MURRAY STATE UNIVERSITY Commonwealth Review of Political Science

Volume 2 | Number 1 Article 3

2014

War Powers in the American Constitutional Scheme: A Legal-Historical Inquiry

Max Guirguis
Shepherd University, mguirguis@shepherd.edu

THE COMMONWEALTH REVIEW • Volume 2, Number 1 • 2014

War Powers in the American Constitutional Scheme: A Legal-Historical Inquiry

Max Guirguis

Shepherd University
mguirgui@shepherd.edu

Since World War II, there has been a significant shift in the balance of war-making power between the executive and legislative branches. Although the Constitution reserves the formal power of declaring war exclusively for Congress, modern presidents have increasingly marginalized Congress in times of international tension or conflict by acting unilaterally without congressional authorization. Congress has lent impetus to this problematic trend by failing to take decisive action whenever its war-making power is usurped by the executive. The War Powers Act of 1973 has not been successful in curbing the exercise and expansion of executive war-making power because Congress gave little or no attention to presidential violations of the Act, thereby undermining its own constitutional role and shifting the power equation in favor of the executive. This paper attempts to delineate the roles that the Framers expected the two political branches to play in regard to war-making and to demonstrate that only Congress has the power to authorize the use of military force.

Key Words: Congress, Commander-in-Chief, Authorization, Military Force, War-making, Declare War Clause, War Powers Act, Quasi War Cases

Since its inception, the United States has engaged in scores of military conflicts, interventions, and operations, though Congress has issued formal declarations of war pursuant to its enumerated powers under Article I, Section 8 on only five occasions, the last of which was World War II.[1] The reason being, many presidents have not requested that Congress declare war prior to taking military action in their capacity as commander-in-chief. As Congress avoided confrontation over the decision to use force, presidents have

[1] The five occasions are the War of 1812 against Great Britain, the Mexican-American War of 1846, the Spanish-American War of 1898, World War I (in 1917), and World War II. Technically, there were 11 war declarations, as Congress enacted six separate statutory authorizations in World War II, one for each Axis country (three in 1941 against Japan, Germany, and Italy; three in 1942 against Bulgaria, Hungary, and Romania).

increasingly sidelined Congress in times of international conflict. Thus Congress has culpably condoned, if not promoted, this disposition by its passive acquiescence, symbolic rebukes, and hollow attempts to keep presidential war powers in check. One notable consequence of congressional inaction is a considerable blurring in the boundaries of institutional powers. At present, there is little agreement and much contention and uncertainty about the respective powers of the executive and legislative branches in making war.

The purpose of this paper is to examine the executive-congressional interaction in the context of war-making in an attempt to dispel some of the widespread confusion surrounding this critical area of constitutional law. The paper proceeds as follows. I begin by briefly furnishing the historical background and the constitutional foundation for the war powers. Second, I provide an overview of how modern presidents came to exercise their war powers as a result of decades of congressional silence. Here I also discuss how Congress has attempted to regain its power over war-making. Third, I present the pro-president and pro-Congress arguments, drawing on scholarly discourse and historical documents and writings of importance. Finally, I review some relevant Supreme Court decisions that clarify the roles and responsibilities of the two political branches of the federal government in times of international tension and armed conflict. But while giving equal weight to the two sides of the argument, the paper leans toward the view that the president lacks the constitutional authority to move the country to a state of war without congressional input. It also demonstrates, contrary to White House statements, that any kinetic attack by armed force against an enemy target constitutes an act of war inasmuch as such an attack, by definition, is carried out to destroy or incapacitate the target, and subsequent retaliation and escalation are always likely.[2] Against this factual and analytical background, the paper unveils that it is Congress that has diminished its own authority over war-making by its general reluctance to take adverse action against intransigent presidents who committed military assets abroad without congressional backing.

[2] Michael J. Lutton, Johndavid Willis, and Christopher T. Yeaw, "Re-thinking Warfare: How Does the Integration of Space and Cyber Forces Impact a Combatant Commander's Air-Sea Battle Concept?" *High Frontier* 6, no. 4, (2010): 37. The authors explain that "the threshold for when a hostile action constitutes war is driven by intent and effects. If the intent of an actor is to render military forces incapable of carrying out a defense or to destroy critical infrastructure, military, and control networks, or is accompanied by kinetic attacks, then the act constitutes a *casus belli*." This logical argument is consistent with original constitutional intent and judicial decisions, as will be demonstrated in this paper.

Historical and Philosophical Roots of Constitutional War Powers

From the times of antiquity through much of the eighteenth century, monarchies ruled with absolute or near-absolute authority. Even in the Late Middle Ages, when the doctrine of divine right lost its popularity and sway, kings continued to wield extensive influence over their military and naval forces. Once consolidated in power, kings would wage war at their caprice to enhance their wealth, strengthen their states, or expand their dominion. Many kings personally led their armies in conquest and fought alongside their subjects, and when they reposed their confidence in able commanders to win battles for them, they still retained the sole right to declare war and continued to assert full control over their military establishments.[3]

It was not until the politically transformative notions of popular sovereignty and civic republicanism began to take hold in Europe in the mid-seventeenth to mid-eighteenth centuries, and monarchs were divested of governing power and relegated to nominal political roles, that the resolution to make war became the province of democratically-constituted assemblies, which were more responsive to the will of the people. Showing no desire in surrendering their newfound power, people asserted their sovereign rights and demanded greater transparency and accountability from their governments. After all, it was the common people who bore the full brunt of war, as the tradition of warrior-kings ended and the elite political functionaries and their family members became safely distant from the bloody battlefields, and insulated from the direct consequences of their belligerent policies.[4]

As students of history, the architects of the American Republic were keenly aware of the dangers of unchecked power. They were equally cognizant of the costs of weak and ineffective central authority to a nation. It is an intricate and delicate balance that they labored long and hard to strike, as evident from the animated debates in the Federalist Papers. In Federalist No. 51, for instance, James Madison warned of the tyranny that ensues when unbridled power is exercised over men: "If angels were to govern men, neither external nor internal controls on government would be necessary."[5] Alexander

[3] John Mabry Mathews, *The Conduct of American Foreign Relations* (New York: The Century Co., 1922), 294 (observing that "[i]n most centuries, the power to declare war was lodged in the executive").

[4] The American experience was no different. As will be elaborated throughout this study, the Framers "were establishing a representative form of government, hence they deemed it better that the power of initiating war, which so profoundly affects the lives and fortunes of the mass of the people, should be in the hands of that branch of the Government which was conceived to be most broadly representative, namely, Congress." Id.

[5] James Madison, "Federalist No. 51," in *The Federalist Papers*, Gary Willis, ed. (New York: Bantam Books, 1982), 262.

Hamilton, on the other hand, was the Philadelphia Convention's foremost proponent of broad executive powers. He warned in Federalist No. 70 of the evils of a "feeble executive" and lauded the "energetic executive" as a vital ingredient to the recipe for good governance, and one that is "best calculated to conciliate the confidence of the people and to secure their privileges and interests."[6]

Upsetting the balance between power and control would have had drastic effects on the democratic republic the Framers were founding, and they seemed to understand the perils of missing the mark quite well.[7] To resolve this contradictory dynamic and avoid the failures of the Articles of Confederation, they sought to create a limited government of checks and balances. Moreover, they followed the separation of powers doctrine, whereby political power is shared and central functions are divided among three fundamental branches of government reinforcing, monitoring, and cooperating with one another. The tripartite structure at the core of the American constitutional system was to prevent any single branch of government, especially the executive, from dominating the other two,[8] or exercising arbitrary power, with the ultimate goals of strengthening the union and preserving public liberty.

With respect to war-making, as the most consequential undertaking a nation can embark upon, the Framers were prudently reluctant to centralize so critical a power in one government branch. A workable balance between legislative and executive influence over war-making could not be correctly achieved without subjecting presidential decision-making to legislative review, thereby limiting the president's ability to act alone in the name of national

[6] Alexander Hamilton, "Federalist No. 70," in *The Federalist Papers*, Gary Willis, ed. (New York: Bantam Books, 1982), 355. Hamilton was influenced in part by the seventeenth-century philosopher John Locke who advocated a strong executive vested with ample prerogative powers "to do many things of choice, which the Laws do not prescribe." Locke's contention that "the Laws themselves should in some Cases give way to the Executive Power" was premised on two assumptions: first, "a strict and rigid observation of the Laws may do harm," and second, "the Law-making Power is not always in being, and is usually too numerous, and so too slow, for the dispatch requisite to Execution." See John Locke, "The Second Treatise," in *Two Treatises of Government*, Peter Laslett, ed. (New York: Cambridge University Press, 1992), 375.

[7] The dilemma, as Kenneth Mayer succinctly described it, was that "[a]n executive that is too strong would re-create monarchy; a weak executive would prove unable to stop the government from tumbling into chaos and paralysis." See Kenneth Mayer, *With the Stroke of a Pen: Executive Orders and Presidential Power* (Princeton, NJ: Princeton University Press, 2002), 218.

[8] Robert Frankel, *Observing America: The Commentary of British Visitors to the United States, 1890-1950*, 3rd ed. (Madison, WI: University of Wisconsin Press, 2006), 218.

security, for it was the sovereign who had historically played the ascendant, if not exclusive, role in military affairs.[9] The Framers thus divided war-making powers between the two political branches of government to preempt military action unless the executive and legislature are united in a common cause. They assigned the president (per Article II, Section 2) the role of commander-in-chief of the armed forces,[10] putting him personally in charge of protecting and defending the nation, yet reserved the momentous decision of declaring war for Congress so that the president may not take unilateral action or have plenary power over military matters. The congressional power of the purse, in the words of James Madison, would serve as another "effectual weapon" with which the "immediate representatives of the people" could further delay military action if needed,[11] and hence rein in or exact the cooperation of an executive eagerly bent upon the use of force without the requisite level of domestic (or international diplomatic) support.[12]

WAR-MAKING AND THE POST-WWII PRESIDENCY

Most presidents until mid-twentieth century had no qualms with the idea that the constitutional power of war-declaration resided in Congress rather than the executive, and were cautious not to engage the country in war without

[9] Louis Fisher of the Constitution Project opines that the drafters of the Constitution "placed in Congress the authority to initiate war because they believed that executives, in their search for fame and personal glory, had a natural appetite for war and military initiatives, all of which inflicted heavy costs on the interests and liberties of their people." See Chris Edelson, "Obama and the Power to Go to War: The Constitution is Clear: The President Must Make his Case to Congress," *Los Angeles Times*, August 30, 2013, http://www.latimes.com/opinion/commentary/la-oe-edelson-obama-syria-military-action-20130830,0,2055546.story (accessed April 25, 2014).

