

POINT / COUNTERPOINT

UNCHECKED PRESIDENTIAL WARS

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With studied care and deliberation, the Framers of the Constitution created a structure to prevent presidential wars. They specifically rejected the British model that allowed the monarch to take the country to war and to exercise exclusive control over foreign policy. Making fundamental judgments about representative government, popular control, and human nature, they placed the power of war and peace with the legislative branch and divided foreign policy between the President and Congress. For the most part, the Framers' model prevailed from 1789 to 1950.

That constitutional system is in tatters. Because of presidential initiatives after World War II—aggravated by congressional acquiescence and judicial passivity—there is no effective check on presidential wars. Presidents claim they can go to war wherever they like, for whatever reason, without seeking authority from Congress. What the Framers feared and tried to avoid we now have: unilateral presidential warmaking.

President Truman's decision to go to war against North Korea in 1950 represented a subversion of the Framers' design.¹ For the first time, a president had involved the nation in a major war without seeking a declaration or authorization from Congress. Over the last decade, Congress has stayed on the sidelines watching Presidents George Bush and Bill Clinton engage militarily against Panama, Somalia, Haiti, Bosnia, Yugoslavia, Afghanistan, and Sudan. Congress did authorize war against Iraq in 1991, but since that time the scope of

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¹ See Louis Fisher, *The Korean War: On What Legal Basis Did Truman Act?*, 89 AM. J. INT'L L. 21, 21-22 (1995) (discussing whether Truman acted contrary to the Constitution).

military operations against that country has been dictated by presidents, not Congress.

Political developments over this past half century do little to support the Framers' expectation that each branch of government would protect itself by fighting off usurpations and transgressions by other branches. The contemporary Congress has abdicated war powers that had been entrusted to the legislative branch—the people's representatives. The legislative check has been reduced to possibly taking some future action to deny funds for an unpopular war started by the President. The judicial check, for the most part, does not exist.

Part I of this Article addresses the Framers' design for the American government, focusing on what they had learned from the colonial governments and the delegate debates over the use of checks and balances. Part II discusses the Framers' intent in giving Congress the power to initiate war. Part III provides a brief description of the Framers' model in practice while describing instances, even before 1950, where presidents initiated the use of force without congressional approval. In Part IV, I analyze Professor John Yoo's argument that the Framers' intent was to give the President the initiative in war. Part V focuses on the application of the War Powers doctrine to Kosovo and presidential reliance on U.N. Security Council resolutions and NATO decisions as "authority."

I. THE FRAMERS' DESIGN

The Framers believed that a powerful dynamic of institutional self-defense would safeguard the structure of separation of powers and give life and energy to the system of checks and balances. They expected Congress to be especially vigilant in protecting the power to go to war. Their model worked for about 160 years, but the record since 1950 reveals an alarming decline in congressional confidence and institutional self-esteem. Lawmakers regularly deride the capacity of Congress to exercise its war and spending prerogatives.² What the Framers had in mind clearly is not working today. Citizens need to understand what has happened, and why, and debate whether the original constitutional principles are worth preserving.

James Madison argued in *Federalist No. 51* that

the great security against a gradual concentration of the several powers in the same department, consists in giving to those who administer each

² See generally LOUIS FISHER, CONGRESSIONAL ABDICATION ON WAR AND SPENDING (forthcoming 2000).

department the necessary constitutional means and personal motives to resist encroachments of the others. The provision for defense must in this, as in all other cases, be made commensurate to the danger of attack. Ambition must be made to counteract ambition. The interest of the man must be connected with the constitutional rights of the place.³

The core principle: each branch would defend its prerogatives. Madison asked how the partition of power among the three branches would be maintained. Acknowledging that other systems had been inadequate, he stated that “the defect must be supplied, by so contriving the interior structure of the government as that its several constituent parts may, by their mutual relations, be the means of keeping each other in their proper places.”⁴

The Framers depended on a written constitution, representative government, and democratic pressures, but they wanted more. Madison agreed that a “dependence on the people is, no doubt, the primary control on the government; but experience has taught mankind the necessity of auxiliary precautions.”⁵ The auxiliary precautions: separation of powers, checks and balances, and each branch intent on safeguarding its institutional interests.

We have it from Woodrow Wilson that the makers of the Constitution “followed the scheme as they found it expounded in Montesquieu, followed it with genuine scientific enthusiasm.”⁶ James Bryce argued that the Framers “had for their oracle of political philosophy the treatise of Montesquieu on the Spirit of Laws. . . . No general principle of politics laid such hold on the constitution-makers and statesmen of America as the dogma that the separation of these three functions is essential to freedom.”⁷ Montesquieu was indeed frequently cited at the Federal Convention and the state ratifying conventions, and Madison praised him as “the celebrated Montesquieu” and the “oracle” who was always consulted on the separation doctrine.⁸

The American Framers did not borrow the separation doctrine

³ THE FEDERALIST NO. 51, at 356 (James Madison) (Benjamin Fletcher Wright ed., 1961).

⁴ *Id.* at 355.

⁵ *Id.* at 356.

⁶ WOODROW WILSON, CONSTITUTIONAL GOVERNMENT IN THE UNITED STATES 56 (1908).

⁷ 1 JAMES BRYCE, THE AMERICAN COMMONWEALTH 29-30 (MacMillan 3d ed. 1908) (1893).

⁸ THE FEDERALIST NO. 47, at 337 (James Madison) (Benjamin Fletcher Wright ed., 1961).

from Montesquieu, who presented a tidy, uncomplicated model of separate branches, free of partisan battles and the evolving cabinet system in England. Montesquieu promoted an idealized form of government, corresponding more to his conceptions—or misconceptions—than to the reality of British politics.⁹ Justice Holmes spoke bluntly of this contrivance: “His England—the England of the three-fold division of power into legislative, executive and judicial—was a fiction invented by him, a fiction which misled Blackstone and De Lolme.”¹⁰

For the most part, Montesquieu adhered to a strict separation of powers. He maintained that the legislative body should not impeach the executive, for the “moment he is accused or tried there is an end of liberty.”¹¹ He gave his “senate” (the house of nobles) the power to reject bills relating to supplies (funding), but no authority to amend them.¹² He allowed the executive a veto to reject legislation but opposed any other participation in the legislative process.¹³ On all those points, and others, the Framers rejected Montesquieu. Yet they agreed on his fundamental premise that power must check power: “*il faut que, par la disposition des choses, le pouvoir arrête le pouvoir.*”¹⁴

A. Lessons Learned at Home

Colonial governments in America accumulated their own insights into the problem of checks and balances. During this period, complaints about institutional encroachments were common. After achieving their independence from England, many of the states wrote into their constitutions explicit guarantees for a separation between the branches of government, but the meaning of separation varied

⁹ See LOUIS FISHER, PRESIDENT AND CONGRESS 243-51 (1972) (arguing that Montesquieu based his model for separated powers on the British Constitution but was heavily criticized because the branches of the British government have been consistently linked).

¹⁰ OLIVER WENDELL HOLMES, COLLECTED LEGAL PAPERS 263 (1920).

¹¹ 1 BARON DE MONTESQUIEU, THE SPIRIT OF THE LAWS 158 (Thomas Nugent trans., 1949).

¹² See *id.* at 156 (arguing that members of the legislative body should only be allowed to reject, and not resolve, legislation so that the interests of the people are not forgotten).

¹³ See *id.* at 159-60 (“If the prince (executive) were to have a part in the legislature by the power of resolving, liberty would be lost.”).

¹⁴ “It is necessary that, by the nature of things, power check power.” The French is taken from Montesquieu’s collected works, 2 MONTESQUIEU, OEUVRES COMPLÈTES 395 (1951).

from state to state and became a source of continual misunderstanding. For example, despite the strong language in the Massachusetts Constitution forbidding one department from exercising the powers of another, the executive possessed a qualified veto over the legislature; the senate acted as a court of impeachment; members of the judiciary were appointed by the governor; and the legislature appointed the major generals of the militia, an advisory council for the governor, and several officers of the administration.¹⁵

Other state constitutions announced separation in strict terms but departed from the maxim when necessary. New Hampshire, the last of the thirteen states to form a constitution, prudently acknowledged the gap between a literal interpretation of separated powers and the demands of workable government. The three departments were to be kept "as separate from and independent of each other, as the nature of a free government will admit, or as is consistent with that chain of connection that binds the whole fabric of the constitution in one indissoluble bond of union and amity."¹⁶

In the months just before the Philadelphia Convention, Madison identified for Thomas Jefferson the essential elements of the new national government, including a reorganization to provide for separate branches. Madison's interest in three branches was drawn more from administrative necessities than from the writings of Montesquieu. The Continental Congress had mismanaged its power under the Articles of Confederation, he told Jefferson, and administrative duties under the new government would be even more demanding.¹⁷ At the convention, Madison reminded the delegates that experience with the states had proved "a tendency in our governments to throw all power into the Legislative vortex. The Executives of the States are in general little more than Cyphers; the legislatures omnipotent."¹⁸ The separation set up in the state constitutions had turned out to be a matter of mere "parchment barriers" incapable of preventing legislatures from draw-

¹⁵ See 3 THE FEDERAL AND STATE CONSTITUTIONS, COLONIAL CHARTERS, AND OTHER ORGANIC LAWS 1893, 1897, 1902, 1904, 1905 (Francis Newton Thorpe ed., 1909) [hereinafter Thorpe] (citing clauses from the Massachusetts Constitution concerning the separation among the branches of state government).

¹⁶ 4 Thorpe, *supra* note 15, at 2457 (quoting Article XXXVII of the New Hampshire Bill of Rights).

¹⁷ See 2 THE WRITINGS OF JAMES MADISON 328 (Gaillard Hunt ed., 1901) ("The limited powers now vested in Congress are frequently mismanaged from the want of such a distribution of them. What would be the case under an enlargement not only of the powers, but the number of federal Representatives?").

¹⁸ 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 35 (Max Farrand ed., 1911) [hereinafter Farrand].

ing other branches into their orbit.¹⁹

After the convention had adjourned, Madison confided to Jefferson that the boundaries between the executive, legislative, and judicial powers, "though in general so strongly marked in themselves, consist in many instances of mere shades of difference."²⁰ He set out in *The Federalist Papers* to contrast the overlapping of powers in the Constitution with the abstract and impracticable partitioning of powers advocated by some of the critics.

