Clause. If the United States is to initiate a war without provocation by an attack or a declaration of war

253 WILENTZ, *supra* note 163, at 448–49 (describing the consequences of the invasion of Iraq).

254 See Curtis A. Bradley & Jack L. Goldsmith, *Congressional Authorization and the War on Terrorism*, 118 HARV. L. REV. 2047, 2128 (2005) (“[A] declaration of war is not required in order for Congress to authorize the President to fully prosecute a war; a broadly worded authorization of force is sufficient.”).

255 U.S. CONST. art. I, § 8, cl. 11 (“The Congress shall have Power to . . . declare War, grant Letters of Marque and Reprisal, and make rules concerning Captures on Land and Water.”).

256 See Gary Minda, *Congressional Authorization and Deauthorization of War: Lessons from the Vietnam War*, 53 WAYNE L. REV. 943, 960 (2007) (“The 2002 AUMF was drafted by a Congress that was unwilling to make what the Constitution demands: a straight out decision that the nation is at war.”).

by the other foreign power, such an offensive action must be accompanied by a declaration of war. While a lesser authorization of offensive action is acceptable when the President is acting inherently defensively or in response to attack, undertaking purely offensive war should be accompanied by the strongest possible sanction by Congress in the form of declaring war, a power specifically placed with Congress by the Constitution.²⁵⁷ As one early commentator noted, “every possible precaution should be used before a nation is plunged into [war].”²⁵⁸ If the United States is to initiate a conflict, such precautions should naturally include the Constitution’s directions for Congress to make the decision to commence the conflict. Because of the importance of the decision itself, it is essential for Congress to fully debate and consider the strongest possible action.²⁵⁹ Taking this route would put Congress back in the role intended for it in initiating war. If the President wishes to pursue a policy of initiating war, he must adhere to the Constitution and follow its guidelines by deferring to Congress and requesting a formal declaration of war.

CONCLUSION

Both the rhetoric and the actions of the Framers, exemplified during the Barbary Wars, reflect a distinct desire for Congress to play a central role in the decision to go to war. This original understanding of Congress’s role under the Constitution manifests itself by placing the power to initiate offensive war with Congress, not the President. However, as undeclared war, whether offensive or defensive in nature, has become the norm, Congress has played less and less of a role in a decision in which it was supposed to be entrusted. The most recent American experience in Iraq calls for Congress to reassert itself to the intended decision-making role in terms of the war power.²⁶⁰

²⁵⁷ *Id.*

²⁵⁸ WILLIAM RAWLE, *A VIEW OF THE CONSTITUTION OF THE UNITED STATES OF AMERICA* 109 (Philadelphia, Philip H. Nicklin, Law Bookseller, 2d ed. 1829).

²⁵⁹ Louis Fisher supported this idea of the need for a full debate before authorizing the commencement of war, writing, “Only after Congress authorizes military action, reaching that decision through parliamentary deliberations, may the President as Commander in Chief order troops into combat.” FISHER, *supra* note 10, at 267.

²⁶⁰ At the time of this writing, there is a significant debate over whether President Obama acted in accordance with the Constitution in ordering the recent military intervention in Libya. See Paul Richter & Christie Parsons, *U.S. Role in Libya Brings Criticism for Obama*, BALT. SUN, Mar. 22, 2011, at 1A (discussing the concerns of several members of Congress about the constitutionality of the bombing campaign in Libya); Charlie Savage, *Attack Renews Debate Over Congressional Consent*, N.Y. TIMES, Mar. 22, 2011, at A14 (summarizing the debate over the constitutionality of President Obama’s decision to intervene militarily in

The crucial decision to initiate war, especially when the United States is unprovoked and commences a conflict itself, must be accompanied by the strongest congressional approval; namely, a declaration of war. Whenever a war takes an offensive character, the original understanding of the Constitution has Congress as the key decision-making authority. Congress, as the branch empowered with policy-making authority in terms of war powers, must therefore fulfill its responsibility to declare war if the United States wishes to initiate conflict, and give its approval if the President wishes to shift from defensive to offensive war.²⁶¹

Libya). This article discusses many of the arguments currently being made regarding the constitutionality of the Libyan intervention, but a full analysis of its constitutionality would involve a review of not only the conflicts primarily discussed in this article but other limited military interventions short of full-scale ground invasions. The Barbary Wars may provide useful background, but, unlike the Barbary Wars, the United States's intervention in Libya was not prompted by a Libyan attack on the United States or American commercial interests; instead, the United States allegedly intervened for the humanitarian purpose of protecting civilians. See Scott Wilson, *Obama: U.S. Had Responsibility to Act*, WASH. POST, Mar. 29, 2011, at A1 (discussing President Obama's stated justifications for ordering the use of military force in Libya). Accordingly, the most instructive historical precedent to review for an analysis of this most recent conflict may be the American participation in the North Atlantic Treaty Organization's air campaign against Yugoslavia in 1999, which sought to halt human rights abuses against civilians in Kosovo. Other apt sources of comparison may be American military involvement in Lebanon in the early 1980s or in Somalia in the early 1990s. Such an analysis is outside of the scope of this article, but the military action in Libya presents a new scenario that will likely require further legal and historical analysis.

²⁶¹ While not raising as much constitutional controversy as the decision to intervene in Libya, President Obama recently authorized a military operation in Pakistan that resulted in the death of al Qaeda's leader, Osama bin Laden. Bob Drogin, Ken Dilanian, & David Cloud,

U.S. Kills Bin Laden; Al Qaeda Leader Dies in a Firefight Near Pakistan Capital, L.A. TIMES, May 2, 2011, at A1. The proper role of Congress in approving overt or covert operations against non-state actors may ultimately become a more important constitutional issue than Congress's role in authorizing conventional war between the United States and other nations, as the United States continues to undertake substantial operations around the globe in other countries against terrorist groups without the explicit approval of Congress. The United States undertook such operations long before the 2011 military operation targeting Osama bin Laden's compound in Pakistan, including numerous drone strikes in Yemen and Pakistan, air strikes on terrorist targets in Somalia, and missile strikes against terrorist targets in Afghanistan and Sudan in response to al Qaeda attacks before September 11, 2001. See Jeb Boone & Greg Miller, *U.S. Conducts First Drone Strike in Yemen since '02*, WASH. POST., May 6, 2011, at A13 (discussing American drone strike against al Qaeda operatives in Yemen); David E. Sanger & Peter Baker, *Obama Reorients Approach of National Security Strategy*, N.Y. TIMES, May 28, 2010, at A8 (noting the Obama administration's authorization of "increased C.I.A. drone strikes against militants in Pakistan"); Jeffrey Gettleman, *U.S. Strikes Inside Somalia, Bombing Suspected Militant Hide-Out*, N.Y. TIMES, June 3, 2007 (late ed.), at 20; John Barry & Mark Dennis, *The Best Laid Plans*, NEWSWEEK, Sep. 7, 1998, at 43 (discussing American strikes in Sudan and Afghanistan in response to bombings of American embassies in Kenya and Tanzania). Congress did not provide authorization for these military operations, and, unlike in most conventional conflicts, would not have the opportunity to disapprove of or halt such operations through legislation or withdrawal of funding because of their limited nature and duration. Legal scholars must assess the proper constitutional role of the legislative branch authorizing such actions as these types of military operations become more common and more important to effectively combating terrorism.