[10] Precisely stated, the Constitution designates the President as "Commander in Chief of the Army and Navy of the United States," since these were the existing branches of the national military establishment at the time. The phrase "Army and Navy" is thus used in the document as a means of describing all the armed forces of the United States.

[11] Madison's main argument in support of the congressional power of the purse, which is also relevant in the context of war-making, is that it can be a "powerful instrument" by which Congress can reduce "all the overgrown prerogatives of the other branches of the government." James Madison, "Federalist No. 58," in *The Federalist Papers*, Gary Willis, ed. (New York: Bantam Books, 1982), 296-297.

[12] A prominent historical example that the Framers were probably familiar with was that of King Charles II (reigned 1660-1685), whose military options were sharply restricted by a parliament that kept a tight hold on the purse strings to exert greater control over the army. See John Childs, *Army of Charles II* (London: Routledge, 2013), 228-229.

authority from Congress.[13] This understanding also guided their conduct of international affairs, an area over which the president, as head of state, has more direct control than Congress. The turning point, however, seems to have been the Korean War (1950-53), where President Harry Truman sidestepped Congress, calling the U.S. intervention a "police action" in an attempt to explain why he did not need the approval of Congress.[14] Treading the same path, President Lyndon Johnson expanded the U.S. role in Vietnam and fought a protracted war involving some 500,000 combat troops without an actual declaration of war.[15] In 1968, Richard Nixon won a close race, promising to withdraw with honor from Vietnam. Once elected, however, he expanded the war to the neighboring countries of Laos and Cambodia, prompting his critics to jibe that he was "widening down the war."[16]

After nearly a decade of operating in a "constitutional twilight zone,"[17] Congress enacted the War Powers Act in 1973,[18] which has been aptly

[13] James M. Lindsay, "Cowards, Beliefs, and Structures: Congress and the Use of Force," in *The Use of Force after the Cold War*, eds. H. W. Brands, Darren J. Pierson, and Reynolds S. Kiefer (College Station, TX: Texas A&M University, 2003), 140.

[14] Louis Fisher, "The Korean War: On What Legal Basis Did Truman Act?" *American Journal of International Law* 89 (1995): 25. Truman also claimed that he was authorized to take military action without congressional approval pursuant to UN Security Council Resolution 82, which demanded the immediate withdrawal of North Korea. Four decades later, President George Bush Sr. made the same argument for driving Iraqi forces out of Kuwait, but Congress eventually authorized Operation Desert Storm. See Garrett epps, "The Authority to "Declare War": A Power Barack Obama Does Not Have," *Atlantic Monthly*, August 30, 2013, http://www.theatlantic.com/politics/archive/2013/08/a-power-barack-obama-does-not-have/279212 (accessed April 25, 2014).

[15] The Gulf of Tonkin Resolution (passed August 7, 1964), which became the subject of great controversy, was at best a limited political endorsement for President Johnson to repel future attacks or prevent further communist aggression on South Vietnam, but not a congressional decision to wage an all-out, protracted war. In fact, President Richard Nixon continued to broaden the Vietnam War and invaded the neighboring country of Laos in February 1971, even after Congress had twice repealed the Gulf of Tonkin Resolution (in May 1970 and January 1971). See Sam Kleiner, "From the Gulf of Tonkin to Syria: The Limits of Legislative Entrenchment in AUMFs," *Vanderbilt Journal of Transnational Law*, September 27, 2013, http://www.vanderbilt.edu/jotl/2013/09/from-the-gulf-of-tonkin-to-syria-the-limits-of-legislative-entrenchment-in-aumfs (accessed April 25, 2014).

[16] Charles W. Dunn, *The Scarlet Thread of Scandal: Morality and the American Presidency* (Lanham, MD: Rowman & Littlefield Publishers Inc., 2001), 131.

[17] Edward Keynes, *Undeclared War: Twilight Zone of Constitutional Power* (University Park, PA: Pennsylvania State University Press, 1982), 117.

[18] Also known as Public Law 93-148 and War Powers Resolution, which is codified in the United States Code (USC) in Title 50, Chapter 33, Sections 1541-48.

described as the "high-water mark of congressional reassertion in national security affairs."[19] Passed on November 7, 1973 as the Vietnam War was de-escalating, the Act was designed to sharpen the contours of congressional-presidential war powers, and hence prevent history from repeating itself should the United States be drawn into another international conflict. Against the vehement objections of President Nixon, this piece of legislation was introduced to regulate the conduct of war and establish procedures whereby the president must seek congressional approval to engage in war. More specifically, Section 3 of the Act requires the president to consult with Congress in "every possible instance" before introducing U.S. forces into hostilities (or imminent hostilities). These consultations are to continue so long as the troops remain in deployment, which under Section 5 is limited to 60 days.[20] The deadline can only be postponed if the president notified Congress that 30 additional days are needed to effect a safe and orderly withdrawal of the troops. In spite of these strict interdictions, the Act is flexible enough to allow the president to take immediate action without the prior consent of Congress if an urgent situation necessitates, and report to Congress within 48 hours of the commitment of the troops. In any case, the president must remove the troops from hostilities within 90 days absent an affirmative congressional authorization extending the military deployment.

President Nixon unsuccessfully vetoed the War Powers Act because it was widely supported in Congress. In his veto statement, he attacked the 60-day clock in particular, arguing it was an impermissible restriction on the operation of the president's commander-in-chief authority, and one that also circumvents the usual bicameral procedure, "with each member taking the responsibility of casting a yes or no vote."[21] Nixon's sentiment was echoed by his predecessors from both parties, as every president has since flouted, or at least denounced, the Act – and yet Congress has not undertaken to enforce it despite a pattern of executive defiance.

The first president to violate the War Powers Act was Gerald Ford, who had voted against it as a congressman from Michigan before his appointment

[19] Louis Fisher and David Gray Adler, "The War Powers Resolution: Time To Say Goodbye," *Political Science Quarterly* 113, no. 1 (Spring, 1998): 1.

[20] From 1975 to mid-September 2012, Presidents have submitted 136 reports pursuant to the Section 4 of the Act, apprising Congress of the circumstances that justify the intervention as well as the scope and duration of their actions in the area of conflict. For a detailed description of the 136 reports, see U.S. Library of Congress, Congressional Research Service, *The War Powers Resolution: After Thirty-Eight Years*, by Richard F. Grimmett, CRS Report R42699 (Washington, DC: Office of Congressional Information and Publishing, September 24, 2012).

[21] "The War Powers Resolution: President Nixon's Veto Message," in *Thinking about the Presidency: Documents and Essays from the Founding to the Present*, ed. Gary L. Gregg (Lanham, MD: Rowman and Littlefield, 2006), 258-259.

as Nixon's Vice President on December 6, 1973. Although Ford was merely reacting to the seizure of the American cargo ship SS Mayaguez by the Cambodian Khmer Rouge navy, he neglected to consult Congress before ordering a military rescue operation. To set himself apart from Ford, Jimmy Carter supported the Act when he was running for president in 1976,[22] but did not adhere to it either despite boasting of being "the first American president in 50 years who has never sent troops into combat."[23] He too authorized a military rescue mission without a congressional resolution. The failed covert mission (Operation Eagle Claw) was an attempt to free the 52 American embassy workers held hostage in Iran.

Ronald Reagan was the first president to commit multiple violations of the War Powers Act. In addition to sending a peace-keeping force to Lebanon in 1982 without consulting Congress, he invaded Grenada in 1983 (Operation Urgent Fury) with 7000 American troops to forestall the installation of a Cuban-backed communist government, and ordered the aerial bombing of Libya in April 1986 (Operation El Dorado Canyon) in reprisal to the bombing of a Berlin nightclub by Libyan terrorists. Reagan's Vice President, George H. W. Bush, did not comply with the Act either when he assumed the powers of the presidency. His violation was carrying out an unauthorized offensive in Panama in December 1989 (Operation Just Cause) with a military force of 14,000. The stated mission was to topple the renegade regime of General Manuel Noriega, who was also believed to preside over an international criminal syndicate dealing in illicit drugs. A few years after leaving office, President Bush sent a letter to Rep. Hyde applauding him for "opposing the War Powers Resolution as an unconstitutional infringement on the authority of the president."[24]

President Bill Clinton also failed to check with Congress before sending some 20,000 armed forces to Haiti in September 1994 (Operation Uphold Democracy) to oust the military junta and restore President Jean-Bertrand Aristide to power. It was not until U.S. military personnel had landed in Haiti that both houses of Congress passed resolutions supporting the president and the troops without an outright endorsement of the deployment decision.[25] Clinton committed yet another violation of the Act by intervening in the

[22] Though once political rivals, Ford and Carter joined in endorsing Rep. Henry Hyde's efforts to repeal the War Powers Act in 1995. See Donald L. Westerfield, *War Powers: The President, the Congress, and the Question of War* (Westport, CT: Greenwood Publishing Group, 1996), 175.

[23] Steven F. Hayward, *The Age of Reagan: The Fall of the Old Liberal Order: 1964-1980* (New York: Crown Publishing, 2001), 659.

[24] Id.

[25] Ryan C. Hendrickson, *The Clinton Wars: The Constitution, Congress, and War Powers* (Nashville, TN: Vanderbilt University Press, 2002), 60.