The bulk of Madison's analysis of the separation doctrine appears in *Federalist No. 47*. He upheld the basic principle of the maxim that tyranny results whenever three branches are concentrated in the same hands, but he charged that the maxim had "been totally misconceived and misapplied."²¹ Montesquieu, he said, could not possibly have meant that the three powers of the British government were actually kept separate. The executive magistrate formed a part of the legislative power by making treaties with foreign sovereigns, and he had a share in the judicial power by appointing the members of the judiciary, as well as by having the power to remove them. Moreover, one house of the legislature formed a constitutional council for the executive, had judicial power in the impeachment process, and was invested with the supreme appellate jurisdiction in all other cases. The judges could not vote in legislative actions, but were permitted to participate in the deliberations.²²

Madison then turned to the state constitutions for further guidance, pointing out that in no instance were the departments of power in the states kept absolutely separate and distinct. The intent of Montesquieu, Madison concluded, could be no more than this: "that where the *whole* power of one department is exercised by the same hands which possess the *whole* power of another department, the fundamental principles of a free constitution are subverted."²³

¹⁹ See THE FEDERALIST NO. 48, at 343 (James Madison) (Benjamin Fletcher Wright ed., 1961) (arguing that an "adequate defense" is necessary to protect less powerful members of the government because the securities in the state constitutions are "greatly overrated").

²⁰ 5 THE WRITINGS OF JAMES MADISON 26 (Gaillard Hunt ed., 1904).

²¹ THE FEDERALIST NO. 47, at 336-37 (James Madison) (Benjamin Fletcher Wright ed., 1961).

²² See *id.* at 337.

²³ *Id.* at 338.

B. *Checks and Balances*

By the late 1780s, the concept of checks and balances had gained dominance over the doctrine of separated powers, which one contemporary pamphleteer called a "hackneyed principle" and a "trite maxim."²⁴ Yet several delegates at the state ratifying conventions expressed shock at the degree to which the Constitution had mingled the departments.

One delegate at the Virginia ratifying convention cried, "How is the executive? Contrary to the opinion of all the best writers, blended with the legislative. We have asked for bread, and they have given us a stone."²⁵ The draft Constitution was attacked at the North Carolina ratifying convention for violating the maxim whereby the three branches "ought to be forever separate and distinct from each other."²⁶ Overlapping of departments also provoked criticism in Pennsylvania. Opponents of the Constitution insisted that the Senate's judicial power in impeachment, as well as the executive's power in making treaties, constituted an "undue and dangerous mixture of the powers of government."²⁷ A lengthy quotation from Montesquieu was introduced to demonstrate the dependence of freedom and liberty on a separation of powers.²⁸

These three states recommended the addition of a separation clause to the national bill of rights. Virginia offered draft language: "legislative, executive, and judiciary powers of Government should be separate [sic] and distinct."²⁹ North Carolina and Pennsylvania submitted their own versions of a separation clause.³⁰ Congress compiled a tentative list of restrictions on the national government, among

²⁴ M.J.C. VILE, *CONSTITUTIONALISM AND THE SEPARATION OF POWERS* 153 (1967).

²⁵ 3 *THE DEBATES IN THE SEVERAL STATE CONVENTIONS: ON THE ADOPTION OF THE FEDERAL CONSTITUTION* 280 (Jonathan Elliot ed., Phila., Lippincott 1836) [hereinafter Elliot].

²⁶ 4 *id.* at 116.

²⁷ *PENNSYLVANIA AND THE FEDERAL CONSTITUTION, 1787-1788*, at 475 (John Bach McMaster & Federal D. Stone eds., Lancaster, Pa., Inquirer 1888).

²⁸ *See id.* at 476-77 ("[T]here is no liberty, if the power of judging be not separated from the legislative and executive powers. . . . There would be an end of everything, were the same man, or the same body of the nobles, or of the people, to exercise those three powers. . . ." (internal quotations omitted)).

²⁹ EDWARD DUMBAULD, *THE BILL OF RIGHTS AND WHAT IT MEANS TODAY* 183 (1957) (quoting Amendments Proposed by Virginia Convention, June 27, 1788).

³⁰ *See id.* at 174-75, 199 (citing Pennsylvania's proposed amendments that "the legislative, executive and judicial powers be kept separate;" citing North Carolina's proposed amendments that "the legislative executive and judiciary powers of government should be separate and distinct").

which was the following:

The powers delegated by this Constitution are appropriated to the departments to which they are respectively distributed: so that the Legislative Department shall never exercise the powers vested in the Executive or Judicial, nor the Executive exercise the powers vested in the Legislative or Judicial, nor the Judicial exercise the powers vested in the Legislative or Executive Departments.³¹

This language was among seventeen constitutional amendments sent to the Senate, which struck it from the list. A substitute amendment (to make the three departments "separate and distinct," and to ensure that the legislative and executive departments would be restrained from oppression by "feeling and participating the public burthens" through regular elections) was also voted down.³² The Senate whittled the list of seventeen amendments down to twelve. Among the deleted amendments was the separation clause.

The Framers did not object to a sharing or partial intermixture of powers. They were not doctrinaire advocates of a pure separation of powers between branches. Some overlapping was necessary to assure a vigorous system of checks and balances. They knew that the "danger of tyranny or injustice lurks in unchecked power, not in blended power."³³

II. THE WAR PREROGATIVE

The Framers were particularly intent on vesting the power of initiating war in the Congress, as the people's representative. They were well aware of the efforts of English kings to rely on extra-parliamentary sources of revenue for their military expeditions and other activities. Some of the extra-parliamentary revenue came from foreign governments; some came from private citizens. Because of these transgressions and encroachments of legislative prerogatives, England lurched into a bloody civil war and Charles I lost both his head and his office.³⁴

³¹ 1 ANNALS OF CONG. 435-36 (Joseph Gales ed., 1789).

³² 1 SENATE JOURNALS, 1788-1794, at 64, 73-74 (1820).

³³ KENNETH CULP DAVIS, ADMINISTRATIVE LAW AND GOVERNMENT 36 (2d ed. 1975).

³⁴ See PAUL EINZIG, THE CONTROL OF THE PURSE 57-62, 100-06 (1959) (discussing the events leading to Charles I's execution and, more generally, the monarchy's insistence on its divine right to levy taxation and the use of extra-parliamentary revenues, often at the objection of the Parliament).

A. *Republican Principles*

Joseph Story, who served on the Supreme Court from 1811 to 1845, wrote about the essential republican principle of vesting the decision to go to war in the representative branch:

[T]he power of declaring war is not only the highest sovereign prerogative; . . . it is in its own nature and effects so critical and calamitous, that it requires the utmost deliberation, and the successive review of all the councils of the nations. War, in its best estate, never fails to impose upon the people the most burthensome taxes, and personal sufferings. It is always injurious, and sometimes subversive of the great commercial, manufacturing, and agricultural interests. Nay, it always involves the prosperity, and not unfrequently the existence, of a nation. It is sometimes fatal to public liberty itself, by introducing a spirit of military glory, which is ready to follow, wherever a successful commander will lead It should therefore be difficult in a republic to declare war; but not to make peace. . . . The co-operation of all the branches of the legislative power ought, upon principle, to be required in this the highest act of legislation³⁵

The Framers deliberately divided government by making the President the commander-in-chief and reserving to Congress the power to finance military expeditions. The Framers rejected a government in which a single branch could both make war and fund it.

In *Federalist No. 69*, Alexander Hamilton argued that the American President was far less threatening than the King of England. He explained that the power of the king “extends to the *declaring* of war and to the *raising* and *regulating* of fleets and armies.”³⁶ In contrast, the Constitution placed those powers expressly with Congress. Jefferson praised this transfer of the war power “from the executive to the Legislative body, from those who are to spend to those who are to pay.”³⁷ Madison warned against placing the power of commander-in-chief in the same hands as the power to go to war:

Those who are to *conduct a war* cannot in the nature of things, be proper or safe judges, whether *a war ought* to be *commenced, continued, or concluded*. They are barred from the latter functions by a great principle in free government, analogous to that which separates the sword from the

³⁵ JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 570, at 410-11-61 (Carolina Academic Press, 1987) (1833).

³⁶ THE FEDERALIST NO. 69, at 446 (Alexander Hamilton) (Benjamin Fletcher Wright ed., 1961).

³⁷ Letter from Thomas Jefferson to James Madison (Sept. 6, 1789), in 5 THE WRITINGS OF THOMAS JEFFERSON 123 (Paul Leicester Ford ed., 1895).

purse, or the power of executing from the power of enacting laws.³⁸

George Mason advised his colleagues at the Philadelphia Convention in 1787 that the “purse & the sword ought never to get into the same hands <whether Legislative or Executive.>”³⁹

B. *Rejecting the British Models*

The Framers were aware that British models placed the power to initiate war with the monarch. John Locke’s *Second Treatise on Civil Government* spoke of three branches of government: legislative, executive, and “federative.”⁴⁰ The last consisted of “the power of war and peace, leagues and alliances, and all the transactions with all persons and communities without the commonwealth.”⁴¹ The federative power (or what we would call foreign policy today) was “always almost united” with the executive.⁴²

Similarly, Sir William Blackstone, the great eighteenth-century jurist, vested foreign policy and the war power exclusively with the monarch. In his *Commentaries*, he defined the King’s prerogative broadly to include the right to send and receive ambassadors, to make war or peace, to make treaties, to issue letters of marque and reprisal (authorizing private citizens to undertake military actions), and to raise and regulate fleets and armies.⁴³

Steeped in these models and theories, the Framers nonetheless vested in Congress many of Locke’s federative powers and Blackstone’s royal prerogatives. At the Philadelphia Convention, Charles Pinckney said he supported “a vigorous Executive but was afraid the Executive powers of <the existing> Congress might extend to peace & war &c which would render the Executive a Monarchy, of the worst kind, towit [sic] an elective one.”⁴⁴ James Wilson supported a single

³⁸ James Madison, *Letters of Helvidius, No. 1*, GAZETTE OF THE UNITED STATES, Aug. 24, 1793, reprinted in 6 THE WRITINGS OF JAMES MADISON 138, 148 (Gaillard Hunt ed., 1906).

³⁹ 1 FARRAND, *supra* note 18, at 139-40 (statement of George Mason in the Committee of the Whole on June 6, 1787).

⁴⁰ JOHN LOCKE, TWO TREATISES OF CIVIL GOVERNMENT §§ 146-47, at 190 (London, J.M. Dent & Sons 1962) (1690) (listing the three branches of commonwealth government).

⁴¹ *Id.* § 146, at 191.

⁴² *Id.*

⁴³ See 1 WILLIAM BLACKSTONE, COMMENTARIES *245-46, *249-52, *254-55, *257-58, *261-62 (discussing each of the royal prerogatives).

⁴⁴ 1 FARRAND, *supra* note 18, at 64-65 (statement of Charles Pinckney in the Committee of the Whole on June 1, 1787).

executive but “did not consider the Prerogatives of the British Monarch as a proper guide in defining the Executive powers. Some of these prerogatives were of a Legislative nature. Among others that of war & peace &c.”⁴⁵

Edmund Randolph worried about executive power, calling it “the foetus of monarchy.”⁴⁶ The delegates to the Philadelphia Convention, he said, had “no motive to be governed by the British Governmt. [sic] as our prototype.”⁴⁷ Wilson agreed that the British model “was inapplicable to the situation of this Country; the extent of which was so great, and the manners so republican, that nothing but a great confederated Republic would do for it.”⁴⁸ Drafts allocated the powers over foreign affairs and war that Locke and Blackstone had given to the monarch either exclusively to Congress or shared between the President and the Senate (as with the treaty and appointment powers).⁴⁹

The one exception to this pattern of legislative control was the discretion left to the President to repel sudden attacks. An early draft empowered Congress to “make war.”⁵⁰ Charles Pinckney objected that legislative proceedings “were too slow” for the safety of the country in an emergency since he expected Congress to meet but once a year.⁵¹ Madison and Elbridge Gerry moved to insert “declare” for “make,” leaving the President with “the power to repel sudden attacks.”⁵² Their motion carried.⁵³ The duty to repel sudden attacks represented an emergency measure that permits the President to take actions necessary to resist sudden attacks against the United States. This discretionary authority did not extend to taking the country into full-scale war or to mounting an offensive attack against other nations. As John Bassett Moore, a noted scholar of international law, remarked:

There can hardly be room for doubt that the Framers of the constitu-

⁴⁵ *Id.* at 65-66 (statement of James Wilson in the Committee of the Whole on June 1, 1787).

⁴⁶ *Id.* at 66 (statement of Edmund Randolph in the Committee of the Whole on June 1, 1787).

⁴⁷ *Id.*

⁴⁸ *Id.* (statement of James Wilson).

⁴⁹ See 2 Farrand, *supra* note 18, at 594 (§ 8), 599 (§ 2(a)).

⁵⁰ *Id.* at 143 (Draft for Committee of Detail, IV).

⁵¹ *Id.* at 318 (statement of Charles Pinckney in Convention on Aug. 17, 1787).

⁵² *Id.* (statement of James Madison and Elbridge Gerry in Convention on Aug. 17, 1787).

⁵³ See *id.* at 319 (noting the passage of the motion to change “make” to “declare” war by a vote of seven to two with one abstention).

tion, when they vested in Congress the power to declare war, never imagined that they were leaving it to the executive to use the military and naval forces of the United States all over the world for the purpose of actually coercing other nations, occupying their territory, and killing their soldiers and citizens, all according to his own notions of the fitness of things, as long as ⁵⁴ he refrained from calling his action war or persisted in calling it peace.

Responses to the Madison-Gerry amendment reinforce the narrow grant of authority to the President. Pierce Butler wanted to give the President the power to make war, but other delegates strongly objected. As demonstrated by the debate below, these objecting delegates supported “clogging rather than facilitating war.”⁵⁵ When it was necessary to engage in war, that decision would be made by Congress, not the President:

Mr [Pierce] Butler. . . . He was for vesting the [war] power in the President, who will have all the requisite qualities, and will not make war but when the Nation will support it. . . .

Mr Sharmen [Sherman] thought it stood very well. The Executive shd. be able to repel and not to commence war. “Make” better than “declare” the latter narrowing the power too much.

Mr Gerry never expected to hear in a republic a motion to empower the Executive alone to declare war.

Mr. Ellsworth [Ellsworth]. there is a material difference between the cases of making *war*, and making *peace*. It shd. be more easy to get out of war, than into it. . . .

Mr. Mason was agst giving the power of war to the Executive, because not <safely> to be trusted with it; or to the Senate, because not so constructed as to be entitled to it. He was for clogging rather than facilitating war; but for facilitating peace. . . .⁵⁶

At the Pennsylvania ratifying convention, James Wilson expressed the prevailing sentiment that the system of checks and balances

will not hurry us into war; it is calculated to guard against it. It will not be in the power of a single man, or a single body of men, to involve us in such distress; for the important power of declaring war is vested in the

⁵⁴ 5 THE COLLECTED PAPERS OF JOHN BASSETT MOORE 196 (1944).

⁵⁵ 2 Farrand, *supra* note 18, at 319 (statement of George Mason in opposition to Pierce Butler made in Convention on Aug. 17, 1787).

⁵⁶ *Id.* at 318-19 (statements of various named delegates in Proceedings in Committee of the Whole on Aug. 17, 1787).

legislature at large.⁵⁷

Similar comments were made by delegates to the North Carolina and South Carolina ratifying conventions.⁵⁸

C. *Associated War Powers*

Through the granting of letters of marque and reprisal, sovereigns were able to authorize private citizens to wage war on other countries. By turning to citizens (or privateers), nations could augment their armies and navies and respond more swiftly and with greater force to emergencies and threats. Privately owned vessels were authorized to prey on foreign vessels and take plunder, or “prizes.” The phrase “letters of marque and reprisal” came to refer to any use of force short of a declared war.

Unlike Blackstone, who recognized that the king had the power to issue letters of marque and reprisal, the Framers transferred that responsibility solely to Congress and associated it with the power to declare war. The Constitution grants Congress the power “[t]o declare war, grant letters of Marque and Reprisal, and make rules concerning Captures on Land and Water.”⁵⁹ Any initiation of war, whether by declaration or by marque and reprisal, was reserved to Congress. Thus, both general and limited wars were left to the decision of the representative branch. In 1793, Secretary of State Thomas Jefferson related marque and reprisal to the power to wage war. The making of a reprisal on a nation, he said, “is a very serious thing. . . . [W]hen reprisal follows it is considered as an act of war, & never yet failed to produce it in the case of a nation able to make war.”⁶⁰ If it became necessary to invoke this power, “Congress must be called on to take it; the right of reprisal being expressly lodged with them by the constitution, & not with the executive.”⁶¹

During the Quasi War against France, from 1798 to 1800, Congress authorized private citizens to provide vessels and other military assistance. Alexander Hamilton, always protective of executive power, recognized that the Constitution vested in Congress exclusive power

⁵⁷ 2 Elliot, *supra* note 25, at 528.

⁵⁸ See 4 *id.* at 107, 287 (containing statements by James Iredell and Charles Pinckney echoing Wilson’s reliance on checks and balances to guard against war).

⁵⁹ U.S. CONST. art. I, § 8, cl. 11.

⁶⁰ Thomas Jefferson, *Opinion on “The Little Sarah”* (May 16, 1793), in 6 THE WRITINGS OF THOMAS JEFFERSON, *supra* note 37, at 257, 259.

⁶¹ *Id.*

over reprisals. In the midst of hostilities, the President could repel force by force, but any actions beyond those measures "must fall under the idea of *reprisals* & requires the sanction of that Department which is to declare or make war."⁶² Congress also authorized letters of marque during the War of 1812, but has not done so since that time. Signatories to the Declaration of Paris, after the Crimean War in 1856, renounced the use of letters of marque.

Seven clauses within Article I of the Constitution vest war powers in Congress. Clause 11 empowers Congress to declare war, grant letters of marque and reprisal, and make rules concerning captures on land and water. Clauses 12 and 13 empower Congress to raise and support armies and provide and maintain a navy. Clauses 14, 15, and 16 authorize Congress to make rules for the government and regulations of the land and naval forces, to call forth the militia, and to provide for the organizing, arming, and disciplining of the militia. At the top of the list stands Clause 10, which empowers Congress "to define and punish Piracies and Felonies committed on the high Seas, and Offences against the Law of Nations."⁶³

This cluster of powers broke with prevailing theories that placed war powers, foreign affairs, and judgments on the law of nations with the Executive. Blackstone, for example, regarded the law of nations as part of the king's power. The law of nations consisted of "mutual compacts, treaties, leagues, and agreements" between various countries.⁶⁴ It was the king's prerogative to make treaties, leagues, and alliances with foreign states.

At the Philadelphia Convention, Madison emphasized the importance of drafting a constitution that would "prevent those violations of the law of nations & of Treaties which if not prevented must involve us in the calamities of foreign wars."⁶⁵ One of the early statutes passed by Congress was legislation in 1790, setting forth punishments for certain crimes against the United States.⁶⁶ One provision established fines and imprisonment for any person who attempted to prosecute or bring legal action against an ambassador or other public minister

⁶² Letter from Alexander Hamilton to James McHenry (May 17, 1798), in 21 THE PAPERS OF ALEXANDER HAMILTON 461-62 (Harold C. Syrett ed., 1974).

⁶³ U.S. CONST. art. I, § 8, cl. 10.

⁶⁴ 1 WILLIAM BLACKSTONE, COMMENTARIES *43.

⁶⁵ 1 Farrand, *supra* note 18, at 316 (statement of James Madison in Committee of the Whole on the Propositions of Mr. Patterson on June 19, 1787).