Kosovo War in March 1999 (Operation Allied Force) with a bombing campaign that lasted until June.[26] His successor, President George W. Bush stands out as the only president who did not violate the War Powers Act, though he expressed strong reservations against it. A self-described "war president,"[27] Bush sought and obtained an authorization to use military force for the Iraq war, but insisted that his "request for congressional support" was not to be construed as sanctioning the constitutionality of the Act.[28] Even when he later informed Congress of the launch of the military operations in Iraq, President Bush stated that his actions were based on the constitutional powers of the president rather than a congressional authorization.[29]

Most of the presidents who disregarded the Act reported to Congress after the fact. In response to the congressional clamor, they offered a variety of pragmatic reasons for their unilateral actions, including strong public support, the low level or absence of casualties, the promotion of democratic ideals, the potential human and moral costs of inaction, and acting as part of a UN-sanctioned multinational effort. No president was self-critical, but some were more self-justifying than others. President Clinton, for instance, maintained that his military activities in Bosnia fell within the boundaries of the

[26] This NATO-led operation of 1999 was preceded by earlier violations. Clinton's 1994 air strikes against the Serbian militias were not authorized, nor was his deployment of 20,000 troops to Bosnia in 1995. Prior to the troops' deployment, the then-Senate Majority Leader Bob Dole said to the press that "No doubt about it, whether Congress agrees or not, troops will go to Bosnia." In so reacting to the president's plan, Congress gave him tacit permission to wage war at his free will and made itself irrelevant as a branch of government. See John M. Broder and Elizabeth Shogren, "Clinton Says U.S. Values Require Troops for Bosnia," *Los Angeles Times*, November 28, 1995, http://articles.latimes.com/1995-11-28/news/mn-7924_1_world-war-ii (accessed April 25, 2014).

[27] Joe Klein, "Why the "War President" is under Fire," *Time*, February 15, 2004, http://content.time.com/time/nation/article/0,8599,591270,00.html (accessed April 25, 2014).

[28] As he signed House H.J.Res. 77 into law, President Bush made the following statement: "As I made clear to congressional leaders at the outset, my request for congressional support did not, and my signing this resolution does not, constitute any change in the long-standing positions of the executive branch on either the President's constitutional authority to use the Armed Forces to defend vital U.S. interests or the constitutionality of the War Powers Resolution." See U.S. Library of Congress, Congressional Research Service, *Declarations of War and Authorizations for the Use of Military Force: Historical Background and Legal Implications*, by Jennifer K. Elsea and Matthew C. Weed, CRS Report RL31133 (Washington, DC: Office of Congressional Information and Publishing, January 11, 2013), 13.

[29] Louis Fisher, *Presidential War Power*, 3rd rev. ed. (Lawrence, KS: University Press of Kansas, 2013), 227.

Act because Congress had supposedly approved the mission by funding it.[30] An effete Congress reacted to the violations with the same supine indifference it had exhibited before passing the Act, and failed to muster the political will to take any president to task. The initial flurry of reactions quickly subsided and fizzled into stasis. Virtually nothing substantive followed the usual rhetorical parries and theatrical condemnations.[31] So have modern presidents come to believe that consulting with Congress prior to minor military engagements was an option rather than an obligation, even in absence of a direct national security threat.

Following the precedent set by several of his predecessors, President Barack Obama utilized his commander-in-chief powers to launch an air war against the Libyan regime of Muammar Gaddafi in March 2011. Without seeking a congressional vote, he ordered U.S. military forces to commence no-fly zone operations and provide air cover for the rebels, although he had ample time and opportunity to notify and consult with Congress in advance.[32] Even

[30] While there is possibly such a thing as an "implicit authorization of force," funding does not constitute tacit congressional assent to military action for legal purposes because an authorization, whether explicit or implicit, is not valid unless enacted into law. The "Tampico Affair" of 1914 is a good example. On April 20, 1914, President Woodraw Wilson sought an authorization from Congress to use the armed forces in response to the Mexican arrest of some American soldiers in Tampico. Congress immediately adopted a joint resolution declaring that "the President is justified in the employment of the armed forces of the United States to enforce his demand for unequivocal amends for the affronts and indignities against the United States." Though neither the word "war" nor "force" was in the authorization, it nonetheless gave the president the authority to employ the armed forces if necessary. See Charles A. Stevenson, *Congress at War: The Politics of Conflict since 1789* (Washington, DC: National Defense University Press, 2007), 18.

[31] In 1999, a bipartisan group led by Rep. Tom Campbell (R-Calif.) and Rep. Dennis Kucinich (D-Ohio) sued the Clinton administration over its unilateral military operations. They sought a declaratory judgment that the President's actions were unlawful under the War Powers Act. The District Court dismissed the case for lack of standing, and the appellate court affirmed, holding that legislative remedies must be exhausted before any judicial relief is sought. See *Campbell v. Clinton*, 52 F. Supp. 2d 34 (D.D.C. 1999) and *Campbell v. Clinton*, 203 F.3d 19 (D.C. Cir. 2000). The U.S. Supreme Court declined to review the case, letting the decision of the lower court stand.

[32] This was a change of heart for Barack Obama who had expressed quite an opposite view in 2007 as a presidential candidate. In a *Boston Globe* interview, then-Senator Obama unequivocally said that the "President does not have power under the Constitution to unilaterally authorize a military attack in a situation that does not involve stopping an actual or imminent threat to the nation." See Charlie Savage, "Barack Obama's Q&A," *Boston Globe*, December 20, 2007, http://www.boston.com/news/politics/2008/specials/CandidateQA/ObamaQA (accessed April 25, 2014).

if the president was pressed for time, he could have invoked the Extraordinary Occasions Clause of Article II, Section 3 and called Congress into special session at once, but he did not. About three months later, the Republican-led House of Representatives, in a gesture of indignation, voted 295-123 against authorizing a war that was already underway.[33]

The air combat mission was admittedly a success, as was the NATO-backed Libyan Revolution, but the administration was unapologetic that it did not involve Congress. Its position, as articulated by State Department legal adviser Harold H. Koh, was that "the limited nature of this particular mission is not the kind of 'hostilities' envisioned by the War Powers Resolution."[34] Again, Congress was largely passive, partly because the strikes were conducted under the umbrella of NATO with the blessing of the United Nations, and partly because congressional leaders held an overwhelmingly negative view of the embattled Libyan ruler and were happy enough to see him gone.

A bipartisan group of ten congressmen led by Rep. Dennis Kucinich took a bold step and sued President Obama in federal court. Filed on June 15, 2011, the suit sought injunctive and declaratory relief "to protect the Plaintiffs and the country from a stated policy of Defendant Barack Obama, President of the United States, whereby a president may unilaterally go to war in Libya and other countries without the declaration of war from Congress required by Article I, Section 8, Clause 11 of the U.S. Constitution."[35] The same relief was also sought with respect to the War Powers Act. A federal judge dismissed the lawsuit on October 20, 2011 in a strongly worded ruling, noting his "dismay" at the plaintiffs' attempt to relitigate "settled questions of law…to achieve what appear to be purely political ends."[36]

[33] The negative vote included 70 Democrats. See Ewen MacAskill and Nick Hopkins, "Barack Obama Rebuked for Libya Action by US House of Representatives," *The Guardian*, June 24, 2011 http://www.theguardian.com/world/2011/jun/24/barack-obama-libya-us-house-of-representatives (accessed April 25, 2014).

[34] Summing up the position of the Obama administration, Mr. Koh said: "We are acting lawfully." See Charlie Savage and Mark Landler, "White House Defends Continuing U.S. Role in Libya Operation," *New York Times*, June 15, 2011, http://www.nytimes.com/2011/06/16/us/politics/16powers.html (accessed April 25, 2014).

[35] The full text of the brief is available on the International Action Center website at http://www.iacenter.org/africa/libyawarpowersbrief. Despite an unsuccessful 1999 lawsuit against President Clinton, Rep. Dennis Kucinich ventured to sue the Obama Administration for allegedly violating the Declare War Clause and the War Powers Act. It was not clear how this case was any different from *Campbell v. Clinton*, which was dismissed by two courts due to the availability of legislative remedies. See supra n. 25.

[36] *Kucinich v. Obama*, 821 F. Supp. 2d 110, 13 n.4 (DDC 2011).

No sooner had the Obama administration dealt with the blowback from the Libya intervention than it became embroiled in another wrangle over another military intervention in the Middle East. In August 2012, as the Syrian civil war raged on, the president set the use of chemical weapons as a "red line" for U.S. intervention.[37] When hundreds of Syrian civilians were killed in a confirmed chemical attack almost exactly a year later, the administration asked Congress to back a military strike to punish the Syrian regime. On September 10, 2013, at the height of the Syrian chemical attack crisis, President Obama addressed the nation from the White House to present his case for punitive military action. The president stated that although he "possess[ed] the authority to order military strikes," he chose to "take this debate to Congress" because "our democracy is stronger when the president acts with the support of Congress."[38]

With the specter of Iraq looming large in the background, President Obama's assertion that he reported to Congress merely as a matter of policy or comity rather than constitutional process triggered a new debate on the congressional-presidential balance of power in the area of war-making. One could agree or disagree with the president on whether the situation in Syria warranted military intervention, but the question of whether the executive can solely initiate hostilities absent express congressional sanction is a separate one that calls for some investigation in light of the constitutional provisions that govern the division of war powers between the executive and legislative branches. The central question before us is whether the Constitution grants the president the power to lead the country into war without a congressional vote of approval. A corollary question, whose answer depends on the outcome of the main inquiry, is whether in passing the War Powers Act Congress has legislatively altered the constitutional powers vested in the president, or merely crafted a procedure by which it can enforce a legitimate constitutional mechanism more effectively.

The Pro-President Perspective

The distribution of powers between the president and Congress over the military has developed into a hotly contested political issue, especially as the

[37] President Obama figuratively drew the Syria red line when he proclaimed that "seeing a whole bunch of chemical weapons moving around or being utilized…would change [his] calculus…[and] equation." See "Remarks by the President to the White House Press Corps," August 20, 2012, http://www.whitehouse.gov/the-press-office/2012/08/20/remarks-president-white-house-press-corps (accessed April 25, 2014).

[38] "Full Transcript: President Obama's Sept. 10 Speech on Syria," *Washington Post*, September 10, 2013, http://www.washingtonpost.com/politics/running-transcript-president-obamas-sept-10-speech-on-syria/2013/09/10/a8826aa6-1a2e-11e3-8685-5021e0c41964_story.html (accessed April 25, 2014).

two parties moved farther away from the center toward the ends of political spectrum.[39] That presidents and their loyal staff should oppose legislation that circumscribes their power is hardly a cause for surprise. For this inquiry to be meaningful, therefore, we ought to look beyond the rhetoric of self-interested parties who have a personal or political stake in the matter. The debate, for our purpose, is solely about the allocation of power between Congress and the president in the constitutional scheme.

It is well recognized that there is an assertion implicit in the commander-in-chief title: the president commands the armed forces and dictates military actions in times of war. A number of contemporary scholars, however, seem to subscribe to the view that the president holds the initiative not only in the conduct of war, but also in starting military hostilities. Perhaps the most salient and intellectual scholarly proponent of the principle of executive supremacy in war-making is John Yoo, a professor of law at University of California, Berkeley, and a former official in the Justice Department's Office of Legal Counsel (OLC) during the Bush presidency. Although a one-time political appointee, John Yoo is principled rather than partisan in his views, as appears from the fact that he continued to express them after leaving office in support of a Democratic president, Barack Obama. An exposition of his views and methods can help bring into focus the complex constitutional relationship between the two political branches from a pro-executive perspective.[40]

Like virtually all originalists, Professor Yoo decries the fact that many scholars nowadays, particularly on the left, commit the sin of interpreting the Constitution apart from its historical context.[41] To him, this historical context

[39] Political analyst William Galston rightly observes that at present "the two political parties are more polarized than at any time since the 1890s." See William Galston, "No Labels, No Apology," *New Republic*, December 22, 2010, http://www.newrepublic.com/blog/william-galston/80300/defense-no-labels-centrist-group (accessed April 25, 2014).

[40] Steven G. Calabresi and Christopher S. Yoo are among the other prominent scholars in agreement with John Yoo. See Steven G. Calabresi and Christopher S. Yoo, *The Unitary Executive: Presidential Power from Washington To Bush* (New Haven, CT: Yale University Press, 2008). Neoconservatives subscribe to this position, too, since they generally favor a strong executive and support military interventionism to perpetuate democratic values. A case in point is Mark Levin, who expressed the very same views in a personal Facebook positing (available at http://www.facebook.com/notes/mark-levin/so-much-educating-to-do-so-little-time-to-do-it/10150116640995946). It should be noted, however, that unlike John Yoo who cites as evidence the concerns, views, and beliefs of the Founders, Levin relies on precedents where Congress failed to assert its right to declare war, as if practice establishes constitutionality.

[41] John Yoo, "Who's Got the Power to Use Force?" August 29, 2013, http://www.nationalreview.com/corner/357102/whos-got-power-use-force-john-yoo (accessed April 25, 2014).

is best revealed and understood by exploring what the Framers meant when they employed specific language. Accordingly, he sets out to ascertain the original meaning of key constitutional terms and phrases in order to make his case. Before entering into the technical arguments, one might note at the outset that Yoo proceeds with the broad assertion that, at the time of framing the Constitution, "executive power was understood to include the war, treaty, and other general foreign affairs powers."[42] The British constitution, which strongly influenced American constitutional thought, granted the Crown "the powers over war and peace, negotiation and communication with foreign nations, and control of the military."[43] Yet the powers of the British parliament were limited to the purse and raising armies. This should lead to the conclusion that the Framers understood Article II, Section 1 to continue the "tradition of locating the foreign affairs power generally in the executive branch."[44]

Turning to the more concrete discussions, Yoo contends that, while Article 1, Section 8 of the Constitution delegates Congress the power to "declare war," it is erroneous to suppose that "declare" is synonymous with "start," "authorize," or "commence."[45] He bases his contention on Article I, Section 10, which, among other things, bars the states from going to war independently: "No State shall, without the Consent of Congress…engage in War, unless actually invaded, or in such imminent Danger as will not admit of delay." With precision the Framers articulated this principle using language different from that used in Article 1, Section 8, thus indicating they meant two different things altogether. It stands to reason, Yoo argues, that the Framers would have used ""declare" in both places if it were to mean the same thing – initiate hostilities."[46] It follows that the Framers set congressional consent as a condition for war-initiation only with respect to the states but not the president. Had the Framers sought to impose the same restriction on the commander-in-chief, a more elaborate and more precise Declare War Clause would have rather read: "The President shall not, without the Consent of Congress, engage the United States in War, unless actually invaded, or in such imminent Danger as will not admit of delay."[47]

Professor Yoo looks to early American documents for further evidence against the view that Congress alone can begin military hostilities. He focuses on the 1781 Articles of Confederation as a document of particular import,

[42] John Yoo, "Unitary, Executive, or Both?," *University of Chicago Law Review* 76 (2009): 1984.

[43] Id.

[44] Id.

[45] John Yoo, "Who's Got the Power to Use Force?"

[46] Id. (internal quotation marks in original).

[47] Id.

having laid the original framework of American government and served as the young nation's guiding compass until the ratification of a new Constitution in 1789. Article IX of the Articles of Confederation vests in Congress "the sole and exclusive right and power of determining on peace and war, except in the cases mentioned in the sixth article," which specifically provides that "No State shall engage in any war without the consent of the united States in congress assembled." Yet when the Framers drafted the U.S. Constitution six years later, they decided to use more succinct and less emphatic language, limiting the role of Congress to declaring war.[48] Such being the case, Yoo concludes that the Framers did not intend to grant Congress the absolute authority to take the country to war, or they would have retained the words "sole and exclusive" that appeared in the Articles of Confederation.

In another vein, Professor Yoo argues that, as a matter of practicality and common sense, it is the president who should play the leading role in the area of national security for two reasons. First, the country during wartime cannot afford to follow the slow-moving procedures of peacetime, where the president proposes and Congress disposes.[49] In support of this position, he relies on Alexander Hamilton's argument in Federalist No. 74 that presidents are better suited to conduct war because, unlike legislative bodies, they possess the varied and apt qualities of "decision, activity, secrecy, and dispatch." Second, Congress should not monopolize the authority to make war because it lacks both the agility and incentive to make the sort of swift life-and-death decisions that war demands. Members of Congress, who are always preoccupied with their reelection bids and personal political gains, tend to avoid controversial issues. But even when they have the desire to act, Congress as an institution is ill-equipped to act quickly in urgent situations because of its sheer size and complexity.[50] In addition, excessive congressional interference with military decisions could curtail the president's ability to protect the national interest by entering into conflicts before they escalate and spread.[51] All this puts the

[48] John Yoo, "The Power of War, Continued," *National Review*, August 29, 2013, http://www.nationalreview.com/corner/357132/power-war-continued-john-yoo (accessed April 25, 2014).

[49] John Yoo, "Like it or not, Constitution allows Obama to strike Syria without Congressional approval," August 30, 2013, http://www.foxnews.com/opinion/2013/08/30/constitution-allows-obama-to-strike-syria-without-congressional-approval (accessed April 25, 2014).

[50] Id.

[51] Yoo views World War II as a good example, as it seems quite obvious with the benefit of hindsight that President Roosevelt should have resorted to military force sooner, if not for a reluctant Congress. See John Yoo, "A President Can Pull the Trigger," *Los Angeles Times*, December 20, 2005, http://articles.latimes.com/2005/dec/20/opinion/oe-yoo20 (accessed April 25, 2014).

commander-in-chief in a better position to take decisive action on behalf of the nation.

Finally, Professor Yoo postulates that the Framers deliberately refrained from establishing clear and specific procedures for war-making comparable to the treaty-making or appointment-making process because they meant for Congress and the president to wrangle over it and come to a decision through the political process.[52] In other words, the lack of clear constitutional guidelines may be interpreted as an open door for genuine and meaningful dialogue between Congress and the president. This raises a question as to what sort of leverage Congress wields in this contentious interaction. Stated differently, if the determination to use force rests with the president, what can Congress do to check on presidential war powers?

Yoo asserts in conclusion that the Constitution assigns to Congress two viable checks: the power to raise the military and the power of the purse. The first check allows Congress to "discourage presidential initiative in war" by reducing the size of the military force, or develop one that is "less offensive-minded."[53] The second check, which Yoo views as the primary one, allows Congress to cut off the funding for war, thereby leaving the president with no choice but to terminate the military operations and remove the forces from combat. The reverse is also true. If Congress created and powered a formidable war machine, the president can be expected to use it at will, as Yoo believes that he should, because the "executive branch needs flexibility" to thwart terrorist attacks and strike rogue nations while the window of opportunity is still open.[54]

THE PRO-CONGRESS PERSPECTIVE

Proponents of congressional control over war-initiation, in the same manner as their scholarly opponents, rely on original intent and founding-era documents to support their position. As stated earlier, the concentration of power in a single governing body was one thing that the Framers were particularly wary of and actively tried to avoid. Nowhere is this more apparent than in the domain of foreign affairs, where the Framers granted Congress, in the words of Professor David Gray Adler, "senior status in a partnership with the president for the purpose of formulating, managing, and conducting America's foreign policy."[55]

The constitutional scheme of checks and balances empowers Congress to regulate foreign commerce, ratify treaties, and concur to the president's

[52] Yoo, *Like it or not.*

[53] Id.

[54] Id.

[55] David Gray Adler, "The Law: Textbooks and the President's Constitutional Powers," *Presidential Studies Quarterly* 35, no. 2 (2005): 381.

appointment of ambassadors and consuls. Further, with respect to military matters, Congress holds the powers to "provide for the common Defense," "declare War," "grant Letters of Marque and Reprisal," "raise and support Armies," "provide and maintain a Navy," and "make rules for the Government and Regulation of the land and naval forces." As such, one could argue that the Constitution establishes not only partnership, but also equilibrium between the legislative and executive branches in this policy sector, having granted Congress a host of powers, checks, and regulatory responsibilities relating to foreign affairs while assigning the president the two shared powers of making treaties and receiving ambassadors, besides the title of "commander-in-chief."

Evidently, the constitutional role of commander-in-chief of the armed forces puts the president in charge of military and strategic decisions. (This designation is often cited as the basis for the inference that the president can engage in hostilities without approval from Congress.) Yet congressional power advocates would insist that these decisions, however diverse or well-intentioned they may be, do not include the decision to take unilateral military action, unless the country or its citizens are under actual or impending attack. And as will be elaborated below, the reason behind the use of the term "declare" in Article 1, Section 8, contrary to Professor Yoo's contentions, was to give the executive the latitude to repel external threats to the nation rather than place the power of war-making in the hands of the executive.