⁶⁶ See Act of Apr. 30, 1790, ch. 9, 1 Stat. 112.

from another country.⁶⁷ Persons who took such actions were deemed “violators of the laws of nations” who “infract the law of nations.”⁶⁸ Actions against ambassadors and public ministers “tend[] to provoke the resentment of the sovereign whom the ambassador represents, and to bring upon the state the calamities of war.”⁶⁹

The Neutrality Act of 1794⁷⁰ gave the Washington administration the legal footing it needed to fine and imprison American citizens whose actions might have embroiled the United States in the war between France and England. Almost two centuries later a district judge noted that one of the major purposes of the Neutrality Act “was to protect the constitutional power of Congress to declare war or authorize private reprisal against foreign states.”⁷¹

D. *Presidential Fame*

The Framers gave Congress the power to initiate war because they believed that presidents, in their search for fame and personal glory, would have an appetite for war.⁷² John Jay warned in *Federalist No. 4* that

absolute monarchs will often make war when their nations are to get nothing by it, but for purposes and objects merely personal, such as a thirst for military glory, revenge for personal affronts, ambition, or private compacts to aggrandize or support their particular families or partisans. These and a variety of other motives, which affect only the mind of the sovereign, often lead him to engage in wars not sanctified by justice or the voice and interests of his people.⁷³

Writing in 1793 under the name “Helvidius,” Madison called war

the true nurse of executive aggrandizement. . . . In war, the honours and emoluments of office are to be multiplied; and it is the executive patronage under which they are to be enjoyed. It is in war, finally, that laurels are to be gathered; and it is the executive brow they are to encircle.

⁶⁷ See *id.* §§ 25-26.

⁶⁸ *Id.* §§ 26, 28.

⁶⁹ 1 JAMES KENT, COMMENTARIES ON AMERICAN LAW 170 (1826).

⁷⁰ Act of May 22, 1794, ch. 33, 1 Stat. 369.

⁷¹ *Dellums v. Smith*, 577 F. Supp. 1449, 1453 (N.D. Cal. 1984) (regarding a mandamus action brought by private plaintiffs to compel the Attorney General to investigate whether the President and other federal executive officers violated the Neutrality Act *vis-à-vis* Nicaragua).

⁷² See William Michael Treanor, *Fame, the Founding, and the Power to Declare War*, 82 CORNELL L. REV. 695, 695-701 (1997) (discussing the significance of vesting in Congress the power to declare war and grant letters of marque and reprisal).

⁷³ THE FEDERALIST NO. 4, at 101 (John Jay) (Benjamin Fletcher Wright ed., 1961).

The strongest passions and most dangerous weaknesses of the human breast; ambition, avarice, vanity, the honourable or venial love of fame, are all in conspiracy against the desire and duty of peace.⁷⁴

Jay and Madison reflected Enlightenment libertarian principles that looked with suspicion upon the monarchical appetite for initiating war to satisfy fame and personal glory.⁷⁵ A republican government relying on the consent of the people would embark on war with much greater caution and circumspection. Madison insisted that war should only be declared "by the authority of the people, whose toil and treasure are to support its burdens."⁷⁶

III. THE FRAMERS' MODEL IN PRACTICE

The Framers' model for constitutional government and democratic control worked well for about 160 years. Of course, the balance of power between Congress and the President fluctuated from decade to decade, depending on who served in the White House and what kind of political conditions temporarily upset the distribution of power. But Congress was fairly consistent in protecting its war power. There was no wholesale delegation or abdication.

A. *To Declare or Authorize*

For all of the major military actions, Congress either declared war or authorized it. A declaration of war was used for the War of 1812 against England, the War of 1846 against Mexico, the Spanish-American War of 1898, World War I, and World War II.⁷⁷ There were two declarations for World War I (Germany and Austria-Hungary) and six separate declarations for World War II (Japan, Germany, Italy, Bulgaria, Hungary, and Rumania).⁷⁸ On other occasions, Congress used the statutory process to authorize war, as with the "Quasi-War" with France from 1798 to 1800 and the Barbary wars during the Jeffer-

⁷⁴ 6 THE WRITINGS OF JAMES MADISON 174 (Gaillard Hunt ed., 1906).

⁷⁵ See JEFFREY A. SMITH, WAR AND PRESS FREEDOM: THE PROBLEM OF PREROGATIVE POWER 3, 5-6, 31 (1999) (explaining the Enlightenment aversion to warfare and preference for transparent and republican, versus monarchical, rule).

⁷⁶ *Id.* at 4.

⁷⁷ See Act of June 18, 1812, ch. 102, 2 Stat. 755; Act of May 13, 1846, ch. 16, 9 Stat. 9; Act of Apr. 25, 1898, ch. 189, 30 Stat. 364; Act of Apr. 6, 1917, ch. 1, 40 Stat. 1; Act of Dec. 8, 1941, ch. 561, 55 Stat. 795.

⁷⁸ See Act of Apr. 6, 1917, ch. 1, 40 Stat. 1; Act of Dec. 17, 1917, ch. 1, 40 Stat. 429; Act of Dec. 8, 1941, ch. 561, 55 Stat. 795; Act of Dec. 11, 1941, ch. 564, 55 Stat. 796; Act of Dec. 11, 1941, ch. 564, 55 Stat. 797; Act of June 5, 1942, ch. 323-25, 56 Stat. 307.

son and Madison administrations.⁷⁹ Similarly, Congress passed legislation authorizing military action in the Indian wars and the Whiskey Rebellion.⁸⁰

During these early decades, presidents and executive officials uniformly acknowledged the need to come to Congress for authority to support anything other than purely defensive operations. President George Washington understood that existing statutory authority, giving him access to the militia to protect inhabitants of the frontiers, permitted only defensive actions against hostile Indian forces. Any step beyond defensive actions required authorization from Congress.⁸¹ Secretary of War Henry Knox told territorial governors that until Congress decided otherwise, military operations were to be confined to "defensive measures."⁸² The direction of offensive operations had to await the decision of Congress, which was "solely . . . vested with the powers of War."⁸³ Knox said that Congress was "alone . . . competent to decide upon an offensive war . . ."⁸⁴

In proposing military action against France in the Quasi-War, President John Adams never argued that he could act unilaterally. He knew that he was required to seek authority from Congress which had enacted several dozen statutes increasing the size of the military and

⁷⁹ See LOUIS FISHER, *PRESIDENTIAL WAR POWER* 17-18, 26 (1995) (discussing statutes enacted to authorize military operations against France and the Barbary powers).

⁸⁰ See *id.* at 13-17 (discussing war power precedents from 1789 to 1800).

⁸¹ See Letter from George Washington to Governor William Moultrie (Aug. 28, 1793), in 33 *THE WRITINGS OF GEORGE WASHINGTON 1745-1799*, at 73 (John C. Fitzpatrick ed., 1940) ("The Constitution vests the power of declaring war with Congress; therefore no offensive expedition of importance can be undertaken until after they shall have deliberated upon the subject, and authorized such a measure."). In one of his messages on Indian affairs, Washington referred to military operations "offensive or defensive," but the full text of his message is designed to avoid any initiative in warmaking and to limit military actions to defensive measures. The President approved military operations only in response to Indian attacks and pursuant to authorization by Congress to "call forth the militia . . . for the protection of the frontiers from the incursions of the hostile Indians." See Instructions from the President of the United States to the Governor of the Western Territory (Oct. 6, 1789), in 1 *AMERICAN STATE PAPERS: INDIAN AFFAIRS, CLASS II*, 96, 96-97 (Walter Lowrie & Matthew St. Clair Clarke eds., 1832).

⁸² Letter from Henry Knox to Governor Blount (Oct. 9, 1792), in 4 *THE TERRITORIAL PAPERS OF THE UNITED STATES* 195 (Clarence Edwin Carter ed., 1936) [hereinafter *TERRITORIAL PAPERS*].

⁸³ Letter from Henry Knox, Secretary of War, to Governor Blount (Nov. 26, 1792), in *TERRITORIAL PAPERS*, *supra* note 82, at 221.

⁸⁴ Letter from Henry Knox, Secretary of War, to Governor Blount (Mar. 23, 1795), in *TERRITORIAL PAPERS*, *supra* note 82, at 389.

reinforcing the defense of ports and harbors.⁸⁵ President Jefferson was willing to take certain defensive actions against the Barbary pirates but told Congress that he was “[u]nauthorized by the Constitution, without the sanction of Congress, to go beyond the line of defense.”⁸⁶ He believed that it was up to Congress to authorize “measures of offence also.”⁸⁷ In at least ten statutes, Congress authorized Presidents Jefferson and Madison to take military actions against the Barbary powers.⁸⁸

No doubt Jefferson’s message to Congress omitted many details of what happened in the Mediterranean.⁸⁹ The essential legal point is that he went to Congress to seek statutory authority. He did not claim an independent and exclusive power to go to war. In 1805, when conflicts arose between the United States and Spain, Jefferson spoke plainly about constitutional principles: “Congress alone is constitutionally invested with the power of changing our condition from peace to war. . . .”⁹⁰

Certainly presidential powers expanded in ways unexpected by the Framers, particularly after presidents had a standing army and could move troops into disputed areas to provoke war, as President Polk did with Mexico. Polk was intent on gaining from Mexico the territories known as Upper California and New Mexico. Through a series of diplomatic and military initiatives, he was able to bring about a military clash between American and Mexican troops and tell Congress that “war exists.”⁹¹ Although some legislators objected to Polk’s tactics, Congress declared war based on the recognition that “a state of war exists.”⁹² Polk never pretended that he could go to war against an-

⁸⁵ See, e.g., Act of Mar. 27, 1798, ch. 23, 1 Stat. 547; Act of Apr. 27, 1798, ch. 31, 1 Stat. 552; Act of May 3, 1798, ch. 37, 1 Stat. 554; Act of May 28, 1798, ch. 47-48, 1 Stat. 558; Act of July 11, 1798, ch. 72, 1 Stat. 594; Act of July 16, 1798, ch. 76, 1 Stat. 604 (establishing appropriations for armament; regiments of artillery; defense of ports and harbors; the raising of a provisional army; protection of the coasts of the country; the organizations of a Marine Corps; and augmentation of the Army).

⁸⁶ Thomas Jefferson, First Annual Message (Dec. 8, 1801), in 1 A COMPILATION OF THE MESSAGES AND PAPERS OF THE PRESIDENTS 315 (James D. Richardson ed., Bureau of National Literature, Inc., New York 1897) [hereinafter RICHARDSON].