It serves us to remember that throughout British history, with which the nation's founders were most acquainted, the executive was the dominant branch that had long wielded the war power. This was seen an outdated model that needed to be dismantled, which is why the Articles of Confederation, the country's first attempt at self-governance, gave Congress rather than the executive "the sole and exclusive right and power of determining on peace and war." The executive branch was altogether left out of the governing document and its powers were vested in a unicameral congress. Even when the confederate experiment failed and a new constitution had to be promulgated, the Framers were still loath to grant the executive such power because they envisioned a system different from the one they had recently gained their independence from, so far as can be judged from founding-era documents.[56] In fact, few concerns were more important to the Framers, and few received as much attention in their debates and writings, than an aggrandized executive branch that operates unfettered.

The debates at the Constitutional Convention of 1787, which bring us as close as we can get to the Framers' intentions, substantiate the hypothesis that the Framers were determined to circumscribe the executive's authority to use the armed forces. Early in the Convention, James Madison who kept a journal of the proceedings of each meeting, "moved to insert "*declare*," striking out

[56] Mathews, *Conduct of American Foreign Relations*, 294.

"*make*" war; leaving to the Executive the power to repel sudden attacks."[57] Successfully adopted, this amendment modified an initial draft of the Constitution in which Congress alone had the power to "make war." The express purpose of Madison's amendment was to give the president the authority he needs to respond swiftly to hostile actions initiated against the United States, rather than to initiate an act of war against another country.[58] It bears mention that Madison's view prevailed with the support of other notable delegates such as Roger Sherman of Connecticut,[59] Elbridge Gerry of Massachusetts,[60] and George Mason of Virginia, who issued statements of their own confirming this understanding.[61] Moreover, when the distinguished Pennsylvania lawyer James Wilson made a motion proposing "that the Executive consist of a single person," the South Carolinian John Rutledge agreed to the proposal, but with the caveat that "he was not for giving him the power of war and peace."[62]

[57] The Founders' Constitution, *Records of the Federal Convention*, Volume 3, Article 1, Section 8, Clause 11, Document 4 (italicization and internal quotation marks in original), available at http://press- pubs.uchicago.edu/founders/documents/a1_8_11s4.html (accessed April 25, 2014).

[58] Edward Keynes, *Undeclared War: Twilight Zone of Constitutional Power* (University Park: Pennsylvania State University Press, 1991), 34 (explaining that the Framers' "division of the congressional war powers from the presidential office of commander-in-chief rests on a fundamental distinction between offensive and defensive war and hostilities").

[59] Endorsing Madison's view, Roger Sherman quickly added that the "Executive shd. be able to repel and not to commence war." The Founders' Constitution, *Records of the Federal Convention*, Volume 3.

[60] Elbridge Gerry famously exclaimed that he "never expected to hear in a republic a motion to empower the Executive alone to declare war." Id. He made that derisive remark in response to Pierce Butler's proposal that the power to initiate war be vested in the president.

[61] Expressing the same misgivings as Madison, George Mason "was agst giving the power of war to the Executive, because not safely to be trusted with it." Id. Like Madison, Mason also preferred replacing "make" with "declare" because he was committed to the goals of "clogging…war" and "facilitating peace." Id.

[62] The Founders' Constitution, Records of the Federal Convention, Volume 3, Article 2, Section 1, Clause 1, Document 4, available at http://press-pubs.uchicago.edu/founders/documents/a2_1_1s4.html (accessed April 25, 2014). In December 1787, during the ratification debates in his home state of Pennsylvania, James Wilson defended the idea of removing the power of war from the president's purview and placing it in a bicameral legislature as a safeguard against rash belligerence: "This system will not hurry us into war; it is calculated to guard against it. It will not be in the power of a single man, or a single body of men, to involve us in such distress, for the important power of declaring war is vested in the legislature at large." See The Founders' Constitution, James Wilson, Pennsylvania Ratifying Convention, Volume 1,

The writings of the Founders, both personal and official, lend further credence to the assertion that the Framers sought to create an executive with limited war powers. Well after the adoption of the Constitution, prominent members continued to express and defend the same pro-Congress arguments advanced in the Convention. Of particular note is a 1798 letter to Thomas Jefferson from James Madison in which he wrote, "The constitution supposes, what the History of all Governments demonstrates, that the Executive is the branch of power most interested in war, and most prone to it. It has accordingly with studied care vested the question of war in the Legislature."[63] Some three decades later, in a correspondence to fellow-Virginian and anti-federalist James Monroe, Madison unequivocally stated that the "only case in which the Executive can enter on a war, undeclared by Congress, is when a state of war has "been actually" produced by the conduct of another power, and then it ought to be made known as soon as possible to the department charged with the war power."[64] These personal observations, which amplify the ideas that shaped the Convention's deliberations, make it abundantly clear that the "chief architect of the Constitution"[65] deemed the executive department dispossessed of the constitutional authority to make offensive war.

Of course, this was not a view unique to Madison. Had it not been popular among his ilk, the Constitution would have been considerably more deferential to the executive in all matters relating to war. Most notably, George Washington, who presided over the Convention and played a central founding role as the first president, acknowledged the authority of Congress over war as a fundamental constitutional tenet: "The constitution vests the power of declaring war in Congress; therefore no offensive expedition of importance can be undertaken until after they shall have deliberated upon the subject and

Chapter 7, Document 17 http://press-pubs.uchicago.edu/founders/documents/v1ch7s17.html (accessed April 25, 2014).

[63] This letter was dated April 2, 1798. James Madison, *Letters and Other Writings: 1794-1815* (Philadelphia: J. B. Lippincott & Co., 1865), 131-132. The fifty-year political partnership between Madison and Jefferson began probably when they met in the Virginia House of Delegates in 1776. The two political soul-mates exchanged well over 1,200 letters, many of which contained discussions about their philosophy of government.

[64] This letter was dated November 16, 1827. James Madison, *Letters and Other Writings: 1816-1828* (Philadelphia: J. B. Lippincott & Co., 1865), 600 (internal quotation marks in original).

[65] James Madison has been so dubbed by a number of scholars, biographers, and historians, including eminent presidential scholar Michael A. Genovese. See Michael A. Genovese, *The Presidential Dilemma: Revisiting Democratic Leadership in the American* (New Brunswick, NJ: Transaction Publishers, 2011), 59.

authorized such a measure."[66] Though a commander-in-chief with an illustrious military past, Washington did not feel unduly constrained by Congress but left war decisions to the "people's branch" as a matter of settled constitutional principle.[67]

Even Alexander Hamilton who called for presidential primacy in foreign policy was unusually reserved when it came to the power of war and peace, and found himself in accord with Madison's ideas. In the Pacificus-Helvidius debates of 1793-1794, Hamilton and Madison agreed on the division of war powers under the Constitution,[68] although they generally differed on the role of the president vis-à-vis Congress in foreign affairs. Expressing the same view on the power to authorize war, Hamilton asserted that "[t]he executive indeed cannot control the exercise of that power."[69] The fact that these two towering political figures saw eye to eye on this one point while having antagonistic positions on a host of other issues is further indication that Madison's restrictive reading of executive power was the accepted interpretation of the Constitution at the time.

Pro-executive scholars like John Yoo, as mentioned earlier, point to the power of the purse as the primary means by which Congress can prevent the president from entering into hostilities. They contend that Congress can use its budget authority, not only positively to fund, but also negatively to defund,

[66] Washington expressed this sentiment in a letter dated August 28, 1793, addressed to William Moultrie, the then governor of South Carolina. See Jared Sparks, *The Writings of George Washington, Pt. IV* (Boston: Ferdinand Andrews, 1839), 367.

[67] In his Northwest Indian War with the Western Indian Confederacy, Washington acted without congressional authorization because it was not an offensive war; he merely took a defensive posture as the Indians attacked. This is to be contrasted with how he handled the piracy threat to American commercial interests in the Mediterranean and the Western coast of Africa. In 1790, Washington's second year in office, he drew Congress's attention to the threat posed by the Barbary pirates, who had already captured the American merchant ship Betsy and its crew in 1784. Washington's Secretary of State Thomas Jefferson suggested that Congress "repel force by force," but left it up to Congress to decide among the three alternatives of "war, tribute, and ransom" to secure the release of the American shipmen and protect American commerce in the region. Congress declined to declare war, pressuring the administration into diplomatic resolution. See Richard J. Ellis, *The Development of the American Presidency* (New York: Routledge, 2010), 198.

[68] The gist of Hamilton's argument is encapsulated in the following statement: "In this distribution of powers the wisdom of our constitution is manifested. It is the province and duty of the Executive to preserve to the Nation the blessings of peace. The Legislature alone can interrupt those blessings, by placing the Nation in a state of War." The Founders' Constitution, Alexander Hamilton, Pacificus, no. 1, Volume 4, Article 2, Section 2, Clauses 2 and 3, Document 14, http://press-pubs.uchicago.edu/founders/documents/a2_2_2-3s14.html (accessed April 25, 2014).

[69] Id.

and hence curb the exercise of executive discretion. In practice, however, the power of the purse has rarely been successfully employed to end ongoing wars and combat missions,[70] for it is often not practically possible for Congress to up the budgetary pressure on the Pentagon in the midst of conflict without abandoning the troops in the field. Such was the case with the Iraq war, even as public support for the war rapidly eroded. The House of Representatives passed a supplemental war budget in March 2007 that included a timeline to remove American troops from Iraq by August 2008,[71] but the bill did not clear Congress.[72] Another good and more recent example is the aforementioned Libya campaign, where House efforts to restrict war funding unsurprisingly failed in summer 2011.[73] It cannot be reasonably argued that so impotent a legislative device, and one that puts the troops at risk, was intended as the primary means by which Congress can constrain the power of the commander-in-chief.[74] The inefficacy of this approach was no more obvious than during

[70] The Foreign Assistance Act of 1974 is sometimes cited as an example of the successful use of power of the purse in military affairs, but it cannot be said that it is an effective tool if the war in Vietnam dragged on for ten long years. Neither were the funding restrictions imposed on President Reagan as instrumental in the withdrawal of the Marines from Lebanon as the 1983 suicidal bombing of their barracks that sapped public support for the dubious mission.

[71] The supplemental appropriations bill, titled the U.S. Troop Readiness, passed the House by a vote of 218-212. See Michael Roston, "Supplemental Budget with Iraq War Timeline Passes House by Razor-Thin Margin," March 23, 2007, http://rawstory.com/news/2007/Supplemental_budget_with_Iraq_timeline_passes_0323.html (accessed April 25, 2014).