⁸⁷ *Id.*

⁸⁸ See FISHER, *supra* note 79, at 26 (noting congressional authorization of military action during the presidencies of Jefferson and Madison).

⁸⁹ See ABRAHAM D. SOFAER, WAR, FOREIGN AFFAIRS AND CONSTITUTIONAL POWER: THE ORIGINS 209-14 (1976) (detailing the events of the 1801 expedition to the Mediterranean).

⁹⁰ 15 ANNALS OF CONG. 19 (1805).

⁹¹ FISHER, *supra* note 79, at 32.

⁹² Act of May 13, 1846, ch. 16, 9 Stat. 9; see also FISHER, *supra* note 79, at 29-34 (de-

other country without asking Congress for authority.

Even during the crisis period of the Civil War, when President Lincoln exercised extraordinary power while Congress was in recess, he recognized that some of his actions (particularly suspending the writ of habeas corpus) were probably in excess of his constitutional authority. Lincoln operated under what John Locke called the "pre-rogative": the executive power to act "according to discretion for the public good, without the prescription of the law and sometimes even against it."⁹³ In the hands of an indiscriminate and unprincipled executive this formula can lead to autocracy, but Lincoln was not inclined to be a dictator.

When Congress returned he explained that his actions, "whether strictly legal or not, were ventured upon under what appeared to be a popular demand and a public necessity, trusting then, as now, that Congress would readily ratify them."⁹⁴ He conceded that he had acted not only under his Article II powers but under the Article I powers of Congress as well. He believed that suspending the writ of habeas corpus was not "beyond the constitutional competency of Congress."⁹⁵ Congress debated at length his request for retroactive authority. Legislators ended up supporting the President, but argued for an assumption that his actions were illegal.⁹⁶ Legislation was passed approving, legalizing, and making valid "all the acts, proclamations, and orders of the President . . . as if they had been issued and done under the previous express authority and direction of the Congress of the United States."⁹⁷

B. *Unauthorized Presidential Actions*

From 1789 to 1950, presidents used military force unilaterally numerous times without seeking or obtaining the authority of Congress. Those ventures, however, were relatively modest in scope and limited in duration. As Edward S. Corwin noted, these presidential initiatives consisted largely of "fights with pirates, landings of small na-

tailoring Polk's actions in the disputed territory and the congressional reaction).

⁹³ JOHN LOCKE, *THE SECOND TREATISE ON CIVIL GOVERNMENT* 89 (Prometheus Books 1986) (1690).

⁹⁴ Abraham Lincoln, Special Session Message (July 4, 1861), in 7 RICHARDSON, *supra* note 86, at 3221, 3225.

⁹⁵ *Id.*

⁹⁶ See CONG. GLOBE, 37th Cong., 1st Sess. 393 (1861) (reporting Senator Howe's statement that he would vote to support the President's actions "upon the assumption that the different acts of the Administration . . . were illegal").

⁹⁷ Act of Aug. 6, 1861, ch. 63, 12 Stat. 326.

val contingents on barbarous or semi-barbarous coasts, the dispatch of small bodies of troops to chase bandits or cattle rustlers across the Mexican border, and the like."⁹⁸ They are, however, in no sense a precedent for the single-handed presidential actions taken after World War II, such as Truman's war against North Korea, Bush's claim in 1990 that he could go to war against Iraq without congressional authority, and Clinton's repeated use of military force in Bosnia, Yugoslavia, Iraq, Haiti, Sudan, and Afghanistan without ever seeking authority from Congress.

Lists have been compiled to show that presidents have resorted to force against other countries hundreds of times with Congress neither declaring war nor authorizing military action.⁹⁹ Many of these operations were minor, such as American forces building a fort on the Marquesas Islands in 1813-1814 to protect three prize ships captured from the British; brief landings in Cuba in 1823 in pursuit of pirates; an 1840 landing on the Fiji Islands to punish natives for attacking American exploring and surveying parties; a display of naval force in Japan in 1853-1854; another display of naval force off of Turkey in 1858-1859; the landing of a naval party in Buenos Aires in 1890 to protect the U.S. consulate and legation; the landing of U.S. forces in Beirut in 1903 to protect the American consulate; and the sending of troops to Panama in 1912 to supervise elections outside the Canal Zone.¹⁰⁰ Additionally, many of those actions were initiated by military commanders, not by presidents.¹⁰¹

Some of the military interventions were much more significant but would hardly serve as a model for U.S. policy today. For example, in 1854 an American ship was ordered to the Nicaraguan port of Greytown (now San Juan del Norte) to compel local authorities to make appropriate amends for an affront to an American diplomat. When U.S. officials deemed the offered apology inadequate, the ship bombarded the town and forces were sent ashore to destroy by fire

⁹⁸ Edward S. Corwin, *The President's Power*, NEW REPUBLIC, Jan. 29, 1951, at 15, 16.

⁹⁹ See RICHARD F. GRIMMETT, CONGRESSIONAL RESEARCH SERVICE, REPORT NO. RL 30172, INSTANCES OF USE OF UNITED STATES ARMED FORCES ABROAD, 1798-1999 (1999) (reviewing "hundreds of instances in which the United States has utilized military forces abroad in situations of military conflict or potential conflict to protect U.S. citizens or promote U.S. interests").

¹⁰⁰ See *id.* at 2-12 (providing a brief description of various U.S. military actions abroad).

¹⁰¹ See *id.* at 1-12 ("In some instances a military officer acted without authorization")

whatever remained.¹⁰² A number of other military operations, including the occupation and bombardment of Veracruz in 1914; the intervention and occupation of Haiti from 1915 to 1934; an eight-year occupation of the Dominican Republic, beginning in 1916; and repeated interventions in Nicaragua from 1909 to 1933 would be condemned, both under the non-intervention policy of the Organization of American States ("OAS")¹⁰³ and the U.N. Charter, which proscribes "the threat or use of force against the territorial integrity or political independence of any state."¹⁰⁴

IV. SCHOLARLY ANALYSIS

Questions about the Framers' intent invariably cause scholars to scatter and divide. Not so with the war power. There is remarkable agreement among war power experts that the Framers broke with available monarchical precedents and vested in Congress the sole power to initiate hostilities against other nations.

A. *Consensus Among Scholars*

The majority of scholars agree on the interpretation of the war power. Taylor Reveley writes that if you could ask a man in the state of nature to read the war power provisions in the Constitution and compare them to war power practices after 1789, "he would marvel at how much Presidents have spun out of so little. On its face, the text tilts decisively toward Congress."¹⁰⁵ Charles Lofgren agrees with Reveley finding that the grants of power to Congress to declare war and to issue letters of marque and reprisal "likely convinced contemporaries even further that the new Congress would have nearly complete authority over the commencement of war."¹⁰⁶ He concludes that events in the years following ratification of the Constitution rein-

¹⁰² See FISHER, *supra* note 79, at 35-37 (recounting the bombardment of Greytown and its effects).

¹⁰³ Article 20 of the OAS provides that the territory of a nation is inviolable and it "may not be the object, even temporarily, of military occupation or of any other measures of force taken by another State, directly or indirectly, on any grounds whatever." CHARTER FOR THE ORGANIZATION OF AMERICAN STATES (as revised) art. 20.

¹⁰⁴ U.N. CHARTER art. 2, para. 4.

¹⁰⁵ W. TAYLOR REVELEY III, *WAR POWERS OF THE PRESIDENT AND CONGRESS: WHO HOLDS THE ARROWS AND OLIVE BRANCH?* 29 (1981).

¹⁰⁶ CHARLES A. LOFGREN, *War-Making Under the Constitution: The Original Understanding*, in "GOVERNMENT FROM REFLECTION AND CHOICE": CONSTITUTIONAL ESSAYS ON WAR, FOREIGN RELATIONS, AND FEDERALISM 3, 36 (1986).

forced the view that Americans “originally understood Congress to have at least a coordinate, and probably the dominant, role in initiating all but the most obviously defensive wars, whether declared or not.”¹⁰⁷

John Hart Ely notes that when academics try to divine the “original understanding” of the Constitution, the results can be “obscure to the point of inscrutability.”¹⁰⁸ When the focus turns on the war power, however, the issue is not that complicated. All wars, big or small, declared or undeclared, “had to be legislatively authorized.”¹⁰⁹ David Gray Adler writes that the Constitution “makes Congress the sole and exclusive repository of the ultimate foreign relations power—the authority to initiate war.”¹¹⁰

Michael Glennon says that it “is clear that the Constitution’s textual grants of war-making power to the President are paltry in comparison with, and are subordinate to, its grants to Congress.”¹¹¹ He further notes that there “is no evidence that the Framers intended to confer upon the President any independent authority to commit the armed forces to combat, except in order to repel ‘sudden attacks.’”¹¹² Harold Koh writes in a similar fashion noting that “[t]he first three articles of the Constitution expressly divided foreign affairs powers among the three branches of government, with *Congress*, not the president, being granted the dominant role.”¹¹³ The Framers “pointedly denied” the President other grants of power, such as the power to declare war, “thereby rejecting the English model of a king who possessed both the power to declare war and the authority to command troops.”¹¹⁴

B. *John Yoo’s Work*

The major exception to these studies is an article written in 1996 by John Yoo, who argues that the Framers designed a system to “en-

¹⁰⁷ *Id.* at 38.

¹⁰⁸ JOHN HART ELY, *WAR AND RESPONSIBILITY: CONSTITUTIONAL LESSONS OF VIETNAM AND ITS AFTERMATH* 3 (1993).

¹⁰⁹ *Id.*

¹¹⁰ David Gray Adler, *Court, Constitution, and Foreign Affairs*, in *THE CONSTITUTION AND THE CONDUCT OF AMERICAN FOREIGN POLICY* 19, 19 (David Gray Adler & Larry N. George eds., 1996).

¹¹¹ MICHAEL J. GLENNON, *CONSTITUTIONAL DIPLOMACY* 72 (1990).

¹¹² *Id.* at 81.

¹¹³ HAROLD HONGJU KOH, *THE NATIONAL SECURITY CONSTITUTION: SHARING POWER AFTER THE IRAN-CONTRA AFFAIR* 75 (1990).

¹¹⁴ *Id.* at 76.

courage presidential initiative in war.”¹¹⁵ Yoo argues that not only would the executive “play the leading role in initiating . . . war” but also that “the Constitution gives the President the initiative in war.”¹¹⁶ Yet at times Yoo backs away from that position by saying the Declare War Clause “made clear that the President could not unilaterally take the nation into a total war.”¹¹⁷ Also, he claims that Madison “quite presciently wanted to prevent the President from using his war power to enhance his overall power and importance *vis-à-vis* Congress and the People.”¹¹⁸

1. Defensive-Offensive

Yoo does not carefully distinguish between the exercise of the President’s *defensive* powers and the initiation of *offensive* actions against another country.¹¹⁹ Taking the United States from a state of peace to a state of war was a prerogative assigned exclusively to Congress. He makes no mention of the understanding by President Washington, Secretary of War Knox, President Jefferson, and other executive leaders of that time that the President’s powers over war were restricted to defensive operations.

In *The Prize Cases* of 1863,¹²⁰ the Supreme Court spoke clearly about the President’s authority to conduct defensive but not offensive actions. Justice Grier said that President Lincoln had authority to take military action in a civil war “without waiting for Congress to baptize it with a name”¹²¹ but carefully stated that the President “has no power to initiate or declare a war either against a foreign nation or a domestic State.”¹²² The executive branch took exactly the same position in that case. During oral argument Richard Henry Dana Jr., representing the United States, said that Lincoln’s action in responding to the Civil War had nothing to do with “the right to *initiate a war, as a voluntary act*

¹¹⁵ John C. Yoo, *The Continuation of Politics by Other Means: The Original Understanding of War Powers*, 84 CAL. L. REV. 167, 174 (1996).

¹¹⁶ *Id.* at 268, 295.

¹¹⁷ *Id.* at 264.

¹¹⁸ *Id.* at 266.

¹¹⁹ *See id.* at 174 (explaining instead that “[t]he Constitution establishe[d] a war-making process that can vary with the circumstances and with the relative political power of the President and Congress”).

¹²⁰ 67 U.S. (2 Black) 635, 668 (1863) (noting that “[i]f a war be made by invasion of a foreign nation, the President is not only authorized but bound to resist force by force”).

¹²¹ *Id.* at 668.

¹²² *Id.* at 669.

of sovereignty. That is vested only in Congress."¹²³

Yoo never mentions Chief Justice Marshall's remark in *Talbot v. Seeman* that "[t]he whole powers of war" are vested in Congress.¹²⁴ Nor does Yoo discuss *United States v. Smith*, an 1806 circuit court case, which asked and answered its own question: "Does [the President] possess the power of making war? That power is exclusively vested in congress . . . [It is] the exclusive province of congress to change a state of peace into a state of war."¹²⁵ Harold Koh makes this comment about *Smith*: "the crucial point is that even during America's infancy, the time of its greatest national insecurity, foreign affairs were not treated as exempt from the ordinary constitutional system of checks and balances."¹²⁶

2. Declare War Clause

Yoo concludes that the Declare War Clause is of legislative-judicial, not legislative-executive, interest. Thus, the Framers "understood the Declare War Clause as a judicial power vested in Congress, just as the Constitution gave the Senate judicial authority in the trial of impeachments. In these areas, the Constitution places Congress in the position of the court of last resort."¹²⁷ The Declare War Clause, Yoo argues,

does not add to Congress' store of war powers at the expense of the President. Rather, the Clause gives Congress a judicial role in declaring that a state of war exists between the United States and another nation, which bears significant legal ramifications concerning the rights and duties of American citizens. Congress' power to declare war also has the additional effect of ousting the courts from war powers disputes . . .¹²⁸

By reading the Declare War Clause as not affecting presidential power, Yoo ignores concerns raised at the Philadelphia Convention and the ratification conventions. The issue, as James Wilson defined it, was about keeping the power of war out of the hands of "a single man."¹²⁹ Yoo does not address Wilson's comment in the text of his article. Instead, it is relegated to a long footnote,¹³⁰ and Wilson becomes

¹²³ *Id.* at 660.

¹²⁴ 5 U.S. (1 Cranch) 1, 28 (1801).

¹²⁵ 27 F. Cas. 1192, 1230 (C.C.N.Y. 1806) (No. 16,342).

¹²⁶ KOH, *supra* note 113, at 83.

¹²⁷ Yoo, *supra* note 115, at 288.

¹²⁸ *Id.* at 295.

¹²⁹ *Id.* at 286 n.547.

¹³⁰ *See id.* (discussing Wilson's doubts about adopting a system in which war powers

“exceptional rather than typical.”¹³¹ Yoo dilutes Wilson’s views by saying they “appear[] to refer to the formal aspects of a declaration of war, rather than to the authorizing process for the commencement of hostilities.”¹³² Nothing in Wilson’s address at the Pennsylvania ratifying convention would suggest such a narrow construction. Wilson wanted a political system that “will not hurry us into war.”¹³³ He advocated legislative deliberation, not quick executive action. His remarks support full legislative debate, whether that leads to a formal declaration or authorization. Although Yoo attempts to confine Wilson’s comments about “a single man” to total war, he concedes that later in his life Wilson continued to believe that Congress “should play the paramount role in war.”¹³⁴

Yoo attempts to weaken the meaning of the Declare War Clause by saying it was intended to clarify that “the declaration of war was a power of the national government, not the state governments.”¹³⁵ If that were the purpose, why not (following British precedents) give the power to declare war to the President? That would solve the federalism issue.

Relying on Madison’s *Federalist No. 41*, Yoo states that “the [Declare War] Clause was designed to allow the national government to provide ‘[s]ecurity against foreign danger.’”¹³⁶ Responding to foreign threats and attacks is part of the President’s duty to act *in a defensive manner* and is unrelated to initiating war or taking the country from a state of peace to a state of war. Similarly, Yoo states that “a declaration of war was unnecessary when a nation was under attack[, providing] further evidence that declarations of war were legally formal, or even ceremonial, in purpose,” and that understanding was “[c]onsistent with the theory of international law that a declaration of war was unnecessary for a nation under attack.”¹³⁷ Yoo’s discussion relates to defensive, not offensive, actions. Yoo refers to Hamilton’s statement in *Federalist No. 23* about the need for the national government to be able to “respond to unpredictable events and foreign dangers.”¹³⁸ Notice that Hamilton is talking about the necessity of *the national government’s*,

are vested in the executive, rather than the legislature).

¹³¹ *Id.*

¹³² *Id.*

¹³³ *Id.*

¹³⁴ *Id.*

¹³⁵ *Id.* at 242.

¹³⁶ *Id.* at 243.

¹³⁷ *Id.* at 247.

¹³⁸ *Id.* at 270.

not merely the President's, ability to respond to foreign attacks rather than initiate war. Hamilton's comments, therefore, also relate to defensive operations. Yoo quotes from Madison's *Federalist No. 41*: "It is in vain to oppose constitutional barriers to the impulse of self-preservation."¹³⁹ Once again, the discussion relates to defensive, as opposed to offensive, activity.

3. Judicial Review

Yoo argues that the Declare War Clause had the effect of "ousting the courts from war powers disputes."¹⁴⁰ "Having placed war powers in the arena of politics, the Framers would have viewed inter-branch disputes in the area as unsuitable for judicial resolution."¹⁴¹ The courts, however, did not shy away from war powers disputes. Decisions by the Supreme Court in 1800 and 1801, and by the circuit court in 1806, demonstrate a willingness to decide war power issues,¹⁴² even though they were not "inter-branch disputes" because they did not involve direct clashes between Congress and the President.

In *Little v. Barreme*, however, Chief Justice Marshall, writing for the Court, concluded that a congressional statute superceded a presidential proclamation.¹⁴³ In a footnote, Yoo states that the Court in *Little* "did not really . . . pass judgment on the exercise of war powers, and thus did not present a political question."¹⁴⁴ In fact, the Court *did* pass judgment on the war power by holding that a statute trumps a presidential proclamation. Yoo further writes: "*Little* never reached questions concerning the justiciability of inter-branch war powers disputes, or the President's inherent authority to order captures going beyond

¹³⁹ *Id.* at 271.

¹⁴⁰ *Id.* at 295.

¹⁴¹ *Id.* at 288.

¹⁴² See *Talbot v. Seeman*, 5 U.S. (1 Cranch) 1, 1 (1801) (allowing salvage to a United States ship of war that captured a neutral owned ship from the French); *Bas v. Tingy*, 4 U.S. (4 Dall.) 37, 40 (1800) (holding that the act of Congress of March 2, 1799, applied to an American ship captured by a French privateer because France and the United States were involved in a public war and, therefore, considered "enemies" for the purpose of the statute); *United States v. Smith*, 27 F. Cas. 1192, 1229-30 (C.C.D. N.Y. 1806) (No. 16,342) (noting that the President does not have the "authority to set on foot a military expedition against a nation with which the United States are [sic] at peace").

¹⁴³ 6 U.S. (2 Cranch) 170, 179 (1804) (holding that Congress's act of February 9, 1799, did not authorize the seizure of ships sailing from French ports, and that the President's order to seize such ships can not exonerate an American commander where he seized such a ship).

¹⁴⁴ Yoo, *supra* note 115, at 295 n.584.

Congress's commands."¹⁴⁵ The Court *did* address an inter-branch dispute, however, and it dismissed any notion that President Adams had some kind of inherent authority that was superior to a congressional statute. At best, Chief Justice Marshall concedes that Adams might have taken certain measures *in the absence* of a congressional statute.¹⁴⁶

Yoo writes that "[n]o provision [of the Constitution] explicitly authorizes the federal courts to intervene directly in war powers questions."¹⁴⁷ Of course, the same could be said about the Commerce Clause, the Taxing Power, and other constitutional provisions. The Court's jurisdiction does not depend on subject matter, except regarding disputes concerning treaties, ambassadors, "other public Ministers and Consuls," admiralty, and disputes between states, states and citizens, and states and foreign states.¹⁴⁸ The Court's jurisdiction reaches beyond these subject areas to embrace all "cases" and "controversies."