[72] Whenever Congress attempts to use the budget weapon, Presidents take their case to public opinion to reverse the pressure on Congress – a common political tactic that has often worked. In response to the congressional budget threats, President Bush admonished Democrats in a November 2007 press conference to approve money to fund the Iraq war in order to provide "our men and women in uniform...[with]...what they need to succeed in their missions." See Aaron Aupperlee, "War Budget Gridlock could Affect Civilian Jobs at Home," *Desert Dispatch*, November 29, 2007, http://www.desertdispatch.com/articles/army-2078-war-budget.html (accessed April 25, 2014).

[73] The vote against a measure to bar funds for U.S. military mission in Libya was 229-199. See Associated Press, "House Rejects Effort to Prohibit Funds for Libya Mission," July 7, 2011, http://www.foxnews.com/politics/2011/07/07/house-rejects-effort-to-prohibit-funds-for-libya-mission (accessed April 25, 2014).

[74] Stanley Kober, "Another Blow to America's Constitution," in *NATO's Empty Victory: A Postmortem on the Balkan War*, ed. Ted Galen Carpenter (Washington, DC: Cato Institute, 2000), 99-100 (arguing that "[t]o swing the balance the other way would mean that Congress's power to declare war would be reduced to stopping war only by cutting off supplies to troops already fighting in the field, thereby placing them in jeopardy.

the Vietnam War, which led Congress to enact the War Powers Act, with much public support, to restore its lost constitutional authority over war-making.[75]

THE SUPREME COURT'S EARLIEST CASE LAW

We finally turn to the U.S. Supreme Court's case law from the early years of the Republic for further guidance and analysis. In reviewing the earliest Supreme Court decisions relating to war, it becomes readily apparent that the Court's original jurisprudence conforms to the understanding propounded by the Framers in their public and private statements, as outlined above. In the war-related cases that the High Court heard at the dawn of the nineteenth century, it consistently took the position that a congressional declaration or authorization of war was necessary before the president could bring military force to bear in an international conflict. We consider three seminal cases and their significance in careful detail. Commonly referred to as the "Quasi War Cases," the three cases arose during the low-grade hostilities between the United States and France at the end of the eighteenth century.[76]

The Supreme Court considered for the first time the question of whether the Constitution requires Congress to permit the use of force in advance in the 1800 case of *Bas v. Tingy*.[77] In addressing this question, the Court had to first determine when a hostile engagement constitutes war in a constitutional sense. The case unfolded against a backdrop of tensions between the United States and France after the latter had captured several American vessels. In response, Congress enacted a body of statutes in 1798 and 1799, which, among other things, allowed for the payment of rewards[78] to American shipmen who could reclaim "from the enemy" any of the taken vessels.[79] The recaptors were to be compensated directly by the ship owners based on the value of the vessel. Respondent Tingy was a captain who had successfully recovered a ship from the French, only to be denied the statutory prize by petitioner Bas, the ship owner. In support of his claim that respondent was ineligible for the prize, petitioner asserted the statute did not apply in this situation because France

Such a position is completely unrealistic and was rejected by Lincoln during the Mexican War").

[75] Sheldon S. Wolin, *Democracy Incorporated: Managed Democracy and the Specter of Inverted Totalitarianism* (Princeton, NJ: Princeton University Press, 2010), 104.

[76] This Franco-American maritime conflict is often referred to as "The Quasi-War (1798-1800)" because it involved the use of naval forces yet without a declaration of war by Congress. See Sidak, J. Gregory, "The Quasi War Cases – and Their Relevance to Whether "Letters of Marque and Reprisal" Constrain Presidential War Powers," *Harvard Journal of Law & Public Policy* 28, no. 2 (2005).

[77] 4 U.S. 37 (1800).

[78] The 1798 law allowed the recaptors to receive 1/8 the full value of the vessel, while the 1799 law authorized the payment of 1/2 the salvage value of the vessel. Id. at 37.

[79] Id. at 40.

was not an enemy state, but rather a "nation in amity with the United States."[80] Besides, Congress had not declared war on France.

The Supreme Court dismissed these arguments, reasoning that the various measures adopted by Congress in 1798 and 1799 had authorized an "imperfect war" against France,[81] making it an enemy within the meaning of the statute in question, even in absence of a declaration of war.[82] In so holding, the Court conclusively settled the question of fact between the two parties. It could have stopped there, but the Court utilized this simple monetary dispute to develop three important principles that are particularly relevant to our inquiry. First, it established that even limited hostilities constitute a state of war, thus rendering vacuous the modern distinction between small- and large-scale military operations. Second, the Court recognized the power of Congress to authorize hostilities as opposed to declare war, which established that formal congressional action, for constitutional purposes, could take either form. Put differently, the Court established that an authorization to use force is the legal equivalent of a declaration of war, and hence is a proper means by which Congress can effectuate its constitutional power to declare war. Finally, and perhaps most significantly, it established that any "state of hostility," be it an "imperfect war or a war," must be authorized by Congress as "the constitutional authority of our country."[83] The practical upshot of this construction is that executive acts of war, at any level of conflict, are prohibited without either a declaration of war or an authorization to use force by Congress.

The second case, *Talbot v. Seeman*,[84] came to the Supreme Court a year later in 1801. The facts bear close resemblance to those involved in the preceding case. On September 15, 1799, the USS Constitution, an American combat ship captained by Silas Talbot, regained from the French a ship called the Amelia while sailing from the British-controlled port of Calcutta. Arriving in the port of New York on October 12, the Amelia had cargo estimated at $200,000.[85] Although the ship was owned by a mercantile company in the city-

[80] Id. at 38.
[81] Id. at 40.
[82] The Court found that the United States and France were indeed at war, albeit a limited one, given that Congress had, by way of legislation, "raised an army, stopped all intercourse with France, dissolved our treaty, built and equipped ships of war, and commissioned private armed ships, enjoining the former, and authorizing the latter, to defend themselves against the armed ships of France, to attack them on the high seas, to subdue and take them as prize, and to recapture armed vessels found in their possession." Id. at 41.
[83] Id at. 45.
[84] 5 U.S. 1 (1801).
[85] "Talbot v. Seeman," in *The Documentary History of the Supreme Court of the United States, 1789-1800*, Maeva Marcus, ed. (New York: Columbia University Press, 2007), 442.

state of Hamburg, which was a neutral party in the ongoing naval conflict, Captain Talbot filed a claim in the District Court of New York seeking the statutorily authorized award for recapturing the ship.[86] Hans Frederick Seeman, an agent for the company, countered that the vessel should be released free from claims for the salvage award because Talbot had no right under international law to interfere with the navigation of a neutral foreign vessel. The District Court held for Talbot but the Circuit Court reversed, whereupon Talbot sought the review of the U.S. Supreme Court.

A unanimous Supreme Court held per Chief Justice John Marshall that Talbot was entitled to his prize. The Court began by reasoning that for Talbot to prevail, the seizure of the ship must be lawful in the first place. Because Talbot had "probable cause to believe the vessel met with at sea is in the condition of one liable to capture,"[87] that is, a French ship, the Court was satisfied that Talbot acted within the laws that Congress had enacted. Still, it must be established that Talbot had saved the ship from danger to receive a reward for his service, since the owner was a neutral party. Marshall went on to conclude that Talbot had rendered "an essential service" because the danger of forfeiture was "real and imminent,"[88] as the laws and decrees of France did not protect the rights of such neutral parties.

That Captain Talbot collected a handsome reward for his service is not the primary significance of this case. Rather, Marshall's opinion in the case is most remembered for the following key statement: "The whole powers of war being by the Constitution of the United States vested in Congress, the acts of that body can alone be resorted to as our guides in this inquiry."[89] So emphatic an assertion can only be construed to mean that, apart from limited defensive actions, the president lacks the constitutional authority to initiate or engage in war without a congressional mandate. Moreover, it should not escape our notice that when the *Talbot* Court set out "to determine the real situation of America in regard to France," it "inspected" the "acts of Congress" to the exclusion of any presidential actions, instructions, or proclamations.[90] Upon examining the relevant measures adopted by Congress, the Court characterized the maritime conflict as a "partial" war,[91] the fact that justified reliance on probable cause to seize the Hamburg vessel. This ruling was reinforced in the subsequent Quasi-War case.

[86] Id. The Hamburg owner was Chapeau Rouge and Company. Id. at 443.
[87] 5 U.S. at 31-32.
[88] Id. at 43.
[89] Id. at 28.
[90] Id. at 29.
[91] Id. at 31.

Little v. Barreme[92] is another important early precedent concerning limitations on the president's commander-in-chief authority. In February 1799, Congress passed an act canceling the treaties of alliance and commerce with France. To enforce the commercial embargo on France, Congress authorized the U.S. Navy to intercept Americans ships "bound or sailing to any port or place within the territory of the French Republic or her dependencies."[93] President John Adams, however, exceeded the congressional mandate and directed the navy to seize American ships bound to or from French ports. In compliance with the executive directive, the frigate USS Boston under the command of Captain George Little seized a Danish-owned ship on December 2, 1799. The owner of the Danish ship, the Flying Fish, sued Captain Little for damages. The lower court ruled for the plaintiff on the premise that the Flying Fish was sailing from a French-controlled port, and hence not subject to capture even if it had been an American vessel. Captain Little appealed the adverse ruling to the Supreme Court.

At issue was a judgment of $8,504 against a commanding officer for the wrongful capture of a foreign-owned ship on the high seas. Once again, however, the Supreme Court used an otherwise undistinguished case that could have easily disappeared in the dim recesses of history to consider an issue of momentous consequence, and carve out a constitutional arrangement for the conduct of war. The Court went beyond the immediate question of fact regarding the money damages to ponder two important questions of federalism. The larger underlying question of law was whether an Act of Congress takes precedence over an executive decree, even in the conduct of war. A narrower question also pertaining to the division of war-making powers was whether Congress could place statutory limits on the president's authority over the armed forces.