4. Declaration and Authorization

Yoo focuses almost exclusively on Congress's power to declare war, rarely recognizing the power of Congress to *authorize* war. He begins by pointing out that "Congress has issued a declaration of war only five times in its history" and that the post-1945 era includes "a litany of undeclared wars."¹⁴⁹ Counting the multiple declarations in the two world wars, there have actually been *eleven* declarations of war. Later Yoo recognizes that "[f]or much of the nineteenth and early twentieth centuries, Congress assented to presidential uses of force abroad,"¹⁵⁰ but does not explain that Congress's "assent" came in the form of authorizing statutes.

For example, Yoo states that "[e]ven though no declaration of war had issued against the Indians, George Washington exclaimed, 'But, we are involved in actual war!'"¹⁵¹ Washington was operating on statutory authority, not inherent executive power. In 1789, 1790, and 1791, Congress passed legislation "for the purpose of protecting the

¹⁴⁵ *Id.*

¹⁴⁶ *See id.*

¹⁴⁷ *Id.* at 176.

¹⁴⁸ *See* U.S. CONST. art. III, § 2 (describing the breadth of the judicial power).

¹⁴⁹ Yoo, *supra* note 115, at 172.

¹⁵⁰ *Id.* at 177.

¹⁵¹ *Id.* at 290-91 (quoting RICHARD H. KOHN, *EAGLE AND SWORD: THE FEDERALISTS AND THE CREATION OF THE MILITARY ESTABLISHMENT IN AMERICA, 1783-1802*, at 107 (1975)).

inhabitants of the frontiers of the United States from the hostile incursions of the Indians."¹⁵² In 1793, Washington said that any offensive operation against the Creek Nation must await congressional action: "The Constitution vests the power of declaring war with Congress; therefore no offensive expedition of importance can be undertaken until after they shall have deliberated upon the subject, and authorized such a measure."¹⁵³

Yoo does refer to the Quasi-War against France and the "full-scale battles" that occurred despite the lack of a declaration of war.¹⁵⁴ There were, however, about two dozen statutes authorizing Adams to act as he did during that war.¹⁵⁵ Yoo argues that "Congress' failure to declare war against France also demonstrates the *limited* nature of the conflict."¹⁵⁶ There was no "failure" on the part of Congress. It chose to authorize, not declare, war, and it was the nature of this authorization (supporting naval but not land forces) that kept the war limited.

Yoo states that the Framers "were not excessively worried by the prospect of unilateral executive action. The President was seen as the protector and representative of the People."¹⁵⁷ This statement ignores what Jay, in *Federalist No. 4*, and Madison, as "Helvidius," said about executives being prone to war; they initiate war not because it is in the interest of the people but because war furthers their ambitions and satisfies their thirst for fame and glory.¹⁵⁸ None of these concerns appear in Yoo's article.

5. British Precedents

According to Yoo, "[t]he Constitution's provisions did not break

¹⁵² Act of Sept. 29, 1789, ch. 27, § 5, 1 Stat. 95; *see also* Act of Apr. 30, 1790, ch. 10, § 16, 1 Stat. 119, 121 (authorizing the President to call out the militia for "the purpose of aiding the troops now in service, or to be raised by this act, in protecting the inhabitants of the frontiers of the United States"); Act of Mar. 3, 1791, ch. 28, 1 Stat. 222 (raising and adding another regiment to the United States military and providing further protection of the frontiers).

¹⁵³ Letter from George Washington to Governor William Moultrie, *supra* note 81, at 73.

¹⁵⁴ Yoo, *supra* note 115, at 291 (noting the occurrence of raids on merchant commerce, full scale battles, and the creation of a regular army during the Quasi-War between the United States and France).

¹⁵⁵ *See* FISHER, *supra* note 79, at 17-18 (discussing several ways in which Congress supported military action by the President, and noting that "Congress had acted to authorize war").

¹⁵⁶ Yoo, *supra* note 115, at 292.

¹⁵⁷ *Id.* at 174.

¹⁵⁸ *See supra* text accompanying notes 72-76.

with the tradition of their English, state, and revolutionary predecessors, but instead followed in their footsteps."¹⁵⁹ He devotes twenty-two pages to the British legacy, including descriptions of the goals of Locke, Blackstone, Montesquieu, and others advocating for the independent and exclusive executive power over war and peace, the treaty power, declaration of war, raising armies, issuing letters of marque and reprisal, and other powers. He concludes that "the war powers provisions of the Constitution are best understood as an adoption, rather than a rejection, of the traditional British approach to war powers."¹⁶⁰ The statements by James Wilson and others at the Philadelphia Convention overwhelmingly refute Yoo's position.¹⁶¹

It is impossible to compare what Locke and Blackstone advocated to what the Framers provided in Articles I and II without concluding that the Framers repudiated the British model on war powers. It is not even necessary to examine the Framers' intent. It is enough to look at the *text* of the Constitution. Yoo states correctly that the English system "gave the executive leadership in the initiation and conduct of war, while the legislature was relegated primarily to funding the wars and impeaching ministers."¹⁶² But he utterly fails to equate that model with what the Framers conceived. However much he strains to make this work, the express language of the Constitution stands in his way. If the Framers had adopted "the traditional British approach to war powers," they would have written Article II to give the President the power to declare war, to issue letters of marque and reprisal, and to raise armies, along with all the other powers that were vested expressly in Congress.

Hamilton, more enamoured with the British model than the other Framers, never advocated the British model for war powers or foreign affairs. In *Federalist No. 75*, he wrote of the treaty power:

The history of human conduct does not warrant that exalted opinion of human virtue which would make it wise in a nation to commit interests of so delicate and momentous a kind, as those which concern its intercourse with the rest of the world, to the sole disposal of a magistrate created and circumstanced as would be a President of the United States.¹⁶³

¹⁵⁹ Yoo, *supra* note 115, at 197.

¹⁶⁰ *Id.* at 242.

¹⁶¹ See *supra* text accompanying notes 44-48.

¹⁶² Yoo, *supra* note 115, at 198.

¹⁶³ THE FEDERALIST NO. 75, at 477 (Alexander Hamilton) (Benjamin Fletcher Wright ed., 1961).

6. Funding As Congress's Primary Power

For Yoo, whenever the President initiates war, "Congress could express its opposition . . . only by exercising its powers over funding and impeachment."¹⁶⁴ He draws an analogy to European precedents: "legislatures of the eighteenth century controlled executive actions leading to war by using their appropriations power."¹⁶⁵ Noting that scholars argue that the power of the purse is a "permissible means" for Congress to participate in foreign affairs, Yoo "suggests that the spending power may be the *only* means for legislative control over war."¹⁶⁶ In establishing a framework for the exercise of war power, Yoo says that the Framers "intended to adopt the traditional system they knew—executive initiative in war combined with a legislative role via the spending power."¹⁶⁷

First, it cannot be the case that the President may exercise powers that are not granted by the Constitution until Congress successfully exercises its spending power to block him. If that were the case, after President Clinton in 1994 had failed to convince Congress of the merits of his health plan, he could simply have issued it as a proclamation and waited to see if Congress passed legislation to deny him the funds to implement the proclamation. Such a procedure would reverse the constitutional order. The burden is on the President to come through the front door and seek authorization from Congress for his legislative proposals. The same principle applies to taking the nation from a state of peace to a state of war. The framers expected the President to submit his proposal to Congress and await authorization from the legislative body.

Second, if Congress were forced to use the power of the purse to stop presidential war initiatives, it would have to place restrictive language in a bill presented to the President. Instead of the President having to muster a majority in each House to support his policy, each House would need a majority to stop the President. Moreover, when the bill reached the President, he could exercise his veto. Congress would then need an extraordinary majority—a two-thirds majority—in each House to override the veto and enforce the spending limitation. As long as the President could maintain a margin of one-third plus one in a single chamber, his veto would be upheld, even if the other

¹⁶⁴ Yoo, *supra* note 115, at 174.

¹⁶⁵ *Id.* at 197.

¹⁶⁶ *Id.* at 197 n.158.

¹⁶⁷ *Id.* at 241.

chamber voted unanimously for the override.

This kind of impasse occurred during the Vietnam War. In 1973, Congress assembled a majority in each House to vote for a funds cut-off to stop the war. When President Nixon vetoed the measure, Congress was unable to find the two-thirds margin in each House for an override.¹⁶⁸ The two branches eventually reached a compromise, allowing President Nixon to bomb Cambodia for another forty-five days.¹⁶⁹

The political settlement affected litigation that had been progressing in the federal courts. In one lawsuit, a federal judge held that Congress had not authorized the bombing of Cambodia.¹⁷⁰ The judge said that the inability of Congress to override the veto and its subsequent adoption of the compromise language could not be taken as an affirmative grant of authority:

It cannot be the rule that the President needs a vote of only one-third plus one of either House in order to conduct a war, but this would be the consequence of holding that Congress must override a Presidential veto in order to terminate hostilities which it has not authorized.¹⁷¹

Because the two branches had agreed to compromise language, appellate courts granted a stay on the district court's decision.¹⁷²

Third, Yoo argues that when President Bush mounted an offensive war against Iraq, all Congress had to do to check him through the appropriations power "was nothing."¹⁷³ This statement ignores the amount of money available to the President in the money pipeline: billions of dollars in previously appropriated funds that had yet to be obligated or expended. The President may also exercise statutory authority to transfer funds from one appropriations account to another and invoke emergency authority, such as the Feed and Forage

¹⁶⁸ See 1973 PUBLIC PAPERS OF THE PRESIDENTS, 621-22 (vetoing the bill and noting that the veto was not overridden by the House); 119 CONG. REC. 21778 (1973) (sustaining the veto).

¹⁶⁹ See Second Supplemental Appropriations Act of 1973, § 307, 87 Stat. 129 (prohibiting use of any appropriated funds "to support directly or indirectly combat activities in or over Cambodia, Laos, North Vietnam and South Vietnam" after the expiration of 45 days).

¹⁷⁰ See *Holtzman v. Schlesinger*, 361 F. Supp. 553, 565 (E.D.N.Y. 1973).

¹⁷¹ *Id.*

¹⁷² See *Holtzman v. Schlesinger*, 414 U.S. 1304, 1310, 1316, 1321 (1973) (granting an application for a stay of the district court order); *Holtzman v. Schlesinger*, 484 F.2d 1307, 1313-14 (2d Cir. 1973) (finding the argument that the President only required a vote of "one-third plus one" unpersuasive in light of the compromise language).