Speaking for a unanimous Court, Chief Justice Marshall held that while the president has the discretion to deal with crisis situations as they occur, he is no longer at liberty to follow his discretion once Congress has spoken.[94] In other words, executive discretion over the use of the armed forces is circumscribed by congressional legislation. It follows that when Congress regulates the exercise of military power, it is performing a legitimate constitutional function rather than usurping power from the executive branch.

[92] 6 U.S. 170 (1804).

[93] Id. at 171.

[94] Jean Edward Smith, *John Marshall: Definer of a Nation* (New York: Henry Holt and Company, 1996), 340. The author also notes that the Court relied heavily on the *Little v. Barreme* precedent in *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952) to rule that President Truman had seized the steel mills in violation of the Taft-Hartley Act, although he merely sought to prevent a strike that would have impeded the Korean War effort.

It is especially noteworthy that the Court emphasized that the president lacked "any special authority" to empower "the officers commanding the armed vessels of the United States" to seize ships coming from French ports.[95] In holding that the president could not escape the restrictions imposed by Congress on the military, the Court effectively negated an oft-cited argument that the president's inherent powers as commander-in-chief allow him to undertake military actions without congressional authorization.[96] It also laid to rest the notion that Congress cannot interfere with actions of the president when he is acting as commander-in-chief. And if commander-in-chief actions are subject to legislative modification and nullification, one could even conclude that the Marshall Court interpreted the Constitution as granting Congress concurrent power in the conduct of warfare. This only goes to show how far modern presidential rhetoric has drifted away from the original understanding of war powers in the American constitutional scheme.

SOME FINAL THOUGHTS

Justice Alexander George Sutherland is credited with, or blamed for, formulating the so-called "sole organ" doctrine in *United States v. Curtiss-Wright Export Corp.*,[97] which defined presidential power very broadly in the realm of foreign affairs. The thrust of Sutherland's argument is captured in his frequently quoted statement that the president "is the sole organ of the nation in its external relations, and its sole representative with foreign nations."[98] This portion of Sutherland's opinion has garnered considerable criticism over the years, but even if we accept his expansive view of the president's power as head of state, there is no textual, historical, or doctrinal support for the presumption that this "plenary and exclusive power"[99] carries over into the realm of war-making. Moreover, if we join the pro-executive camp in recognizing *Curtiss-Wright* as a basis for the assertion of sweeping inherent powers in foreign affairs, it is patently obvious that war-making cannot be deemed an undefined inherent power of the executive when Article I specifically assigns Congress the power to declare war.

[95] Id.

[96] Discussing the renewed importance of this case during the Bush presidency, Katharine A. Wagner notes that its "brief opinion has since become a favorite weapon of critics of President George W. Bush's post-September 11, 2001, anti-terror programs." Katharine A. Wagner, "*Little v. Barreme*: The Little Case Caught in the Middle of a Big War Powers Debate," *The Journal of Law in Society* 77 (2008): 78.

[97] 299 U.S. 304 (1936).

[98] Id. at 319. Justice Sutherland was quoting from a speech that John Marshall gave in the House of Representatives on March 7, 1800 while serving as a congressman before ascending to the high bench. Marshall was sworn in as the nation's second Chief Justice on February 4, 1801.

[99] Id. at 320.

The question then becomes whether the power to declare war is indeed the power to initiate hostilities, and whether this constitutional grant relates to all military actions or only major conflicts. As discussed above, it is permissible for, even incumbent upon, the president as commander-in-chief to ward off military aggression and impending threats to the nation's security. In absence of congressional acquiescence, however, the president can only engage in hostilities reactively rather than proactively, as the evidence presented amply demonstrates. Based on the legal and factual considerations described at length in this essay, against which Professor Yoo's speculative and conjectural arguments fade, it would strain credulity to suggest that "the president has the sole authority to engage in war, followed only by Congress' latent approval via its power of the purse."[100] Justice William Paterson could not have been more explicit in *United States v. Smith*,[101] a case contemporary with the Quasi-War Cases: "It is the exclusive province of Congress to change a state of peace into a state of war."[102] And while there has been a pattern of presidents exercising military power independently of Congress for over half a century, it stands to reason and principle that "the existence of a practice does not establish it as a constitutional right."[103]

Ironically, it was Congress that helped create the permissive environment in which the constitutional violations occurred by its own passivity and flaccidity. Time and again, congressional leaders stood by idle as one administration after another siphoned off power from the legislative branch. The resort to court injunctions by some lawmakers is only indicative of the failure of Congress as an institution to act in a bipartisan fashion, even in the face of executive overreach. So while modern presidents have not been blameless in their use of the armed forces, it is Congress that seems to have delegated, if not abdicated, too much of its responsibility to the executive branch. The Supreme Court, for its part, has taken a rather permissive approach to delegation.[104] The truckling attitude of Congress and the Court

[100] This is the position of Professor Yoo and his ilk as tersely expressed by Richard Brust of the *ABA Journal*. See Richard Brust, "Constitutional Dilemma: The Power to Declare War Is Deeply Rooted in American History," *ABA Journal*, February 1, 2012, http://www.abajournal.com/mobile/article/constitutional_dilemma_the_power_to_declare_war_is_deeply_rooted_in_america (accessed April 25, 2014)

[101] 27 F. Cas. 1192 (C.C.N.Y. 1806).

[102] Id. at 1230.

[103] Though made in a First Amendment context, this statement remains true in other areas of constitutional law and by any mode of constitutional construction. See Jason M. Shepard and Genelle Belmas, "Anonymity, Disclosure and First Amendment Balancing in the Internet Era: Developments in Libel, Copyright, and Election Speech," *Yale Journal of Law and Technology* 15 (2012): 105.

[104] Douglas Ginsburg, "Legislative Powers: Not Yours to Give Away," January 6, 2011, http://www.heritage.org/research/reports/2011/01/legislative-powers-not-yours-to-give-away (accessed April 25, 2014) (noting that the case of *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495 (1935) "marks the last time the Court held a statute unconstitutional under Article I, Section 1," and lamenting that the "Court has since moved toward an entirely hands-off approach to delegation").

toward the president has led to a broad expansion in executive power, which is not limited to but is particularly pronounced in the areas of national security and international affairs. In contrast to the fears once expressed by Alexander Hamilton, the executive has become increasingly powerful at the expense of Congress and the courts.

In light of judicial and congressional deference to presidential judgments in matters of war, the most viable check on the abuse of commander-in-chief authority currently exists outside the formal constitutional machinery, represented in the democratic principle of electoral responsibility. But while public opinion may set limits to executive war power, it tends to be a less effective deterrent to presidents in their second term, since they would not be facing the electorate again. It is true that executive indiscretion could lead to a protest vote against the president's party in the next midterm or general election, yet voters in a two-party system are inclined, if not compelled, to be forgiving, given the lack of political choice and the desire to avoid one-party rule. As such, there appears to be no alternative to congressional action to restrict the exercise of the president's war power.

A question might be raised as to whether executive ascendancy poses a real problem for American democracy, or is rather an abstract public policy issue devoid of practical significance. There are two practical implications that should be highlighted here. First, the structure of American government, as intended by the Framers and prescribed by the Constitution, presupposes three coequal branches. If one branch gained supremacy over the other two, the governmental system of checks and balances would cease to function effectively, amplifying the potential for abuse of power and office. It has been argued as a counterpoint that "legislative-executive relationships are not zero-sum games," so that "[i]f one branch gains power, the other does not necessarily lose it."[105] Of course it is sometimes true that an expansion in the power of the executive branch may be accompanied by a corresponding expansion in congressional power. Such was the case during the Marshall Court, New Deal, and Great Society eras, when the scope of federal power in general grew in relation to the states. It should be noted, however, that the powers of the two branches simultaneously grew during these periods due to cooperative governance, which makes this counterargument irrelevant in the present context where one branch is high-handed and overreaching while the other has all but waived its right to exercise its constitutional authority. It is

[105] Roger H. Davidson et al., *Congress and Its Members*, 14th ed. (Thousand Oaks, CA: CQ Press, 2014), 305.

highly unlikely that this trend will reverse unless Congress mends its fragmented culture, or at least changes its business-as-usual demeanor toward usurpations of its authority.

The second problematic implication of executive dominance in war-making is that it constitutes an attack on the rule of law itself. The presidential oath of Article II, Section 1 binds the president "by Oath or Affirmation" to "preserve, protect and defend the Constitution of the United States." The Faithful Execution Clause of Article II, Section 3 instructs the president to "take Care that the Laws be faithfully executed." The laws must be comprehensively enforced, just as the Constitution must be fully respected, if the president is to function within the rule of law. Selective implementation of the law is not within the rights of the president. A president who believes the War Powers Act is a severe encroachment on his commander-in-chief authority may challenge it but does not have the option of ignoring it.[106]

This is a matter of great importance because the president, as the nation's figurehead, models and demonstrates good citizenship. The president's role, be it positive or negative, in shaping national political culture is paramount. In this regard, it is fitting to recall the timeless words of Justice Louis Brandeis, dissenting in *Olmstead v. United States*: "Our Government is the potent, the omnipresent teacher. For good or for ill, it teaches the whole people by its example ... If the Government becomes a lawbreaker, it breeds contempt for law; it invites every man to become a law unto himself; it invites anarchy."[107]

[106] As Representative Steve Scalise (R-La), put it, "The president does not have the option of choosing which laws he will follow and which laws he can ignore." See William G. Howell, *Thinking about the Presidency: The Primacy of Power* (Princeton, NJ: Princeton University Press, 2013), 41.

[107] 277 U.S. 438, 485 (1928) (Brandeis, J., dissenting).

REFERENCES

Adler, David Gray. "The Law: Textbooks and the President's Constitutional Powers," *Presidential Studies Quarterly* 35, no. 2, 2005.

Aupperlee, Aaron. "War Budget Gridlock could Affect Civilian Jobs at Home," *Desert Dispatch*, November 29, 2007, http://www.desertdispatch.com/articles/army-2078-war-budget.html (accessed April 25, 2014).

Barack Obama, "Full Transcript: President Obama's Sept. 10 Speech on Syria," *Washington Post*, September 10, 2013, http://www.washingtonpost.com/politics/running-transcript-president-obamas-sept-10-speech-on-syria/2013/09/10/a8826aa6-1a2e-11e3-8685-5021e0c41964_story.html (accessed April 25, 2014).