¹⁷³ Yoo, *supra* note 115, at 297.

Act, to incur obligations in advance of an appropriations.¹⁷⁴ A war initiated by the President can proceed for quite a period of time, independent of fresh appropriations granted by Congress.

Lastly, Yoo claims that when President Clinton decided to send 20,000 American troops to Bosnia in 1995, he "already had received funding for the Bosnia operation in the 1996 Defense Department appropriations."¹⁷⁵ In fact, Congress had appropriated nothing for Bosnia. Clinton's military commitment was financed not by funds specifically appropriated by Congress but rather by siphoning several billion dollars from other appropriations accounts without congressional deliberation or support. Approval for this prestigation came from a few legislative leaders, not from Congress nor statutory language.¹⁷⁶

VI. WAR POWERS DOCTRINE IN KOSOVO

On March 11, 1999, with President Clinton close to unleashing air strikes against Serbia, the House voted on a resolution to support U.S. armed forces as part of a NATO peacekeeping operation. The resolution purporting to "authorize" Clinton to deploy U.S. forces to implement a peace agreement passed, 219 to 191.¹⁷⁷ However, legislators were voting on a concurrent resolution (House Concurrent Resolution 42); Congress cannot authorize anything in a concurrent resolution because it is not legally binding. Authorization requires a bill or joint resolution, both of which are presented to the President for his signature or veto. A concurrent resolution passes both chambers but is not presented. A second point: by supporting a NATO peacekeeping operation, members of the House clearly anticipated a peace agreement between Serbs and Kosovars. The House was not supporting military action. The Kosovars eventually accepted the plan, but the Serbs did not. Therefore, the House vote cannot be taken as support for the bombing operation that would begin within two weeks.

¹⁷⁴ See LOUIS FISHER, PRESIDENTIAL SPENDING POWER 110-18, 238-47 (1975) (discussing Nixon's use of transfer authority to fund the war in Cambodia, and the open-ended authority of the Department of Defense to commit funds under the Feed and Forage Act).

¹⁷⁵ Yoo, *supra* note 115, at 298.

¹⁷⁶ See Louis Fisher, *The Bosnia Commitment*, LEGAL TIMES, Mar. 11, 1996, at 22 (noting that some legislators deferred to Clinton's decision to send troops but asserting that there was not adequate process because there was no action or authorization by the entire Congress).

¹⁷⁷ 145 CONG. REC. H1249-50 (daily ed. Mar. 11, 1999).

By the time the Senate voted on March 23, 1999, negotiations had collapsed and air strikes were imminent. The Senate voted fifty-eight to forty-one in support of military air operations and missile strikes against the Federal Republic of Yugoslavia (Serbia and Montenegro).¹⁷⁸ Like the House, the Senate made the mistake of using the word "authorize" in a concurrent resolution (Senate Concurrent Resolution 21¹⁷⁹). The war against Yugoslavia began on March 24.

Following these votes in the House and the Senate and the outbreak of war, Congressman Jim Leach (R-Ohio) wrote an op-ed piece that said, correctly, that the War Powers Resolution "stands as a declaration that war is too profound a business to be left to a single individual."¹⁸⁰ That value was indeed uppermost in the minds of the Framers. And yet Leach claimed that Clinton was "on solid legal ground for the military steps he has taken."¹⁸¹ Neither the House nor the Senate vote provided legal support for Clinton. He operated against the Constitution and without any statutory support. There was no legal or constitutional ground for his actions.

On April 28, 1999, after the first month of bombing, the House took a series of votes on the war in Yugoslavia. It voted 249 to 180 to prohibit the use of appropriated funds for the deployment of U.S. ground forces unless first authorized by Congress. A motion to direct the removal of U.S. armed forces from Yugoslavia failed, 290 to 139. A resolution to declare a state of war between the United States and Yugoslavia fell, 427 to two. A fourth vote, to authorize air operations and missile strikes, lost on a tie vote, 213 to 213.¹⁸²

Newspaper editorials and commentators derided the House for these multiple and supposedly conflicting votes,¹⁸³ but the House articulated some basic values. It insisted that Congress authorize the introduction of ground troops and it refused to grant authority for the air strikes. Lawmakers pointed to the irony of President Clinton seeking the approval of eighteen NATO nations but not the approval of Congress. Congressman Ernest Istook (R-Okla.) remarked: "President Clinton asked many nations to agree to attack Yugoslavia, but he

¹⁷⁸ See 145 CONG. REC. S3118 (daily ed. Mar. 23, 1999).

¹⁷⁹ *Id.* at S3110.

¹⁸⁰ James A. Leach, *A War Vote*, WASH. POST, Apr. 15, 1999, at A31.

¹⁸¹ *Id.*

¹⁸² See 145 CONG. REC. H2376-452 (daily ed. Apr. 28, 1999).

¹⁸³ See, e.g., Julie Malone, *Mixed Signals for the House Get Tangled Interpretations*, TIMES-PICAYUNE (New Orleans), Apr. 30, 1999, at A12; Editorial, *No-confidence Vote for a Waffling House*, BALTIMORE SUN, Apr. 30, 1999, at 26A; Editorial, *War Waffling in House*, L.A. TIMES, Apr. 30, 1999, at B6.

failed to get permission from one crucial country, America."¹⁸⁴

Although President Clinton claimed to be operating under the "authority" of NATO decisions, the NATO treaty of 1949 did not transfer the war power from Congress to a regional military alliance. There is nothing in the text or legislative history of NATO, or any other mutual defense pact, to support such a transfer.¹⁸⁵ Mutual security treaties do not—they cannot—alter the constitutional allocation of the war power. It would be impermissible for the Senate and the President to use the treaty process to deny the House of Representatives its Article I powers in determining whether the nation should commit itself to war.¹⁸⁶ Senator Walter George said this about SEATO: "The treaty does not call for automatic action; it calls for consultation. If any course of action shall be agreed upon or decided upon, then that course of action must have the approval of Congress, because the constitutional process is provided for."¹⁸⁷

This same reasoning applies to resolutions passed by the U.N. Security Council to "authorize" military action. Although President Truman relied on those resolutions in taking the nation to war against North Korea, and President Bush threatened to take military action against Iraq on the basis of a Security Council resolution,¹⁸⁸ U.N. resolutions are not a source of authority and do not supplant the need for obtaining authority from the only branch capable of giving it: Congress. Just as Congress did not transfer its war power to mutual security pacts, neither did it transfer its war power to the U.N.¹⁸⁹ In 1994, after the Security Council passed a resolution "inviting" all states to use "all necessary means" to remove military leaders from Haiti, the Senate responded with a nonbinding resolution stating that the Security Council resolution "does not constitute authorization for the deployment of United States Armed Forces in Haiti under the Constitution of the United States or pursuant to the War Powers Resolution

¹⁸⁴ 145 CONG. REC. H2419 (daily ed. Apr. 28, 1999).

¹⁸⁵ See FISHER, *supra* note 79, at 92-97 (arguing that mutual security treaties "do not empower the President to use armed force abroad without congressional consent").

¹⁸⁶ See Michael J. Glennon, *United States Mutual Security Treaties: The Commitment Myth*, 24 COLUM. J. TRANSNAT'L L. 509 (1986) (arguing that without legislative approval presidential action predicated upon a mutual security treaty is constitutionally unauthorized).

¹⁸⁷ 101 CONG. REC. 1051 (1955).

¹⁸⁸ See FISHER, *supra* note 79, at 84-86, 148-51 (noting the reliance by both Truman and Bush on U.N. resolutions as authorization for their actions).

¹⁸⁹ See *id.* at 72-84 (arguing that the U.N. Charter and the U.N. Participation Act of 1945 did not alter the constitutional framework by allowing the President to take military action without obtaining congressional approval).

(Public Law 93-148).”¹⁹⁰ The Senate language passed by a vote of 100 to zero.¹⁹¹

CONCLUSIONS

For more than a century and a half, from 1789 to 1945, Congress and the President followed the general constitutional principle that the initiation of war against foreign nations lay with the representative branch, Congress. That understanding was recognized in several court decisions, some of them authored by Chief Justice Marshall. A number of presidential military initiatives were taken during this period, but those actions were relatively modest in scope and limited in time. During this period, no president claimed the right to take the country to war without first seeking the authority of Congress. President Polk’s initiatives led to hostilities between the United States and Mexico, but Polk came to Congress for authority to declare war. In the one major military conflict where the president acted first—Lincoln in the Civil War—the dispute was domestic, not foreign. Even here Lincoln acknowledged that he lacked full constitutional authority for what he had done, and asked Congress to enact legislation to provide the necessary legitimacy.

In warning about the possibility of Congress’s “pushing the country into war too hastily,” Yoo invokes this language from *Federalist No. 70*: “In the legislature, promptitude of decision is oftener an evil than a benefit.”¹⁹² Supposedly the value here is avoiding hasty, and possibly misguided, action. Yet on the same page Yoo turns the principle on its head by describing the President’s ability to “act quickly,” “swiftly and with decisiveness.”¹⁹³ The Framers did not want cautious, deliberative action by Congress and unilateral, precipitate action by the President, other than when repelling sudden attacks. The deliberative model applies to both branches, acting jointly.

For the initiation of war, the Framers wanted both branches to act with deliberation and full debate through the regular legislative process to determine whether hostilities were in the national interest. When James Wilson said it would not be in the power “of a single man” to involve the nation in war, he believed that by relying on the

¹⁹⁰ 140 CONG. REC. 19324 (1994).

¹⁹¹ *See id.*

¹⁹² Yoo, *supra* note 115, at 304 (quoting THE FEDERALIST NO. 70, at 475 (Alexander Hamilton) (Jacob E. Cooke ed., 1982)).

¹⁹³ *Id.*

deliberative process in Congress “nothing but our national interest can draw us into war.”¹⁹⁴ The Framers knew, as we should, that when presidents unleash the war power, “promptitude of decision is oftener an evil than a benefit.”

¹⁹⁴ 2 Elliot, *supra* note 25, at 528.