Broder, John M. and Elizabeth Shogren. "Clinton Says U.S. Values Require Troops for Bosnia," *Los Angeles Times*, November 28, 1995, http://articles.latimes.com/1995-11-28/news/mn-7924_1_world-war-ii (accessed April 25, 2014).

Brust, Richard. "Constitutional Dilemma: The Power to Declare War Is Deeply Rooted in American History," *ABA Journal*, February 1, 2012, http://www.abajournal.com/mobile/article/constitutional_dilemma_the_power_to_declare_war_is_deeply_rooted_in_america (accessed April 25, 2014)

Calabresi, Steven G., and Christopher S. Yoo, *The Unitary Executive: Presidential Power from Washington To Bush*. New Haven, CT: Yale University Press, 2008

Childs, John. *Army of Charles II*. London: Routledge, 2013.

Davidson, Roger H., et al., *Congress and Its Members*, 14th ed. Thousand Oaks, CA: CQ Press, 2014.

Dunn, Charles W. *The Scarlet Thread of Scandal: Morality and the American Presidency*. Lanham, MD: Rowman & Littlefield Publishers Inc., 2001.

Edelson, Chris. "Obama and the Power to Go to War: The Constitution is Clear: The President Must Make his Case to Congress," *Los Angeles Times*, August 30, 2013, http://www.latimes.com/opinion/commentary/la-oe-edelson-obama-syria-military-action-20130830,0,2055546.story (accessed April 25, 2014).

Ellis, Richard J. *The Development of the American Presidency*. New York: Routledge, 2010.

Elsea, Jennifer K., and Matthew C. Weed, *Declarations of War and Authorizations for the Use of Military Force: Historical Background and Legal Implications*, Congressional Research Service, Report RL31133. Washington, DC: Office of Congressional Information and Publishing, January 11, 2013.

Epps, Garrett. "The Authority to "Declare War": A Power Barack Obama Does Not Have," *Atlantic Monthly*, August 30, 2013,

http://www.theatlantic.com/politics/archive/2013/08/a-power-barack-obama-does-not-have/279212 (accessed April 25, 2014).

Fisher, Louis, and David Gray Adler. "The War Powers Resolution: Time To Say Goodbye," *Political Science Quarterly* 113, no. 1 (Spring, 1998).

Fisher, Louis. *Presidential War Power*, 3rd rev. ed. Lawrence, KS: University Press of Kansas, 2013.

Fisher, Louis. "The Korean War: On What Legal Basis Did Truman Act?" *American Journal of International Law* 89 (1995).

Frankel, Robert, *Observing America: The Commentary of British Visitors to the United States, 1890-1950*, 3rd ed. Madison, WI: University of Wisconsin Press, 2006.

Galston, William. "No Labels, No Apology," *New Republic*, December 22, 2010, http://www.newrepublic.com/blog/william-galston/80300/defense-no-labels-centrist-group (accessed April 25, 2014).

Genovese, Michael A. *The Presidential Dilemma: Revisiting Democratic Leadership in the American*. New Brunswick, NJ: Transaction Publishers, 2011.

Ginsburg, Douglas. "Legislative Powers: Not Yours to Give Away," *Heritage Foundation Report*. January 6, 2011, http://www.heritage.org/research/reports/2011/01/legislative-powers-not-yours-to-give-away (accessed April 25, 2014).

Grimmett, Richard F. *The War Powers Resolution: After Thirty-Eight Years*, CRS Report R42699. Washington, DC: Office of Congressional Information and Publishing, September 24, 2012.

Hamilton, Alexander. "Pacificus, no. 1," *The Founders' Constitution*, , Volume 4, Article 2, Section 2, Clauses 2 and 3, Document 14, http://press-pubs.uchicago.edu/founders/documents/a2_2_2-3s14.html (accessed April 25, 2014).

Hayward, Steven F. *The Age of Reagan: The Fall of the Old Liberal Order: 1964-1980*. New York: Crown Publishing, 2001.

Hendrickson, Ryan C. *The Clinton Wars: The Constitution, Congress, and War Powers*. Nashville, TN: Vanderbilt University Press, 2002.

Howell, William G. *Thinking about the Presidency: The Primacy of Power*. Princeton, NJ: Princeton University Press, 2013.

Joe Klein, "Why the "War President" is under Fire," *Time*, February 15, 2004, http://content.time.com/time/ nation/article/0,8599,591270,00.html (accessed April 25, 2014).

Keynes, Edward. *Undeclared War: Twilight Zone of Constitutional Power*. University Park, PA: Pennsylvania State University Press, 1982.

Keynes, Edward. *Undeclared War: Twilight Zone of Constitutional Power*. University Park: Pennsylvania State University Press, 1991.

Kleiner, Sam. "From the Gulf of Tonkin to Syria: The Limits of Legislative Entrenchment in AUMFs," *Vanderbilt Journal of Transnational Law*, September 27, 2013, http://www.vanderbilt.edu/jotl/2013/09/from-

the-gulf-of-tonkin-to-syria-the-limits-of-legislative-entrenchment-in-aumfs (accessed April 25, 2014).

Kober, Stanley. "Another Blow to America's Constitution," in *NATO's Empty Victory: A Postmortem on the Balkan War*, ed. Ted Galen Carpenter. Washington, DC: Cato Institute, 2000.

Lindsay, James M. "Cowards, Beliefs, and Structures: Congress and the Use of Force," in *The Use of Force after the Cold War*, eds. H. W. Brands, Darren J. Pierson, and Reynolds S. Kiefer. College Station, TX: Texas A&M University, 2003.

Locke, John. "The Second Treatise," in *Two Treatises of Government*, Peter Laslett, ed. New York: Cambridge University Press, 1992.

Lutton, Michael J., Johndavid Willis, and Christopher T. Yeaw. "Re-thinking Warfare: How Does the Integration of Space and Cyber Forces Impact a Combatant Commander's Air-Sea Battle Concept?" *High Frontier* 6, no. 4, (2010): 37.

MacAskill, Ewen and Nick Hopkins. "Barack Obama Rebuked for Libya Action by US House of Representatives," *The Guardian*, June 24, 2011, http://www.theguardian.com/world/2011/jun/24/barack-obama-libya-us-house-of-representatives (accessed April 25, 2014).

Madison, James, Alexander Hamilton and John Jay. *The Federalist Papers*, Gary Willis, ed. New York: Bantam Books, 1982.

Madison, James. *Letters and Other Writings: 1794-1815*. Philadelphia: J. B. Lippincott & Co., 1865.

Marcus, Maeva, ed. "Talbot v. Seeman," in *The Documentary History of the Supreme Court of the United States, 1789-1800*. New York: Columbia University Press, 2007.

Mathews, John Mabry. *The Conduct of American Foreign Relations*. New York: The Century Co., 1922.

Mayer, Kenneth. *With the Stroke of a Pen: Executive Orders and Presidential Power*. Princeton, NJ: Princeton University Press, 2002.

Savage, Charlie, and Mark Landler, "White House Defends Continuing U.S. Role in Libya Operation," *New York Times*, June 15, 2011, http://www.nytimes.com/2011/06/16/us/politics/16powers.html (accessed April 25, 2014).

Savage, Charlie. "Barack Obama's Q&A," *Boston Globe*, December 20, 2007, http://www.boston.com/news/politics/2008/specials/CandidateQA/ObamaQA (accessed April 25, 2014).

Shepard, Jason M., and Genelle Belmas. "Anonymity, Disclosure and First Amendment Balancing in the Internet Era: Developments in Libel, Copyright, and Election Speech," *Yale Journal of Law and Technology* 15 (2012).

Sidak, J. Gregory, "The Quasi War Cases – and Their Relevance to Whether "Letters of Marque and Reprisal" Constrain Presidential War Powers," *Harvard Journal of Law & Public Policy* 28, no. 2 (2005).

Smith, Jean Edward. *John Marshall: Definer of a Nation.* New York: Henry Holt and Company, 1996.

Sparks, Jared. *The Writings of George Washington, Pt. IV.* Boston: Ferdinand Andrews, 1839.

Stevenson, Charles A. *Congress at War: The Politics of Conflict since 1789.* Washington, DC: National Defense University Press, 2007.

The White House, "Remarks by the President to the White House Press Corps," August 20, 2012, http://www.whitehouse.gov/the-press-office/2012/08/20/remarks-president-white-house-press-corps (accessed April 25, 2014).

The White House. "The War Powers Resolution: President Nixon's Veto Message," in *Thinking about the Presidency: Documents and Essays from the Founding to the Present,* ed. Gary L. Gregg (Lanham, MD: Rowman and Littlefield, 2006).

Wagner, Katharine A. "*Little v. Barreme*: The Little Case Caught in the Middle of a Big War Powers Debate," *The Journal of Law in Society* 77 (2008).

Westerfield, Donald L. *War Powers: The President, the Congress, and the Question of War.* Westport, CT: Greenwood Publishing Group, 1996.

Wilson, James. Remarks at Pennsylvania Ratifying Convention, *The Founders' Constitution,* Volume 1, Chapter 7, Document 17. http://press-pubs.uchicago.edu/founders/documents/v1ch7s17.html (accessed April 25, 2014).

Wolin, Sheldon S. *Democracy Incorporated: Managed Democracy and the Specter of Inverted Totalitarianism.* Princeton, NJ: Princeton University Press, 2010.

Yoo, John. "Like it or not, Constitution allows Obama to strike Syria without Congressional approval," August 30, 2013, http://www.foxnews.com/opinion/2013/08/30/constitution-allows-obama-to-strike-syria-without-congressional-approval (accessed April 25, 2014).

Yoo, John. "Unitary, Executive, or Both?," *University of Chicago Law Review* 76 (2009): 1984.

Yoo, John. "A President Can Pull the Trigger," *Los Angeles Times,* December 20, 2005, http://articles.latimes.com/2005/dec/20/opinion/oe-yoo20 (accessed April 25, 2014).

Yoo, John. "The Power of War, Continued," *National Review,* August 29, 2013, http://www.nationalreview.com/corner/357132/power-war-continued-john-yoo (accessed April 25, 2014).

Yoo, John. "Who's Got the Power to Use Force?" *National Review.* August 29, 2013, http://www.nationalreview.com/corner/357102/whos-got-power-use-force-john-yoo (accessed April 25, 2014).